

# The Future of Bioethics Testimony: Guidelines for Determining Qualifications, Reliability, and Helpfulness

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## I. INTRODUCTION

During the last thirty years, the influence of bioethics on public institutions has grown. Bioethicists have served on national and state government commissions, testified before Congress, written amicus briefs for landmark legal cases, and testified as experts in the courtroom.<sup>1</sup> Each of these developments has taken bioethics out of the

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1. Experts have testified about bioethics issues in the following cases: *Planned Parenthood v. Verniero*, 22 F. Supp. 2d 331, 334 (D.N.J. 1998) (ethics testimony regarding partial birth abortion); *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1115-16 (D. Neb. 1998) (ethics testimony regarding partial birth abortions); *Andrade Garcia v. Columbia Med. Ctr.*, 996 F. Supp. 617, 626 (E.D. Tex. 1998) (ethics testimony regarding responsibilities of physicians, nurses, hospitals, and their employees); *United States v. Morvant*, 898 F. Supp. 1157, 1163 (E.D. La. 1995) (ethics testimony regarding standards for referring HIV positive dental patients); *Zenith Lab. Inc. v. Bristol-Myers Squibb Co.*, 24 U.S.P.Q.2d (BNA) 1652, 1656, 1664 (D.N.J. 1992) (ethics testimony regarding standards in human subjects research), *rev’d*, 19 F.3d 1418 (Fed. Cir. 1994); *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1331 (E.D. Pa. 1990) (ethics testimony about informed consent in abortion services), *aff’d in part & rev’d in part*, 947 F.2d 682 (3d Cir. 1991), *and aff’d in part & rev’d in part*, 505 U.S. 833 (1992); *DeGidio v. Pung*, 704 F. Supp. 922, 957 (D. Minn. 1989) (ethics testimony regarding dual responsibilities of physicians practicing institutional medicine), *aff’d*, 920 F.2d 525 (8th Cir. 1990); *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1564 (N.D. Ill. 1983) (ethics testimony regarding standards of informed consent in research); *American Academy of Pediatrics v. Lungren*, 32 Cal. Rptr. 2d 546, 560 (Ct. App. 1994) (ethics testimony

academy and into a new setting. While commentators support most of these developments,<sup>2</sup> they have expressed serious reservations about the

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regarding decision to undergo abortion), *rev'd*, 912 P.2d 1148 (Cal. 1996), *vacated*, 940 P.2d 797 (Cal. 1997); Conservatorship of Morrison, 253 Cal. Rptr. 530, 533-34 (Ct. App. 1988) (ethics testimony regarding conservator's duty and testimony regarding physicians' rights and obligations when conscientiously objecting to withdrawing life-sustaining treatment); Bartling v. Superior Court, 209 Cal. Rptr. 220, 223, 225 (Ct. App. 1984) (ethics testimony regarding standards for withdrawing ventilator support from competent non-terminal patient); Hart v. Brown, 289 A.2d 386, 389 (Conn. 1972) (ethics testimony regarding reasoning about child's organ donation); Breesmen v. Department of Prof'l Regulation, Bd. of Med., 567 So. 2d 469, 470-71 (Fla. Dist. Ct. App. 1990) (ethics testimony regarding standards for documenting patient's refusal of tests and treatment); Curran v. Bosze, 566 N.E.2d 1319, 1338 (Ill. 1990) (ethics testimony regarding standards of consent and assent for minor's donation of bone marrow for transplant); *In re Estate of Greenspan*, 558 N.E.2d 1194, 1196-97 (Ill. 1990) (ethics testimony regarding elective status of artificial nutrition and hydration); Neade v. Portes, 710 N.E.2d 418, 422 (Ill. App. Ct. 1999) (ethics testimony regarding disclosure of physician's financial incentives to limit treatment); Sarka v. Rush Presbyterian-St. Luke's Med. Ctr., 566 N.E.2d 301, 305 (Ill. App. Ct. 1990) (ethics testimony regarding standards of consent to treatment and appropriate risk/benefit ratio for medical intervention); *In re Lawrance*, 579 N.E.2d 32, 42 (Ind. 1991) (ethics testimony regarding practical and theoretical tasks of ethics); Herridge v. Board of Registration in Med., 648 N.E.2d 745, 747, 751 (Mass. 1995) (ethics testimony regarding psychopharmacologist-patient sex); Commissioner of Correction v. Myers, 399 N.E.2d 452, 454 (Mass. 1979) (ethics testimony regarding overriding standards for overriding refusal of dialysis by prisoner); McKnight v. Midwest Eye Inst., Inc., 799 S.W.2d 909, 917-18 (Mo. Ct. App. 1990) (ethics testimony regarding appropriateness of preventing physicians from seeing patients during contract dispute); Dow Chem. Co. v. Mahlum, 970 P.2d 98, 126, 130 (Nev. 1998) (ethics testimony regarding standards for animal research); *In re Jobes*, 529 A.2d 434, 444 n.9 (N.J. 1987) (ethics testimony regarding distinction between withdrawing nasogastric tubes and other kinds of life sustaining treatment); *In re Conroy*, 457 A.2d 1232, 1234 (N.J. Super. Ct. Ch. Div. 1983) (ethics testimony regarding benefit/burden calculation for forgoing medical treatment), *rev'd*, 464 A.2d 303 (N.J. Super. Ct. App. Div. 1983), *and rev'd*, 486 A.2d 1209 (N.J. 1985); *In re Delio v. Westchester County Med. Ctr.*, 516 N.Y.S.2d 677, 683 (App. Div. 1987) (ethics testimony regarding distinction between withholding and withdrawing treatment); MacClements v. LaFone, 408 S.E.2d 878, 882 (N.C. Ct. App. 1991) (ethics testimony regarding prohibition on psychologist-client sex); Mazza v. Huffaker, 300 S.E.2d 833, 842 (N.C. Ct. App. 1983) (ethics testimony regarding sex between psychiatrist and patient's spouse); Weiner v. State Med. Bd., No. 98AP-605, 1998 Ohio App. LEXIS 5716, at \*6 (Ct. App. 1998) (ethics testimony regarding standards in podiatry); Rogers v. South Carolina Dep't of Mental Health, 377 S.E.2d 125, 126 (S.C. Ct. App. 1989) (ethics testimony regarding psychologist's duty to warn potential victim of client); Davis v. Davis, 842 S.W.2d 588, 593 (Tenn. 1992) (ethics testimony regarding moral distinction between embryo and preembryo).

2. See generally OFFICE OF TECHNOLOGY ASSESSMENT, 103D CONG., BIOMEDICAL ETHICS IN U.S. PUBLIC POLICY (1993) (reviewing involvement of bioethics in federal policy making); Brief for Bioethics Professors Amicus Curiae Supporting Petitioners, *Vacco v. Quill*, 519 U.S. 1039 (1996) (No. 95-1858) (opposing assisted suicide); Brief for Bioethicists for Privacy as Amicus Curiae Supporting Appellees, *Webster v.*

presence of bioethics experts in the courtroom.<sup>3</sup>

This Article addresses key questions about expert bioethics testimony<sup>4</sup> from within the framework of the basic rule concerning expert witnesses, Federal Rule of Evidence 702.<sup>5</sup> This Rule<sup>6</sup> requires judges to

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Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605) (supporting abortion rights); Dan W. Brock, *Truth or Consequences: The Role of Philosophers in Policy-Making*, 97 ETHICS 786 (1987) (describing the work of the President's Commission for the Study of Ethical Problems in Medicine and Research); R. Alto Chara, *The Hunting of the Snark: The Moral Status of Embryos, Right-to-Lifers, and Third World Women*, STAN. L. & POL'Y REV., Spring 1995, at 11 (describing the work of the Human Embryo Research Panel); James F. Childress, *The National Bioethics Advisory Commission: Bridging the Gaps in Human Subjects Research Protection*, 1 J. HEALTH CARE L. & POL'Y 105 (1998) (describing the work of the National Bioethics Advisory Commission); Rita Marker, *The Woodstock of Bioethics*, HUM. LIFE REV., Winter 1995, at 35, 36-37 (describing a luncheon at which a prominent bioethicist encouraged "bioethicists to position themselves to be on panels, boards and other [policy]-making bodies"); Alan J. Weisbard, *The Role of Philosophers in the Public Policy Process: A View from the President's Commission*, 97 ETHICS 776 (1987) (describing the work of the President's Commission for the Study of Ethical Problems in Medicine and Research).

3. See Arthur Caplan, *Bioethics on Trial*, HASTINGS CENTER REP., Mar.-Apr. 1991, at 19, 20 (stating that bioethicists should not testify as experts); Richard Delgado & Peter McAllen, *The Moralists as Expert Witness*, 62 B.U. L. REV. 869, 894-926 (1982) (stating that normative ethics testimony should be subject to heightened scrutiny); John C. Fletcher, *Bioethics in a Legal Forum: Confessions of an "Expert" Witness*, 22 J. MED. & PHIL. 297, 310 (1997) (stating that bioethics testimony presents role strain for bioethicists); Kenneth Kipnis, *Confessions of an Expert Ethics Witness*, 22 J. MED. & PHIL. 325, 325 (1997) (stating that some consider the role of expert ethics witness as inherently illicit); Douglas B. Mishkin, *Proffering Bioethicists as Experts*, JUDGES' J., Summer 1997, at 50, 89 (discussing the need for examination of standards for admission of expert bioethics testimony); John J. Paris, *An Ethicist Takes the Stand*, HASTINGS CENTER REP., Feb. 1984, at 32, 32-33 (discussing the inability of courts to deal appropriately with expert bioethics testimony); Edmund D. Pellegrino & Virginia Ashby Sharpe, *Medical Ethics in the Courtroom: The Need for Scrutiny*, 32 PERSP. BIOLOGY & MED. 547, 562 (1989) (arguing against admission of normative bioethics testimony); Giles R. Scofield, *Is the Medical Ethicist an "Expert"?*, A.B.A. BIOETHICS BULL., Winter 1994, at 1, 1 (criticizing admission of bioethics testimony); Virginia A. Sharpe & Edmund D. Pellegrino, *Medical Ethics in the Courtroom: A Reappraisal*, 22 J. MED. & PHIL. 373, 378 (1997) (stating that the use of ethics experts as normative authorities remains problematic); Kevin Wm. Wildes, *Healthy Skepticism: The Emperor Has Very Few Clothes*, 22 J. MED. & PHIL. 365, 367 (1997) (stating that the use of ethics experts is problematic in a morally pluralistic society).

4. Other concerns are that testifying in litigation destroys the impartiality required of an ethicist, that it requires an ethicist to step out of the pedagogical role, and that judges confuse ethics with law.

5. The Rule states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

6. The Advisory Committee on Evidence Rules has approved an amendment to Rule 702 that reads as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education,

affirmatively answer three basic questions before admitting expert testimony: (1) does this witness qualify as an expert by knowledge, skill, experience, training, or education; (2) does the testimony consist of scientific, technical or other specialized knowledge; and (3) will the testimony assist the trier of fact. Bioethics testimony presents distinctive problems in each area, on which commentators have not necessarily focused.

Part II of this Article addresses the question of expert qualifications. First, it briefly surveys concerns about bioethics experts' qualifications. Part II then suggests that judges should be aware of the problem of generalization of expertise, in order to determine whether a bioethics expert is qualified to testify about a particular issue and how to limit the scope of the expert's testimony.

Part III addresses the question of reliability. After addressing concerns regarding the reliability of nonscience testimony, it argues that, in light of the Supreme Court's recent decision in *Kumho Tire v. Carmichael*,<sup>7</sup> judges should require parties proffering expert bioethics testimony to point to indicators of reliability used in the field of bioethics, rather than categorically exclude normative bioethics testimony.

Part IV outlines the concerns about the helpfulness of bioethics testimony. It suggests that, to determine if bioethics testimony will be helpful, judges should make a threshold assessment of the relation of the bioethics testimony to current law. If the testimony conflicts directly with law, or merely restates it, the testimony should not ordinarily be admitted.

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may testify thereto in the form of an opinion or otherwise, provided that (1) the testimony is sufficiently based on reliable facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case.

Advisory Committee's Note on Proposed Fed. R. Evid. 702, Preliminary Draft of Proposed Amendments to the Fed. R. Civ. P. and Evid.: Request for Comment (1998). Thus, the proposed amendments to Rule 702 would require that all expert testimony admitted at trial to be "sufficiently based on reliable facts or data" and "the product of reliable principles and methods," and that "the witness has reliably applied the principles and methods to the facts of the case." *Id.* These views were confirmed by the Supreme Court's opinion in *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). See discussion *infra* Part III.A.3.

7. 119 S. Ct. 1167 (1999).

## II. QUALIFICATIONS OF BIOETHICS EXPERTS

### A. Challenges to Qualifications of Bioethics Experts

#### 1. General Concerns: "Generalization of Expertise"

Bioethics testimony is not an entirely unique courtroom phenomenon. Authorities in legal ethics, accounting ethics, engineering ethics, journalism ethics, and clergy ethics also provide expert testimony.<sup>8</sup> But the presence of bioethics experts has generated significantly greater controversy than other kinds of ethics testimony, in part because bioethics is an interdisciplinary field. As a result of this interdisciplinarity, all bioethics experts do not testify about the practices of their own profession in the same way as other ethics experts.<sup>9</sup>

Questions arise, therefore, about what qualifies these individuals as experts. If an individual lacks the experience and knowledge of a practicing physician or a bioscientist, what distinguishes the individual's views about medicine or the biosciences from those of a lay person? If, on the other hand, the bioethicist lacks specialized ethics knowledge, training or experience, what distinguishes the bioethicist's ethical views from a lay person's views?

Furthermore, even if the expert does seem to have some specialized ethics knowledge or experience, critics of bioethics testimony frequently assert that it is impossible to distinguish a good from a poor ethicist, and by implication, a highly qualified from a less qualified or even an unqualified one. The public is, after all, increasingly familiar with and vocal about a range of bioethics issues.<sup>10</sup> To pick out a few individuals

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8. See *Post Office v. Portec, Inc.*, 913 F.2d 802, 806-07 (10th Cir. 1990) (engineering ethics testimony), *vacated*, 499 U.S. 915 (1991); *United States v. Reed*, 851 F. Supp. 1296, 1298 (W.D. Ark. 1994) (legal ethics testimony), *aff'd*, 47 F.3d 288 (8th Cir. 1995); *F.G. v. MacDonell*, 696 A.2d 697, 702 (N.J. 1997) (clergy ethics testimony); *Endress v. Brookdale Community College*, 364 A.2d 1080, 1089 (N.J. Super. Ct. App. Div. 1976) (journalist ethics testimony).

9. See, e.g., *Wetherill v. University of Chicago*, 565 F. Supp. 1553 (N.D. Ill. 1983) (non-physician testifying about ethical standards for medical research); *Conservatorship of Morrison*, 253 Cal. Rptr. 530 (Ct. App. 1988) (non-physician testifying about ethical standards in medicine); *In re Conroy*, 457 A.2d 1232 (N.J. Super. Ct. Ch. Div. 1983) (non-physician testifying about ethical standards for end-of-life medical care); *In re Delio v. Westchester County Med. Ctr.*, 516 N.Y.S.2d 677 (App. Div. 1987) (non-physicians testifying about ethical standards for medicine); see also *infra* Part IV.A.4 (endorsing medical ethicists as experts on the standards of some health professions).

10. Pellegrino and Sharpe, for example, state that "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." Pellegrino & Sharpe, *supra* note 3, at 563. The popular press has also taken up this theme: "What qualifies these professional moralists to tell us how we should behave? Not much." Dan

as being “expert” seems vaguely undemocratic in a morally pluralistic society.<sup>11</sup>

[I]f a Buddhist monk, Dr. Joyce Brothers, Ann Landers, and Abigail van Buren all gave conflicting moral advice, there is no way to tell which of these four, if any, speaks as a moral expert and to rank the extent of that expertise. We have no such difficulty picking out experts, or judging who is more expert than who, in the different branches of mathematics or physics, in marksmanship, cooking, law, surgery, and the like.<sup>12</sup>

Individuals testifying in court as bioethics experts are, of course, usually not drawn from the ranks of advice columnists. Typically, they are scholars and practitioners in medical and health care fields, such as health care ethics. They tend to be highly-credentialed (usually Ph.D.s and M.D.s), possessing a range of experiences a judge or jury would not possess. As a result, the question with which courts have struggled is not whether the purported expert is any more qualified to make bioethical judgments than the average lay person, but rather 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 bioethics issue. If the particular qualifications are not precisely right, then the “generalization of expertise” problem arises.<sup>13</sup> The Supreme Court of Michigan stated 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.’”<sup>14</sup> Convergence of a witness’ expertise and the issues to be decided is the problem motivating challenges to the

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Seligman, *Talking Back to the Ethicists*, FORBES, May 5, 1997, at 198, 198.

11. See Giles R. Scofield, *Ethics Consultation: The Least Dangerous Profession?*, 2 CAMBRIDGE Q. HEALTHCARE ETHICS 417, 421-22 (1993) (critiquing professionalization of medical ethics consultants); see also Jay Alexander Gold, *Wiser than the Laws?: The Legal Accountability of the Medical Profession*, 7 AM. J.L. & MED. 145, 149 (1981) (discussing the problem of expertise and the democratic principle in medicine); Kevin Wm. Wildes, *Particularism in Bioethics: Balancing Secular and Religious Concerns*, 53 MD. L. REV. 1220, 1230-31 (1994) (stating that moral pluralism poses intractable problems for bioethics).

12. RONALD SUTER, ARE YOU MORAL? 55 (1984).

13. Robert M. Veatch, *Generalization of Expertise*, 1 HASTINGS CENTER STUDIES 29, 29 (1973); see Gold, *supra* note 11, at 171.

14. *People v. Beckley*, 456 N.W.2d 391, 406 (Mich. 1990) (holding expert testimony of child sexual abuse accommodation syndrome admissible but only as rebuttal evidence) (alteration in original) (quoting *People v. Zimmerman*, 189 N.W.2d 259, 275 (Mich. 1971) (holding expert testimony on speed of oncoming automobile inadmissible)).

qualification of bioethics experts.<sup>15</sup> The cases discussed below illustrate this particular issue.

2. *Wetherill v. University of Chicago: Ethics Professor Testimony Admitted Regardless of His Lack of Medical Training*

In *Wetherill v. University of Chicago*,<sup>16</sup> the federal district court was asked to decide if an expert witness had precisely the right credentials and experience to testify regarding the standards of informed consent in research. This 1983 case is one of only two cases in which discussions of the qualifications of such experts have been published.<sup>17</sup> It illustrates the kind of hurdle that nonscientist experts in bioethics must overcome to be considered qualified.

Plaintiffs Rachel Wetherill and Maureen Rogers alleged they were injured by prenatal exposure to diethylstilbestrol (DES).<sup>18</sup> They claimed that the University of Chicago battered them in utero by subjecting their mothers to medical experimentation without knowledge or consent. Plaintiffs also alleged that the University and its employees committed malpractice. In addition, the plaintiffs sought recovery against the University and against Eli Lilly, the manufacturer of DES, on strict

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15. See *Gray v. Briggs*, 45 F. Supp. 2d 316, 324 (S.D.N.Y. 1999) (excluding testimony of expert in securities where expertise and the issues to be decided did not converge).

16. 565 F. Supp. 1553 (N.D. Ill. 1983).

17. Additionally, an expert bioethics witness described having his qualifications challenged by Dr. Jack Kevorkian's attorney in a 1991 trial:

Geoffrey Fieger, Dr. Kevorkian's attorney, seemed genuinely puzzled when the prosecution called me to testify. He had not spent any time wondering about the qualifications of the two previous witnesses—I suspect because they are physicians. I, however, was an entirely different creature, one that had no obvious place in his bestiary of experts.

For nearly an hour Mr. Fieger challenged my credentials as an expert. Fieger flailed away at my curriculum vitae, academic training, previous research and teaching positions, and my professional affiliations. He asked if I were a Nazi or a practicing homosexual since I had written articles that touched on these topics and he did not understand the basis of my expertise in either area. I understood what Fieger was trying to do—cast doubt on my testimony and rattle me as a witness—and that it was his job to do this. I understood, yet I was not always able to restrain myself from replying to his questions with a barbed response. The media, omnipresent at the trial, ate up what were, if nothing else, lively exchanges.

Finally, Judge Gilbert, seeming to tire of this banter, lifted up my cv, which had been introduced into evidence, and pronounced herself impressed with its bulk. Mr. Modelski quickly noted that I had been qualified as an expert in medical ethics in another trial in another state and that ended the logjam; expert status was conferred on me.

Caplan, *supra* note 3, at 20.

18. See *Wetherill*, 565 F. Supp. at 1556.



liability grounds.<sup>19</sup>

The plaintiffs proffered a professor of ethics as an expert witness to testify about standards of informed consent.<sup>20</sup> The University argued that the expert could not provide the requisite expertise because he was too young to have personal knowledge of physicians' practices and, more importantly for the issue of generalization of expertise, he was not a licensed physician.<sup>21</sup>

The court turned to Federal Rule of Evidence 702.<sup>22</sup> Because Rule 702 permits expert witnesses to form their opinions through studying the work of others rather than by first-hand empirical observations alone, the court decided that the defendant's first objection—that the expert was too young—was not persuasive.<sup>23</sup> The second objection—that the expert was not a licensed physician—also failed.<sup>24</sup>

The court noted that the expert was an associate professor of ethics in a university department of internal medicine, as well as a member of an institutional review board, and that he had published extensively in the field of medical ethics and experimentation.<sup>25</sup> On that basis, the court determined that despite the fact that he was not a physician, the expert was "eminently qualified" to testify whether then-prevailing ethical practices required the disclosure of the risks which had not been disclosed.<sup>26</sup> The court also found him qualified to testify about sources of disclosure standards other than hospital practices.<sup>27</sup> In fact, it found him "particularly well suited—more so than the vast majority of physicians—to testify as to alternative sources of disclosure standards."<sup>28</sup>

Fairly standard criteria were used by the *Wetherill* court to determine whether the witness was qualified to testify as an expert on standards of disclosure despite the fact that he was not medically trained. The three criteria the court used were: professional credentials, experience, and scholarly publications. The defendants did not challenge, nor did the court discuss, whether this individual could legitimately be chosen as more qualified than others to testify about ethical matters in general.

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19. *See id.*

20. *See id.* at 1563.

21. *See id.*

22. *See id.*

23. *See id.* at 1563-64.

24. *See id.* at 1564.

25. *See id.*

26. *Id.*

27. *See id.*

28. *Id.*

Instead, the court assumed that some ethics-related expertise existed, and pursued the more pragmatic question: whether the particular expertise the witness possessed converged with the medically-related issue the court was to address, or whether admitting his testimony would amount to unwarranted generalization of expertise.<sup>29</sup>

Another variation to the challenge of avoiding generalization of expertise in qualifying ethics experts arose several years later. This time, the Tennessee Supreme Court criticized a trial court for overgeneralizing a witness's expertise.

3. *Davis v. Davis: Admission of Geneticist Testimony Criticized for Expert's Lack of Ethical Expertise*

The qualifications of an expert witness were questioned in dicta by the Tennessee Supreme Court in *Davis v. Davis*.<sup>30</sup> In 1989, the trial court had determined how to dispose of a divorced couple's seven cryogenically preserved products of in vitro fertilization.<sup>31</sup> The wife wanted to use the seven embryos to attempt to have a child over her husband's objection.<sup>32</sup> Five expert witnesses offered testimony at the trial, including the reproductive endocrinologist who performed the in vitro fertilization procedures on Mrs. Davis.<sup>33</sup>

Four of the experts, testifying for Mr. Davis, characterized the disputed in vitro fertilization (IVF) products as preembryos rather than as embryos.<sup>34</sup> A geneticist testifying for Mrs. Davis, however, objected to drawing a distinction between preembryos and embryos.<sup>35</sup> The trial court judge found the geneticist's testimony persuasive, and held for Mrs. Davis.<sup>36</sup>

*Davis* was appealed to the Tennessee Supreme Court, which held in favor of Mr. Davis.<sup>37</sup> Criticizing the lower court's reliance on the geneticist's testimony, the court noted that the geneticist's background failed to reflect any expertise in obstetrics, gynecology, or medical ethics.<sup>38</sup> Further, the court noted that that his testimony revealed a profound confusion between science and religion.<sup>39</sup> Moreover, the court

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29. *See id.*  
30. 842 S.W.2d 588 (Tenn. 1992).  
31. *See id.* at 589.  
32. *See id.*  
33. *See id.* at 592-94.  
34. *See id.*  
35. *See id.*  
36. *See id.*  
37. *See id.*  
38. *See id.*  
39. *See id.*

stated that had the lower court judge been similarly convinced that the geneticist's training was not in itself sufficient to qualify him as an expert in the area of bioethics, he might not have been permitted to testify. Unlike the expert in *Wetherill*, however, whose qualifications were challenged because they were not in medicine, this particular expert's qualifications were criticized because they were not in ethics.

Commentators have been concerned with determining whether ethical expertise can exist,<sup>40</sup> or, assuming that it does exist, whether it should be recognized in a democratic society. The more practical question courts have dealt with is whether the testimony bioethics experts offer is appropriate for the question at hand. *Wetherill* and *Davis* illustrate the significant generalization risk accompanying bioethics expert testimony: whether a witness who clearly has expertise in one area of this highly interdisciplinary field may testify about a matter that is outside that area of expertise.

### B. Future Challenges: Specialization and Interdisciplinarity

Courts will increasingly need to consider the problem of generalization of bioethics expertise. A potential witness' expertise may or may not correspond to the area of bioethics in which expert testimony is needed.<sup>41</sup> The importance of this issue will increase in the future, if courts continue to attempt to keep expert testimony within the witness' designated area of expertise, either by excluding it altogether if the witness is insufficiently qualified, or by limiting testimony once the

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40. See A. L. Caplan, *Moral Experts and Moral Expertise: Do Either Exist?*, in *CLINICAL ETHICS: THEORY AND PRACTICE* 59-87 (1989) (B. Hoffmaster et al. eds., 1989) (surveying objections to moral expertise and concluding that moral expertise does exist); Jan Crosthwaite, *Moral Expertise: A Problem in the Professional Ethics of Professional Ethicists*, 9 *BIOETHICS*, 5:361-79 (1995) (stating that an expert ethical opinion requires skills, knowledge, and values, resulting in a critically examined moral perspective); Cheryl N. Noble, *Ethics and Experts*, 12 *HASTINGS CENTER RPT.*, June 1982, at 7, 7-15 (critiquing claim to expertise in applied ethics); Bruce D. Weinstein, *The Possibility of Ethical Expertise*, 15 *THEORETICAL MED.* 61, 61-75 (1994) [hereinafter Weinstein, *Possibility*] (stating that the four senses of ethical expertise include expertise in descriptive ethics, expertise in metaethics, expertise in normative ethics, and expertise in living a good life); Bruce D. Weinstein, *What Is an Expert?*, 14 *THEORETICAL MED.* 57, 57-71 (1993) (stating the distinction between epistemic expertise and performative expertise); Scott D. Yoder, *Experts in Ethics? The Nature of Ethical Expertise*, 28 *HASTINGS CENTER RPT.*, Nov.-Dec. 1998, at 11, 11-12 (stating that misconceptions muddle the debate about ethics expertise).

41. *But see* Yoder, *supra* note 40, at 16-18 (stating that bioethics expertise does not require specialization).

witness has been qualified.<sup>42</sup>

The issue's importance will correspondingly increase as the field of bioethics becomes more specialized and more interdisciplinary.<sup>43</sup> Twenty years ago a bioethicist who was an expert in the ethics of human subjects research might also have been viewed as an expert in a half-dozen other areas of bioethics. Today, such broad-ranging attribution of expertise would be even more suspect than the attribution of expertise in the ethics of human subjects research was to a non-physician in the 1983 *Wetherill* case. At that time, bioethicists came almost exclusively from

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42. See *Eagleston v. Guido*, 41 F.3d 865, 874 (2d Cir. 1994) (excluding sociologist's testimony on sufficiency of police officers' training in domestic violence because witness lacked expertise in either criminology or domestic violence); *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) (excluding testimony that excessive force by police was caused by failure to discipline officers who had committed similar acts because sociologist expert was unqualified and testimony was unreliable); *Crespo v. McCartin*, 582 A.2d 1011, 1016 (N.J. Super. Ct. App. Div. 1990) (holding that plaintiff's medical expert was insufficiently qualified to testify to the standard of care for treating an ectopic pregnancy). For limitations of novel testimony, see *People v. Bowker*, 249 Cal. Rptr. 886, 891-92 (Ct. App. 1988) (admitting expert testimony of child abuse accommodation syndrome but limiting testimony to popular "myths" that would affect jury's consideration of witness credibility); *People v. Beckley*, 409 N.W.2d 759, 763 (Mich. Ct. App. 1987) (admitting expert testimony of child sexual abuse accommodation syndrome but only as rebuttal evidence); *People v. Beckford*, 532 N.Y.S.2d 462, 465 (Sup. Ct. 1988) (admitting expert identification testimony in a robbery case provided there was a limit to the testimony and a limiting charge to the jury). *But see* *McMillan v. Durant*, 439 S.E.2d 829, 832 (S.C. 1993) (holding that a practitioner's experience teaching in a particular specialty and his professional interaction with practitioners of that specialty are facts sufficient to support his qualification as an expert, and defects in qualification go to weight rather than admissibility); *State v. Best*, 232 N.W.2d 447, 454 (S.D. 1975) (holding that a lack of specialization may affect the weight of the testimony, but the trial judge need not find such expert testimony incompetent).

43. The major reference works in bioethics show the effect of increasing specialization in the field. The first edition of the *Encyclopedia of Bioethics* included 315 articles, see *ENCYCLOPEDIA OF BIOETHICS* (1978); the second edition included 464 articles, see *ENCYCLOPEDIA OF BIOETHICS* (2d ed. 1995). The current edition of the *Bibliography of Bioethics* is divided into 15 major topics and 51 subtopics. See *BIBLIOGRAPHY OF BIOETHICS* at v-vii (1999). An editor of one of the major journals in the field observed:

[T]he . . . compelling pattern in the bioethics journal literature is an evolutionary one, of the continual elaboration of new issues within a broad domain through ever more finely differentiated analyses reaching ever greater levels of delicacy. This might be called a pattern of specialization: Over time, clusters of issues that form a "family" differentiate into identifiably discrete lines of inquiry ("genuses"), which in their turn give rise to even finer distinctions and the emergence of "species" as increasingly specialized discussion focus on issues raised in ever more narrowly circumscribed domains. This pattern, I suggest, seems best to capture the dynamics at the intellectual core of bioethics as a discipline, to pick out its most defining issues.

Bette-Jane Crigger, *As Time Goes By: An Intellectual Ethnography of Bioethics*, in *BIOETHICS AND SOCIETY: CONSTRUCTING THE ETHICAL ENTERPRISE* 192, 208-09 (Raymond DeVries & Janardan Subedi eds., 1998).

the fields of philosophy, theology, law, and medicine; today bioethicists are trained in numerous other fields as well.<sup>44</sup> For instance, a geneticist could very well have the ethics expertise needed by a court.<sup>45</sup> As a result, the questions of whether general expertise in the field of bioethics is sufficient qualification to testify as an expert, and when a witness' testimony should be limited to a particular subfield or to a particular question in bioethics, will be faced with increasing frequency.

Despite the need for increased attention to the issues of specialization and interdisciplinarity in bioethics experts, the qualifications of a bioethics expert are not likely to be the most controversial Rule 702 issue to arise. The more pressing and difficult question will likely be whether bioethics testimony offers something worthwhile to the legal system. Exploration of this question will fall into two parts: the Rule 702 reliability inquiry, and the Rule 702 helpfulness inquiry.

### III. RELIABILITY OF BIOETHICS TESTIMONY

#### A. *Challenges to the Reliability of Bioethics Testimony*

##### 1. *General Concerns: Exclusion of Normative Bioethics Testimony*

Commentators have been highly skeptical about the reliability of bioethics testimony. One commentator has claimed that so-called experts in ethics "disagree so much and so radically that we hesitate to say that they are experts."<sup>46</sup> An amicus brief submitted to a Massachusetts court echoed this complaint, stating "[t]here is, and can be, no objective criteria in this area."<sup>47</sup> A third commentator stated:

Ultimately, the claims [ethicists] make simply cannot be proven because ethics is not like mathematics or the physical sciences. Value systems cannot be reduced to taxonomies, nor moral reasoning to algorithmic certainty. Even if

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44. See Raymond DeVries & Janardan Subedi, *Preface to BIOETHICS AND SOCIETY*, *supra* note 43, at xiv-xv (stating that although bioethics has existed as an organized movement for decades, it attracted little sociological attention until recently).

45. See Mishkin, *supra* note 3, at 50 (observing that the explosion of ethical issues related to genetics may increase the use of bioethics experts).

46. J. R. Bambrough, *Plato's Political Analogies*, in PLATO, POPPER AND POLITICS 152, 168 (R. Bambrough ed., 1967).

47. Weinstein, *Possibility*, *supra* note 40, at 65 (citing G. J. Annas & L. H. Glantz, Brief of Amicus Curiae, *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986)). Bioethics testimony was, nevertheless, admitted in *Brophy*. See *Brophy*, 497 N.E.2d at 630. *But see* Pellegrino & Sharpe, *supra* note 3, at 549 (criticizing the use of this testimony).

we could agree about the values that should form the basis of ethical decision making, there are no objective truths about how those values will or should be weighed by different persons in the same or different situations. However much [ethicists] may believe that they can reduce moral problems . . . to systematic, predictable manageability, human judgment in matters of conscience remains an uncertain, probabilistic exercise of human discretion.<sup>48</sup>

Commentators have tried to resolve problems involving the reliability of bioethics testimony by using a construct employed in philosophy. This construct divides ethics into three categories: descriptive ethics, metaethics, and normative ethics.

Descriptive ethics is understood as the study of what ethical principles or norms actually guide behavior.<sup>49</sup> For example, identifying the practice of infanticide in ancient Greece provides evidence that the ancient Greeks did not in fact prohibit infanticide. Descriptive ethics would also include attention to what Greek laws and thinkers said about the practice of infanticide. Metaethics is the study of language, concepts, and theories relevant to ethical theory<sup>50</sup>—for instance, the meaning of ethical language, such as the meaning of the term “good,” and the relevance of theories, such as the theory of personhood or human nature, that bear on the applications of ethical norms are metaethics concepts. Normative ethics evaluates and justifies ethical concepts, practices, and theories and is generally regarded as a theoretical enterprise; in the debate over ethics expert testimony, it is often treated as a body of knowledge consisting in prescriptive statements or normative standards.<sup>51</sup> McAllen and Delgado originally borrowed this tripartite scheme from philosophy in order to illustrate and analyze several potential functions of ethics experts in

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48. Scofield, *supra* note 11, at 420.

49. Beauchamp and Childress explain descriptive ethics as follows: “[D]escriptive ethics is the factual investigation of moral behavior and beliefs. It uses standard scientific techniques to study how people reason and act. For example, anthropologists, sociologists, psychologists and historians determine which moral norms and attitudes are expressed in professional practice, in codes, and in public policies.” TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 4-5 (4th ed. 1994).

50. Beauchamp and Childress explain metaethics as follows:

[M]etaethics [is] analysis of the language, concepts, and methods of reasoning in ethics. For example, it addresses the meanings of such ethical terms as *right, obligation, virtue, principle, justification, sympathy, morality, and responsibility*. It also includes study of moral epistemology (the theory of moral knowledge) and the logic and patterns of moral reasoning and justification. Metaethical questions for analysis include whether social morality is objective or subjective, relative or nonrelative, and rational or emotive.

*Id.* at 5.

51. Beauchamp and Childress explain normative ethics as follows: “*Normative ethics* [is] . . . [i]nquiry that attempts to answer the question ‘Which . . . norms for the guidance and evaluation of conduct are worthy of moral acceptance and for what reasons?’” *Id.* at 4.

litigation, explaining,

[I]t is possible to distinguish three branches of inquiry: descriptive ethics, metaethics, and normative ethics. Testimony under these various headings implicates a corresponding variety of evidentiary considerations. As a result, it can be expected that such testimony will meet different degrees of resistance by the judicial system. Of course, not all potential functions of expert moralists fit neatly within this tripartite division; to some extent, the categories overlap and merge. A question concerning the nature of a person's religious beliefs, for example, could fall under any or all of the three subheadings depending upon the purpose of the ethicist's response. Nonetheless, the suggested subdivision offers a useful starting point for illustration and analysis of the ethicist's potential functions.<sup>52</sup>

Since McAllen and Delgado's work in 1982, the majority of commentators on ethics expert testimony have become convinced that normative bioethics testimony is less reliable than other kinds of bioethics testimony.<sup>53</sup> While both descriptive ethics and metaethics could be appropriately used in the courtroom, normative ethics could not be, under this view.<sup>54</sup>

## 2. *Daubert v. Merrell Dow Pharmaceuticals: Scientific Expert Testimony Standards*

Precisely how the reliability of bioethics testimony should be evaluated has never been directly addressed by a court. However, the appropriate test for determining the reliability of nonscience testimony in general has been widely debated, especially since the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>55</sup> In *Daubert*, the Court clarified standards for determining whether

52. Delgado & McAllen, *supra* note 3, at 875-76.

53. See Scofield, *supra* note 3, at 2.

54. See Pellegrino & Sharpe, *supra* note 3, at 559 (recommending that normative testimony be excluded from evidence, and that ethics experts be confined to descriptive and metaethical testimony). Wildes similarly views the tripartite division as an important distinction and consequently urges that normative testimony be excluded from the courtroom. See Wildes, *supra* note 3, at 366-67. Although Mishkin admits that the categories of descriptive, metaethical and normative ethics are fuzzy, he nevertheless urges judges to limit ethics testimony to descriptive testimony about a particular school of thought. See Mishkin, *supra* note 3, at 51, 89. The tripartite division has thus been elevated during the course of the debate about ethics expert testimony from a "starting point for illustration and analysis" to the evidentiary screening device of choice among commentators.

55. 509 U.S. 579 (1993). See generally Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699 (1998) (stating that *Daubert* has created problems for lower courts because the opinion gave a mixed message); Edward J. Imwinkelried, *The Next Step*

expert scientific testimony is reliable.<sup>56</sup> Among the factors the Court said a judge may consider are whether: (1) the expert's theory or technique can be and has been empirically tested; (2) the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error is acceptable; and (4) the theory or technique is generally accepted by the scientific community.<sup>57</sup> These gatekeeping criteria are known as the "Daubert factors." *Daubert* seemed to leave open, however, whether these criteria apply to expert testimony that does not purport to be scientific.<sup>58</sup>

Since the *Daubert* decision, some courts have found that the criteria are inapplicable to nonscience expert testimony.<sup>59</sup> Others have applied *Daubert* to technical and specialized knowledge as well as to science.<sup>60</sup> Still others have concluded that *Daubert* can be applied to nonscience testimony, but that it must be modified in those circumstances.<sup>61</sup> Recently the Supreme Court decided the case of *Kumho Tire Co. v. Carmichael*,<sup>62</sup> clarifying some aspects of this debate about the criteria for determining the reliability of non-science expert testimony.

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*After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Testimony*, 15 CARDOZO L. REV. 2271 (1994) (assessing that the reliability of nonscience testimony may be more difficult than assessing science testimony); Teresa S. Renaker, *Evidentiary Legerdemain: Deciding when Daubert Should Apply to Social Science Evidence*, 84 CAL. L. REV. 1657 (1996) (stating that the scope of *Daubert* has been expanded to cover all expert testimony); Jennifer Laser, Note, *Inconsistent Gatekeeping in Federal Courts: Application of Daubert v. Merrell Dow Pharmaceuticals, Inc. to Nonscientific Expert Testimony*, 30 LOY. L.A. L. REV. 1379 (1997) (stating that *Daubert* left unanswered important questions about its application to nonscience testimony).

56. See *Daubert*, 509 U.S. at 579. In *Daubert*, the Supreme Court determined that the long-standing *Frye* "general acceptance" standard had been superseded by the standard embodied in Rule 702. See *id.* at 586. Under *Frye*, judges in their gatekeeping role were to defer to the judgments of scientists regarding novel scientific evidence. See *Frye v. United States*, 293 F. 1013, 1014 (1923). Under *Daubert*, however, judges themselves must decide if inferences and assertions have been derived by scientific method. See 509 U.S. at 592.

57. See *Daubert*, 509 U.S. at 593-94.

58. See *id.* at 599-600.

59. See *United States v. Jones*, 107 F.3d 1147, 1157 (6th Cir. 1997) (holding that *Daubert* does not apply to a handwriting analysis expert); *United States v. Starzeczpyzel*, 880 F. Supp. 1027, 1038-41 (S.D.N.Y. 1995) (holding that forensic document evidence examination (FDE) testimony did not satisfy the *Daubert* standard but holding the testimony admissible, nonetheless, because *Daubert* is not applicable to FDE testimony).

60. See *Berry v. City of Detroit*, 25 F.3d 1342, 1348 (6th Cir. 1994) (holding sociologist not qualified to testify that failure to discipline police officers was proximate cause of police shooting), *reh'g denied*, *Berry v. City of Detroit*, 1994 U.S. App. LEXIS 23079 (6th Cir. Aug. 23, 1994), *cert. denied*, *Berry v. City of Detroit*, 513 U.S. 1111 (1995).

61. See *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263-64 (7th Cir. 1996) (holding social science testimony improperly excluded because testimony was based on peer reviewed articles and method was well-accepted in the field of social science).

62. 119 S. Ct. 1167 (1999).



### 3. *Kumho Tire v. Carmichael: Modified Standards for Nonscience Expert Testimony*

*Kumho Tire* was a products liability action against the manufacturers and distributors of a steel belted radial automobile tire.<sup>63</sup> The tire blew out during a cross-country trip the Carmichael family was taking in July of 1993, resulting in a motor vehicle accident, serious injuries to several members of the family, and the death of a child.<sup>64</sup> The plaintiffs claimed that the tire was defective.<sup>65</sup>

The district court excluded the expert testimony of a tire failure analyst who was to testify that a defect in the tire's manufacture and design caused the tire to blow out.<sup>66</sup> The expert used a two-factor test and visual/tactile inspection. Using this method, the expert concluded that, unless a failed tire showed certain signs of wear or abuse, a manufacturing defect caused the failure.<sup>67</sup> The expert's testimony was excluded on grounds that it was unreliable because it failed to meet the *Daubert* factors.<sup>68</sup> Because the expert's testimony provided the only evidence of a tire defect, the district court granted the petitioner's motion for a summary judgment.<sup>69</sup>

On appeal, the Eleventh Circuit reversed, holding that the district court had erred as a matter of law in applying *Daubert*. It reasoned that *Daubert* could not be applied because the testimony rested on a "technical" rather than a "scientific" analysis.<sup>70</sup>

The question presented to the Supreme Court was, does *Daubert*'s gatekeeping function apply only to "scientific" testimony or to all expert testimony. Justice Breyer, writing for the Court, found that the gatekeeping function applies to all expert testimony, for several reasons.<sup>71</sup> First, the language of Rule 702 makes no relevant distinction between scientific knowledge and technical or other specialized knowledge.<sup>72</sup> The word "knowledge," rather than its modifier ("scientific," "technical," or "other specialized"), establishes the

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63. *See id.* at 1171.

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.* at 1171-73.

68. *See id.* at 1173.

69. *See id.*

70. *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1436 (11th Cir. 1997).

71. *See Kumho Tire*, 119 S. Ct. at 1174.

72. *See id.*

standard of evidentiary reliability.<sup>73</sup>

Second, the rationale underlying the *Daubert* Court's "gatekeeping" determination was not limited to "scientific" knowledge.<sup>74</sup> The Federal Rules grant testimonial latitude to all experts on the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline."<sup>75</sup>

Finally, the *Kumho Tire* Court stated that it would be difficult or impossible to administer evidentiary rules based on a distinction between scientific and technical or other specialized knowledge.<sup>76</sup> It saw no clear dividing line among them, and further, no need to make such a distinction.<sup>77</sup>

More specifically, the Court addressed whether trial judges determining the admissibility of an engineering expert's testimony may be allowed to consider the *Daubert* factors. The Court said that judges may consider those factors, but refused to categorically rule on their applicability.<sup>78</sup> The Court also refused to rule on the applicability of the *Daubert* factors for subsets of cases defined by type of expert or kind of evidence. In the Court's view, the decision would depend upon the particular circumstances of each case, making such line drawing unfeasible.<sup>79</sup> Thus, the determination of what measures of reliability to use should be made on a case by case basis.

Justice Breyer further noted that *Daubert* itself emphasized the flexibility of the Rule 702 inquiry.<sup>80</sup> Despite this flexibility, Justice Breyer emphasized the importance of not obscuring the overarching goal of *Daubert*'s gatekeeping requirement: ensuring that the same level of intellectual rigor characterizing practice in a particular field is applied to expert testimony in the courtroom.<sup>81</sup> The Court thus endorsed a rigorous standard of reliability for all expert witnesses while limiting the application of specifically scientific standards to all expert witnesses.

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73. *Id.*

74. *See id.*

75. *Id.* (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993)).

76. *See id.* at 1174.

77. *See id.*

78. *See id.* at 1175.

79. *See id.*

80. *See id.*

81. *See id.* Chief Judge Posner formulated the test. *See, e.g., Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996) (holding that *Daubert* requirement of some degree of rigor in courtroom as professional practice applies to social science expert testimony), *cert. denied*, 520 U.S. 1251 (1997); *Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996) (holding method of analyzing lung tissue for asbestos as insufficiently rigorous), *cert. denied*, 519 U.S. 992 (1996); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318-19 (7th Cir. 1996) (rejecting cardiologist's expert testimony because method insufficiently rigorous), *cert. denied*, 519 U.S. 819 (1996).

The Supreme Court found that the district court's decision regarding the tire failure analyst's testimony in *Kumho Tire* was lawful.<sup>82</sup> The specific issue before the trial court had been whether the expert's method could reliably determine the likelihood that a defect in the tire caused its tread to separate from its carcass.<sup>83</sup> The plaintiffs wanted the reliability inquiry to focus at a more general level. But the Court determined that the reliability inquiry should be quite specific and narrow. The expert's method, understood at a general level as a way to predict whether overdeflection had caused the tire's tread to separate from its steel belted carcass, might have been reliable. But when the method was viewed more specifically, as a way of predicting whether a defect in the tire at issue caused its tread to separate from its carcass, it failed to satisfy either the *Daubert* factors or any other set of reasonable reliability criteria. It was thus properly excluded, according to the Court.<sup>84</sup>

*B. Future Challenges: Conflict Between Kumho Tire and Ethical Theories—Normativity, Principlism, and Casuistry*

What are the implications of *Kumho Tire* for assessing the reliability of bioethics testimony? Despite widespread endorsement by commentators, a criterion of non-normativity for determining reliability meshes poorly with the *Kumho Tire* standard for two reasons. First, the Supreme Court in both *Kumho Tire* and *Daubert* noted that the gatekeeping inquiry must be “‘tied to the facts’ of a particular ‘case.’”<sup>85</sup> The tripartite division of ethics is not tied to the facts of a case, but focuses instead on distinguishing general categories of ethics. The *Kumho Tire* Court was also unwilling to draw fine lines in order to categorically separate scientific from technical or other specialized knowledge. It is unlikely that categorically separating normative ethics testimony from other ethics testimony in order to exclude the former would be viewed any more favorably on appeal.

Second, *Kumho Tire* requires that standards of reliability correspond

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82. See *Kumho Tire*, 119 S. Ct. at 1178.

83. Justice Stevens dissented from this part of the opinion because he thought it “neither fair to litigants nor good practice for this Court to reach out to decide questions not raised by the certiorari petition.” *Id.* at 1179.

84. See *id.* at 1178.

85. *Id.* at 1175 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985))).

to those used in practice. The tripartite division is not widely used in bioethics practice. In discussion of testimony, ethics expert commentators do commonly advert to the normative-descriptive-metaethical distinction. But, in their work as consultants, ethics committee members, or commission members, they do not employ the distinction in order to exclude normative judgments.

Underlying the separation of normative from metaethical or descriptive judgment is the fact-value distinction that became a philosophical truism for much of twentieth century ethics.<sup>86</sup> The disjunctive character of this distinction, however, has been seriously questioned by many philosophers,<sup>87</sup> who do not believe that it is possible to separate facts and values to the degree that the normative, metaethics, and descriptive ethics advocates imply. By insisting that experts replicate standards that exist in the field, *Kumho Tire* should discourage judges from using a strict division between normative and other bioethics testimony to reject unreliable testimony.

But what should judges use as indicators of the reliability of bioethics testimony? In 1982, Delgado and McAllen suggested that ethics experts from particular schools of thought could represent views that were "consonant with the considered moral judgments of our society."<sup>88</sup> Presumably, they believed that consonance with social views was a good indicator of reliability. They suggested that such experts could be drawn from classical schools of ethical thought such as utilitarianism or deontology.<sup>89</sup> It is doubtful, however, that any method tested at the "schools" level of generality could be sufficiently "tied to the facts of a particular case" to pass *Kumho Tire* scrutiny.

Today, there are several approaches under discussion and in use in bioethics that borrow from the classical schools and are somewhat more specified. Principlism is foremost among them.<sup>90</sup> It has been

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86. Proponents of the fact-value distinction hold that one cannot logically move directly from a statement of fact about "what is" to a statement of value about "what ought to be." See generally R. M. HARE, *THE LANGUAGE OF MORALS* (1972); GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* (1978).

87. See generally G. J. WARNOCK, *CONTEMPORARY MORAL PHILOSOPHY* (W.D. Hudson ed., 1967); R. M. Hare, *Descriptivism*, 49 *PROCEEDING OF THE BRITISH ACADEMY* 115 (1963); Jan Narveson, *Is There a Problem About "Applied" Ethics?*, in *APPLIED ETHICS AND ETHICAL THEORY* 100 (David M. Rosenthal & Fadlou Shehadi eds., 1988); James Rachels, *Can Ethics Provide Answers?*, in *APPLIED ETHICS AND ETHICAL THEORY* 3 (David M. Rosenthal & Fadlou Shehadi eds., 1988); John R. Searle, *How to Derive "Ought" from "Is"*, 73 *PHIL. REV.* 43, 43-48 (1964). The division is rejected in pragmatic philosophy, which some argue best characterizes bioethics practice. See generally Glenn McGee, *Introduction to PRAGMATIC BIOETHICS* at ix, xiii-xiv (Glenn McGee ed., 1999).

88. Delgado & McAllen, *supra* note 3, at 904.

89. See *id.* at 907-13.

90. Principlism, or the four-principled approach to biomedical ethics, is explained

extensively reviewed and is generally (though certainly not universally) accepted; it therefore has at least the potential to meet several of the *Daubert* reliability criteria. As one observer of the field recently noted:

[Beauchamp and Childress] tried to systematize bioethics by creating a set of bioethical principles that could be applied to all bioethical cases . . . . "Principlism," as the approach came to be known . . . was articulated in Tom Beauchamp and James Childress's (1994) *Principles of Biomedical Ethics*, which originally was published in late 1977 and has become the document in bioethics most resembling a common disciplinary charter. The four principles articulated by Beauchamp and Childress in their book—autonomy, nonmaleficence, beneficence, and justice, the "Georgetown mantra"—promised in their formulation an operationalizable tool for evaluating and adjudicating case-based ethical dilemmas. Though principlism has been assaulted, criticized, or amended by a host of critics ever since, it was quickly adopted as the standard approach to bioethical issues, its seminal contribution is widely acknowledged, and its vocabulary and basic principles remain at the center of bioethical debate.<sup>91</sup>

Principlism in its early versions may have had only marginally greater potential for application at the level of specificity *Kumho Tire* requires than would utilitarianism or deontology. It was regularly criticized for its inability to provide strategies for deciding between conflicting principles or conflicting ways of balancing the principles.<sup>92</sup> As a result, Beauchamp and Childress incorporated the notion of "specification" in their most recent revision of *The Principles of Biomedical Ethics*.<sup>93</sup>

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by Beauchamp and Childress as follows:

*Principles* are general guides that leave considerable room for judgment in specific cases and that provide substantive guidance for the development of more detailed rules and policies. . . .

The four clusters of principles are (1) respect for autonomy (a norm of respecting the decisionmaking capacities of autonomous persons), (2) nonmaleficence (a norm of avoiding the causation of harm), (3) beneficence (a group of norms for providing benefits and balancing benefits against risks and costs), and (4) justice (a group of norms for distributing benefits, risks, and costs fairly).

BEAUCHAMP & CHILDRESS, *supra* note 49, at 38.

91. Paul Root Wolpe, *The Triumph of Autonomy in American Bioethics: A Sociological View*, in *BIOETHICS AND SOCIETY*, *supra* note 43, at 38, 41 (citations omitted) (footnote omitted).

92. See generally BERNARD GERT ET AL., *BIOETHICS: A RETURN TO FUNDAMENTALS* (1997); PARK RIDGE CENTER FOR THE STUDY OF HEALTH, FAITH, AND ETHICS, *A MATTER OF PRINCIPLES? FERMENT IN U.S. BIOETHICS* (Edwin R. DuBose et al. eds., 1994); K. Danner Clouser & Bernard Gert, *A Critique of Principlism*, 15 *J. MED. & PHIL.* 219, 221-23 (1990) (stating that the principles are not guides to action, and often conflict with each other); David Degrazia, *Moving Forward in Bioethical Theory: Theories, Cases, and Specified Principlism*, 17 *J. MED. & PHIL.* 511, 511-39 (1992).

93. See BEAUCHAMP & CHILDRESS, *supra* note 49, at 28-37.

Whether that move will result in a method that can be sufficiently tied to cases will be a matter for courts to decide in the future.

Another candidate for a generally accepted method of bioethics is casuistry.<sup>94</sup> Casuistry is, by definition,<sup>95</sup> “tied to cases,” but *Kumho Tire* criteria seem to require that expert testimony be tied not simply to cases generally, but to a specific question or matter at issue in the particular case in which the expert is giving testimony. It is thus an open question whether either principlism or casuistry would survive *Kumho Tire* reliability scrutiny.

In addition to this obstacle to reliability, principlism and casuistry are not strictly speaking practical procedures, but theoretical understandings of bioethics that have a formal methodological component (though they are often referred to as methods). The *Kumho Tire* Court focused on the adequacy of a particular method to answer specific questions at issue in the case, not its adequacy to serve as a general “philosophical” approach or approach to a field. It is unclear, therefore, that either principlism or casuistry can provide the kind of specificity that the *Kumho Tire* criteria envision. To meet the *Kumho Tire* reliability standard, courts would need to assess the degree to which actually-employed bioethics methods or procedures answer the specific matters on which testimony is given.<sup>96</sup>

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94. See generally ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988).

95. Casuistry is defined as follows:

Casuistry . . . focuses on practical decisionmaking in particular cases. . . . Appropriate moral judgment occur . . . through an intimate understanding of particular situations and the historical record of similar cases.

. . . .  
. . . [C]asuists dispute the use of the model of scientific theory for ethical theory, the accompanying account of moral judgments, and the insistence on firm, universal principles.

BEAUCHAMP & CHILDRESS, *supra* note 49, at 92-94.

96. The *Kumho Tire* requirement that standards of reliability correspond to those used in practice suggests that the processes involved in bioethics research and clinical bioethics would be what a *Kumho Tire*-inspired court would likely examine; thus, scrutiny of specific research methods or methods of inquiry that have general acceptance or meet peer review standards would be needed. Experience-based reliability and expertise have not been well explored within the field. Only Chervenak and McCullough have attempted to address the issue. See LAURENCE B. MCCULLOUGH & FRANK A. CHERVENAK, *ETHICS IN OBSTETRICS AND GYNECOLOGY* 43-44 (1994). The lack of discussion of standards of reliability in the field raises the question whether the field of bioethics is methodologically rigorous enough to pass *Kumho Tire* scrutiny regardless of how well accepted or well reviewed certain methods are within its ranks.

## IV. HELPFULNESS OF BIOETHICS TESTIMONY

A. *Challenges to the Helpfulness of Bioethics Expert Testimony*1. *General Concerns: Ethics Expertise or Just Common Sense*

The third issue that judges must address when considering whether to admit expert testimony is whether the testimony will be helpful. Although a 1990 study of judicial decision making about life sustaining treatment reported that judges who had received a variety of information aids frequently found the testimony of ethicists persuasive or useful,<sup>97</sup> commentators have worried that bioethics testimony would not actually help courts. Some see ethics testimony as merely the expression of common sense, not specialized or esoteric enough to be helpful.<sup>98</sup> Others see it as testimony merely telling the judge or jury which result to reach.<sup>99</sup> Neither type of testimony would meet the standards for Rule 702, which requires testimony to aid in understanding the evidence or determining a fact in issue.<sup>100</sup>

Occasionally, in particular cases, judges have determined that bioethics testimony would not be helpful. Contrary to what commentators have suggested, however, the unhelpfulness of bioethics testimony was neither the result of its common sensical nature nor of its conclusory nature. Rather, the bioethics testimony was not helpful to the

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97. In cases about foregoing life sustaining medical treatment, these aids included medical or ethical guidelines or codes of ethics, nursing home or hospital policies and regulations, review by a hospital ethics committee, prognosis committee, ethics consultation services, testimony of the patient, testimony of a representative of the state, an amicus curiae brief, a document purported to express the wishes of the patient, advice of a resource judge, and testimony of an ethicist. See generally Thomas L. Hafemeister & Donna M. Robinson, *The Views of the Judiciary Regarding Life-Sustaining Medical Treatment Decisions*, 18 LAW & PSYCHOL. REV. 189 (1994) (reporting results of their 1990 study of state trial court judges).

98. See Scofield, *supra* note 3, at 2.

99. An advisory committee note to Rule 704 suggests that such testimony would be the paradigm of unhelpful expert testimony. See FED. R. EVID. 704 advisory committee's note. Critics of ethics testimony have claimed, "'Expert testimony' in this area . . . consists of nothing more than . . . medical ethicists stating what they believe is right and wrong." Weinstein, *Possibility*, *supra* note 40, at 65 (quoting G.J. Annes & L.H. Glantz, Brief of Amicus Curiae, *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626 (Mass. 1986)).

100. See generally John William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form*, 71 OR. L. REV. 349 (1992) (describing the function of expert testimony within the litigation process).

court because it conflicted with law.<sup>101</sup> Two cases illustrate this bioethics-law conflict.

## 2. *Expert Testimony Which Conflicts with State Law*

### a. *Sarka v. Rush Presbyterian-St. Luke's Medical Center*

In *Sarka v. Rush Presbyterian-St. Luke's Medical Center*,<sup>102</sup> the plaintiff, a child, brought an action against hospitals and physicians alleging that negligence during a childbirth procedure resulted in neurological injury. The defendants claimed the injury may have been caused by a congenital condition and sought a court order for diagnostic tests to support their position. At the trial level, the court ordered the plaintiff to submit to a physical examination including magnetic resonance imaging (MRI) and/or a computed axial tomography (CT) scan.<sup>103</sup> These procedures were the only remaining diagnostic techniques that could determine whether the child's condition was a congenital condition or a condition due to negligence. Because the child was not under sedation at the time of the tests, however, his movement adversely affected the quality of the images, rendering them almost useless for the diagnosis. The defendants then filed a motion requesting an order to repeat the examination under sedation to generate a clearer image. The trial court granted this request. When the plaintiff's parents failed to produce the child for examination, the trial court found them in contempt. Plaintiff then appealed.<sup>104</sup>

On appeal, the court weighed the risks of chloral hydrate sedation with the benefits of a clear CT scan or MRI.<sup>105</sup> The plaintiffs argued that the risks should be weighed against the medical benefit to the child. The court rejected that assertion, however, and stated that the risks were to be weighed against the benefit to the case.<sup>106</sup>

A medical ethics expert for the plaintiff had testified that the scan would be unethical and improper because no medical benefit could be

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101. See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 3 (1987) (discussing approaches to conflicts between law and morality from the perspective of the citizen and from the perspective of the jurist); see also Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1391 (1992) (exploring tension between the state's normative system of law and the legal profession's normative system of ethics).

102. 566 N.E.2d 301 (Ill. App. Ct. 1990).

103. See *id.* at 302.

104. See *id.* at 302-06.

105. See *id.* at 308.

106. See *id.*



derived from the procedure.<sup>107</sup> Even a minimal risk would have to be weighed against the nonexistent medical benefits, in his view. The ethics expert testified further that consent of either the patient or his parents was ethically required. Since neither the parent nor the child had consented, the procedure would not meet medical ethics standards even if it were entirely risk-free.<sup>108</sup>

The court characterized the expert's affidavit as "meritless."<sup>109</sup> It pointed out that Illinois law specifically granted courts the power to order physical exams as a legal discovery device, and that no law in Illinois or elsewhere required courts making such orders to consider whether the exam provided benefits for the plaintiff.<sup>110</sup> Courts were required only to determine whether the exam was relatively safe. The expert's testimony about the ethical appropriateness of compelling a CT scan was therefore beside the point, in the court's view. In the context of legal discovery, neither consent to the scan nor risks and benefits solely to the plaintiff could be dispositive.<sup>111</sup> After the defendants showed that the potential risk of harm due to sedation was minimal, and after the plaintiffs failed to show the child was particularly susceptible to sedative-related risks or injury, the appellate court affirmed in part, reversed in part, and remanded to the lower court.<sup>112</sup>

#### *b. Rogers v. South Carolina Department of Mental Health*

A second case further illustrates that when bioethics testimony conflicts with law, it is unhelpful to a court. *Rogers v. South Carolina Department of Mental Health*<sup>113</sup> was a 1989 appeal to the Court of Appeals of South Carolina from a judgment in a wrongful death case.<sup>114</sup> A woman with paranoid schizophrenia was being treated through the South Carolina Department of Mental Health. She received inpatient care, and subsequently, when she suffered a relapse, outpatient care. The patient believed that her sister was trying to poison her; she

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107. *See id.* at 305.

108. *See id.*

109. *Id.*

110. *See id.*

111. *See id.* at 308.

112. *See id.* at 309. On remand, the court's test order was to "be made more specific as to the dosage, names of physicians, and safety measures employed in performing the CT scan." *Id.*

113. 377 S.E.2d 125 (S.C. Ct. App. 1989).

114. *See id.* at 125.

subsequently shot and killed another family member. The victim's personal representative sued the Department, the Commissioner of Mental Health, the Superintendent of the State Hospital, and two physicians who treated the patient, alleging negligent failure to warn the victim that the patient might harm her.<sup>115</sup>

A psychologist-ethics expert was to testify that the codes of ethics of the American Psychiatric Association and the American Psychological Association recognized a duty to warn if there is a reasonable probability of risk to a named victim, and a warning could be given without violating the patient's civil rights.<sup>116</sup> But, the trial judge refused to admit the testimony. Because the plaintiff had offered no other expert testimony to establish a breach of the professional standard of care, the court granted the defendant a directed verdict.<sup>117</sup> In explaining its affirmation of the lower court's decision, the appellate court noted the following:

Our disposition of the appeal makes it unnecessary to reach the appellant's specific exceptions, since they are all based on the assumption that the doctors were under a duty to warn [the victim]. In particular, we note that the controversy over the admission of the psychologist's testimony is beside the point, because the existence of a duty to warn is a question of law for the court, not a matter of opinion testimony from witnesses.<sup>118</sup>

The exclusion of the ethics testimony was affirmed in *Rogers* because the question of whether there exists a duty to warn had already been determined by law. When ethics and law conflict, the court implied, bioethics testimony cannot be helpful to the court.<sup>119</sup>

In cases such as *Sarka* and *Rogers*, where bioethical standards directly conflict with law, the expert testimony will not be helpful and should ordinarily not be admitted.<sup>120</sup> Judges should also avoid admitting testimony even when it does not conflict with law, if it merely restates

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115. *See id.*

116. *See id.* at 126.

117. *See id.* at 125.

118. *Id.* at 126-27.

119. *Cf. McKnight v. Midwest Eye Inst., Inc.*, 799 S.W.2d 909, 917 (Mo. Ct. App. 1990) (bioethics testimony conflicts with contract).

120. This is not to suggest that when law and ethics or morality conflict, law should always prevail; only that, in such cases, an expert ethics witness will probably not help the court understand the facts or issues in the manner envisioned by Rule 702. *See* Gunther Teubner, *De Collisione Discursuum: Communicative Rationalities in Law, Morality, and Politics*, 17 *CARDOZO L. REV.* 901, 901-02 (1996) (describing "collision rules" between law and other discourses); *see also* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 192-93 (1977) (arguing that when moral rights conflict with law, enforcing the law would inflict an additional wrong); Alan H. Goldman, *The Force of Precedent in Legal, Moral, and Empirical Reasoning*, 71 *SYNTHESE* 323, 323-29 (1987) (stating that the force of precedent in legal reasoning is stronger than in moral or empirical reasoning, but does not blindly bind judges to an amoral status quo).

law. A restatement was part of the bioethics testimony in the following case.

3. Conservatorship of *Morrison v. Abramovice: Bioethics Testimony Used to Supplement Persuasive Law when Novel State Issue*

In *Conservatorship of Morrison v. Abramovice*,<sup>121</sup> a conservator sought injunctive relief against a California hospital and the attending physician to remove a nasogastric tube from a patient who was in a persistent vegetative state (PVS).<sup>122</sup> The court faced two questions: did the conservator have authority to request removal of the nasogastric (NG) tube, and, if so, were physicians obligated to comply with the request.<sup>123</sup>

A bioethics ethics expert testified that a conservator was ethically bound to seek medical advice, but not necessarily to follow it.<sup>124</sup> That is, the conservator could authorize removal of the NG tube over the physician's objections. The ethics expert also testified that it was "[t]he prevailing viewpoint among medical ethicists . . . that a physician has the right to refuse on personal moral grounds to" comply with a surrogate's choice, "but [that he or she] must [then] be willing to transfer the patient."<sup>125</sup>

As to the first question, the court ruled the conservator could order removal of the tube if the conservatee lacked the capacity to give informed consent for medical treatment.<sup>126</sup> The conservator had exclusive authority to give consent to the treatment or its removal as long as consent was given in "good faith," based on medical advice. The medical advice requirement did not, however, mandate that the conservator adhere to the defendant physician's opinion about whether to remove the tube or not.<sup>127</sup> So long as the conservator had consulted with physicians to obtain information regarding the patient's condition and the prognosis for the conservatee was that he would not improve, the conservator satisfied the medical advice requirement and could consent in good faith.<sup>128</sup>

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121. 253 Cal. Rptr. 530 (Ct. App. 1988).

122. *See id.* at 531-32.

123. *See id.* at 532, 534.

124. *See id.* at 533.

125. *Id.* at 534.

126. *See id.* at 531.

127. *See id.* at 533.

128. *See id.*

The expert's testimony regarding authorizing removal of the NG tube led the appellate court to a conclusion consistent with California law. In particular, the *Morrison* court cited California's *In re Drabick*.<sup>129</sup> *Drabick* had held that the conservator of an incompetent person in a vegetative state, with no hope of recovery, has the authority to decide, considering medical advice and the conservatee's best interests, that a NG tube should be withdrawn and the conservatee permitted a natural death.<sup>130</sup> This part of the medical ethics testimony in *Morrison*, therefore, merely reiterated California law and could have been excluded on a number of grounds.<sup>131</sup>

Bioethics testimony can, however, be helpful to a court. John William Strong has outlined several ways in which expert testimony may theoretically be of assistance:

(1) supplying general propositions which will permit inferences from data which the trier of fact would otherwise be forced to find meaningless; (2) applying general propositions to data so as to generate inferences where the complexity of the body of propositions applied, the difficulty of the application, or other factors make the expert's conclusion probably more accurate or precise than that of the trier of fact; (3) modifying, qualifying, and refining general propositions which the trier of fact may reasonably be expected to use; and (4) adding specialized confirmation and, thus, confidence to general propositions otherwise likely to be assumed more tentatively by the trier.<sup>132</sup>

If bioethics testimony clarifies, refines, adds precision, or gives content to health care standards that are consistent with the law, the testimony may thereby be helpful to a court. In fact, medical ethics testimony on the second issue in *Morrison* was helpful to the court.<sup>133</sup>

Having determined that a conservator has the authority to request

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129. *See id.*; *Conservatorship of Drabick v. Drabick*, 245 Cal. Rptr. 840, 861 (Ct. App. 1988) (holding that conservator for incompetent person in vegetative state may decide to withdraw artificial nutrition and hydration).

130. *See Drabick*, 245 Cal. Rptr. at 861.

131. Concerns about confusing law and ethics are frequently raised in the ethics literature, but concerns about the cumulativeness of such testimony are not. *See* Mishkin, *supra* note 3, at 51; Pellegrino & Sharpe, *supra* note 3, at 561. Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. For discussions of expert testimony concerning law, see generally Thomas E. Baker, *The Impropriety of Expert Witness Testimony in the Law*, 40 U. KAN. L. REV. 325 (1992) (increasing use of expert testimony on the law); Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645 (1990) (outlining dangers of relaxed admissibility requirements); Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797 (1984) (stating that expert legal testimony should be judged by the same standards as other expert testimony).

132. Strong, *supra* note 100, at 360.

133. *See Morrison*, 253 Cal. Rptr. at 534.

withdrawal of a nasogastric tube, the *Morrison* court faced a second question: whether a conservator could require a physician to remove the nasogastric tube against the physician's personal moral objections. This issue was novel in California at the time.

The bioethics expert summarized for the court current medical ethics standards regarding physicians' rights to conscientiously refuse to participate in forgoing life sustaining treatment, and their concomitant responsibility to assist in patient transfers.<sup>134</sup> While the conclusion the court drew was consistent with the bioethics expert's testimony, as it was for the first question, the court's approach to expert testimony on the second question, for which there was no binding law, was different. In explaining its decision, the court referred first to the medical ethics testimony.<sup>135</sup> It then cited the work of a joint Los Angeles Bar and Medical Association Committee, case law from outside the jurisdiction, and language from the state's natural death act (which did not govern the case).<sup>136</sup>

In *Morrison*, therefore, the expert apparently did not help the court with the first question, since the issue had already been resolved by case law.<sup>137</sup> But the bioethics testimony did contribute to resolving the second question by "adding specialized confirmation . . . to . . . propositions otherwise likely to be assumed more tentatively by the trier,"<sup>138</sup> in Strong's terms. The conclusion that a physician may conscientiously refuse to participate, but then must transfer a patient, could have been reached on the basis of the recommendations of the Los Angeles Bar and Medical Association Committee, case law from outside the jurisdiction, or suggestive language in the state's natural death act, but the bioethics testimony gave the judge a greater degree of certainty than if the other sources had been the only ones relied upon. Though the testimony on the second *Morrison* issue made only a modest contribution to the court's reasoning, it was apparently helpful nonetheless.

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134. *See id.* at 533.

135. *See id.* at 534.

136. *See id.*

137. *See id.* at 533.

138. Strong, *supra* note 100, at 360.

#### 4. McCracken v. Walls-Kaufman: *Ethicist Testimony Can Be Used to Determine Standard of Medical Care*

*McCracken v. Walls-Kaufman*<sup>139</sup> was a 1998 appeal from the Superior Court of the District of Columbia.<sup>140</sup> In that case, the court described a specific role that bioethics testimony may fill in aiding courts.

Appellants alleged that Walls-Kaufman, while serving as Mrs. McCracken's chiropractor, sexually assaulted her on several occasions.<sup>141</sup> Appellants' complaint asserted that these sexual assaults violated applicable standards of care and ethical considerations as well as District of Columbia law, "constituted acts of malpractice, breach of fiduciary duty, and/or negligence," and caused Mrs. McCracken to suffer emotional distress which required in-patient and out-patient psychiatry care.<sup>142</sup>

The appellate court stated that the allegations of the complaint were undoubtedly sufficient to state a cause of action for assault and battery.<sup>143</sup> But the court also needed to determine whether appellants had stated a claim for negligence. In order to determine the limits of a chiropractor's duty to avoid sex with his patient, the court looked to common law treatment of sex in analogous relationships: sex between physicians and patients, sex between mental health professionals and clients or patients, and sex between physicians and patients with a special relationship of trust.<sup>144</sup> The court held that if a medical professional not practicing in the field of mental health enters into a relationship of trust and confidence with a patient and takes on a counseling role similar to that of a psychiatrist or psychologist, the professional should be bound by the same standards as would bind a psychiatrist or psychologist in a similar situation.<sup>145</sup>

Mrs. McCracken was required to establish the applicable standard of care through expert testimony.<sup>146</sup> This testimony could, in the court's opinion, be supplied by an ethicist, if necessary. The court stated,

It may be appropriate and necessary to rely upon the testimony of an expert medical ethicist or other expert, who can testify as to existing standards of care that are followed with respect to practitioners in fields other than mental health, who become engaged in giving counsel or advice to patients similar to that

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139. 717 A.2d 346 (D.C. 1998).

140. *See id.* at 348.

141. *See id.*

142. *Id.*

143. *See id.* at 350.

144. *See id.* at 351-52.

145. *See id.* at 352.

146. *See id.*

usually given by psychologists or [psychiatrists].<sup>147</sup>

Therefore, in regard to the *McCracken* issue as well as the second *Morrison* issue, judges viewed bioethics testimony as a potential aid to understanding the applicable standards of conduct for relationships between health care providers and patients.<sup>148</sup> In *Morrison*, the expert added incrementally to the court's understanding; in *McCracken*, the court suggested that an ethicist could substitute for a health professional in supplying information about the relevant ethical standard. These functions fit squarely within Rule 702 notions of helpfulness.

### *B. Future Challenges: Relation Between Testimony and Relevant Law*

Although expert bioethics testimony is too new to define with precision the circumstances in which it will and will not be helpful to courts, two kinds of bioethics testimony should clearly be suspect on grounds of unhelpfulness. Testimony directly conflicting with binding law in the jurisdiction or merely restating it is unlikely to meet the Rule 702 standard of aiding the trier of fact to understand the evidence or determine a fact in issue. Thus, such testimony should ordinarily not be admitted. Other expert bioethics testimony should not *automatically* be admitted, but should be further scrutinized for helpfulness.

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147. *Id.* at 353. Ethics testimony was used in a similar way in *Mazza v. Huffaker*, 300 S.E.2d 833 (N.C. Ct. App. 1983). *Mazza* was a 1983 appeal from a malpractice judgment against a North Carolina psychiatrist. *See id.* at 833. While Mr. Mazza was his patient, Dr. Huffaker had sexual relations with Mr. Mazza's wife. The lower court found the psychiatrist liable. One of the issues for the Court of Appeals of North Carolina was whether the trial judge had made an error in permitting expert witnesses to testify that professional ethics required psychiatrists to refrain from having sexual relations with their patients' spouses. *See id.* at 841. Dr. Huffaker's claim was that permitting the expert testimony allowed the jury to impose legal liability for what was actually a breach of professional ethics. *See id.* The appellate court determined that admission of the bioethics testimony was not in error. The ethics experts could give content to the accepted standards of care by referring to the ethical standards of the profession, according to the court, at least when the accepted standards of care were coterminous with the relevant standards of professional ethics, as several experts had testified they were. *See id.*

148. Deriving "ought" from "is" is often considered a mistake in philosophy. *See* Searle, *supra* note 87, at 43. But this is roughly what is required in legal determinations of professional standards of care. An expert must testify to the standard of care to which the defendant is expected to have conformed, if he or she is to avoid being found negligent. Implicit in the process is that one should "do one's duty."

## V. CONCLUSION

Three guidelines discussed above will help ensure that bioethics testimony meets Rule 702 standards. When scrutinizing bioethics experts, courts will first need to bear in mind that bioethics is an interdisciplinary and increasingly specialized field. In order to avoid the problem of generalization of expertise, they should ask whether the proffered expert has done work that is related to the particular issue about which the expert will testify.

Second, in light of *Kumho Tire*, courts should be wary of recommendations to exclude ethics testimony simply because the testimony is normative. Relying categorically on a strict separation of normative, descriptive, and metaethical testimony is inconsistent with the *Kumho Tire* Court's insistence on case-by-case criteria for reliability. Courts should instead focus on indicators of reliability that have some currency in the field, such as general acceptance and peer review. Courts should insist, in addition, on a clear link between the expert's method and the facts of the case.

Finally, judges should recognize that in specific cases, law and ethics may be synonymous, distinct, at odds, complementary, or overlapping.<sup>149</sup> Bioethics testimony that directly conflicts with law ordinarily cannot be helpful to a court, at least not in the sense that Rule 702 envisions. The threshold question in the helpfulness inquiry, therefore, should be whether the bioethics testimony is related to relevant law. Only after the bioethics testimony has been determined to be neither in conflict with the law nor a mere restatement of it should the court proceed to determine whether it will be helpful.

The field of bioethics has achieved a remarkable degree of public recognition in a relatively short period of time. Given the complexity of medical technology and the health care delivery system, and the speed of change in both, it is likely that courts will continue to look to bioethics experts for help with difficult questions.<sup>150</sup> The three guidelines discussed above should help clarify what is needed to meet Rule 702 standards and to ensure that, despite potential problems with qualification, reliability, and helpfulness, the presence of bioethics

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149. See generally MARSHALL B. KAPP, *OUR HANDS ARE TIED: LEGAL TENSIONS AND MEDICAL ETHICS* (1998) (declaring that unethical medical practices are frequently based on physicians' reactions to, and misperceptions of, the law).

150. See Mishkin, *supra* note 3, at 50 (predicting that the Human Genome Project will spawn many disputes in which litigants may attempt to introduce expert bioethics testimony); see also E. Haavi Morreim, *Bioethics, Expertise, and the Courts: An Overview and an Argument for Inevitability*, 22 J. MED. & PHIL. 291, 294-95 (1997) (arguing that moral values cannot be excluded from legal decisions, and that people trained in bioethics may enrich the proceedings).



experts in the courtroom will augment rather than thwart the legal process.

