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The Moralist as Expert Witness

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

Peter McAllen

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THE MORALIST AS EXPERT WITNESS†

BY RICHARD DELGADO* AND PETER MCALLEN**

I. INTRODUCTION

Virtually all modern legal theorists believe that law and morality interpenetrate in the areas of constitutional and appellate decisionmaking.[1] Yet trial

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* Professor of Law, UCLA. J.D., University of California, Berkeley, 1974.

** Clerk to the Honorable Warren J. Ferguson, Judge, United States Court of Appeals for the Ninth Circuit, J.D., University of California, Los Angeles, 1981.

[1] *See, e.g.*, B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 5 (1977) ("[I]t is only after resolving certain philosophical issues that one can make sense of the constitutional question . . . ."); A. BICKEL, THE LEAST DANGEROUS BRANCH 109 (1962) (Supreme Court is "charged with the evolution and application of society's fundamental principles.") [hereinafter cited as A. BICKEL, LEAST DANGEROUS BRANCH]; A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 87 (1970) [hereinafter cited as A. BICKEL, THE SUPREME COURT]; LORD DEVLIN, THE ENFORCEMENT OF MORALS (1959); R. DWORKIN, TAKING RIGHTS SERIOUSLY 131-49, 184, 207, 240 (1977); J. ELY, DEMOCRACY AND DISTRUST (1980); C. FRIED, AN ANATOMY OF VALUES (1970); H. HART, THE CONCEPT OF LAW 151-207 (1961) [hereinafter cited as H. HART, CONCEPT]; H. HART, LAW, LIBERTY AND MORALITY (1963) [hereinafter cited as H. HART, LAW]; J. RAWLS, A THEORY OF JUSTICE 46-53 (1971); C. STONE, WHERE THE LAW ENDS (1975); R. UNGER, KNOWLEDGE AND POLITICS (1975); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815, 820 (1980). Grey, *Procedural Fairness and Substantive Rights*, in DUE PROCESS 182 (J. Pennock & J. Chapman eds. 1977); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 21 (1975); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83

courts, too, must reason normatively.[2] Even when a case is "governed by a rule," a trial judge must necessarily supplement linguistic interpretation of the rule with moral intuitions about justice, fairness, and rightness.[3] The need for supplementation is particularly acute in cases of first impression, controversies requiring an unusual or unanticipated application of a preexisting rule to a factual setting, and litigation under a statute or rule requiring a discretionary judgment concerning the best interest of a child or an incompetent person.[4] Without careful analysis, however, "[i]t is unclear how (ethical

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HARV. L. REV. 7 (1969); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 664 (1960); Morris, *Persons and Punishment*, 52 MONIST 475 (1968); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

Some would afford a broader, or narrower, scope for judicial valuation, *see, e.g.*, J. ELY, *supra* (judiciary should determine process, rather than substantive, values); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (similar argument), but all agree that the appellate process requires at least some normative reasoning by courts, *see* Yesley, *The Ethics Advisory Board & the Right to Know*, 10 HASTINGS CENT. REP., Oct. 1980, at 5, 6-7 (describing the range of ways in which law and morals might overlap: (1) law forecloses moral inquiry; (2) law establishes bounds within which ethical inquiry may proceed; (3) moral analysis reveals need for legal change; (4) metaethical analysis may reveal that a dilemma is not resolvable by legal or moral arguments); *see also* Carter, *When Courts Should Make Policy: An Institutional Approach*, in PUBLIC LAW & PUBLIC POLICY (J. Gardiner ed. 1977) (offering guidelines to help decide when judicial policymaking is permissible). Of course, the Constitution itself mandates protection of the substantive norms and values incorporated in the Bill of Rights. *See* R. DWORKIN, *supra*, at 180 (The "Constitution fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems."); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184 (1977) ("[C]onstitutional law must . . . be understood as the means by which effect is given to those ideas that . . . are held to be fundamental in defining the limits and distribution of government power in our society.").

[2] *See, e.g.*, R. WASSERSTROM, THE JUDICIAL DECISION (1970); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 293-94 (1981) (rejecting as conceptually impossible the extreme formalist view that judges merely apply legislative or common law rules to the case before them); *see also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) (judges "fill the open spaces in the law"); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); *cf.* Yesley, *The Use of an Advisory Commission*, 51 S. CAL. L. REV. 1451, 1452 (1979) (advocating use of ethics advisory panels to achieve consensus in areas of "sharply conflicting values"). *But see* R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 175 (1975); Zane, *German Legal Philosophy*, 16 MICH. L. REV. 287, 338 (1918) ("Every judicial act [is] a pure deduction.").

[3] Moore, *supra* note 2, at 293-94.

[4] *See infra* Section V (discussing the use of expert witnesses by trial courts to supply normative value analysis).

and jurisprudential) issues like these are to be resolved; certainly they lie beyond the ordinary techniques of the practicing lawyers."[5]

Faced with issues that require moral decisionmaking, trial courts sometimes receive expert testimony from moral, ethical, and religious authorities.[6] Such testimony can take three basic forms. The first, "descriptive

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"Supplementation" is also inevitable in constitutional litigation involving "fundamental" interests. Courts sometimes make value judgments when plaintiffs seek to establish previously unrecognized fundamental rights, *e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (recognizing privacy as a fundamental right); Ravin v. State, 537 P.2d 494, 502-12 (Alaska 1975) (in-home possession of marijuana by adults for personal use protected by Federal and Alaska constitutional right of privacy; however, possession or ingestion of marijuana are not fundamental rights in and of themselves), and necessarily engage in normative analysis when they balance competing "rights" or moral principles, *e.g.*, Matthews v. Eldridge, 424 U.S. 319, 339-49 (1976) (balancing plaintiff's need for disability benefits, discounted by probable sufficiency of existing procedures, against fiscal and administrative burdens associated with an evidentiary hearing); Roe v. Wade, 410 U.S. 113, 162-64 (1973) (identifying the point at which the state's interest in protecting health and the potentiality for human life becomes sufficiently compelling to override privacy concerns); Rochin v. California, 342 U.S. 165, 172 (1952) (finding "conduct that shocks the conscience" after engaging in a "disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated"). Questions concerning the proper role of the courts in this area are beyond the scope of this Article. *Compare* A. BICKEL, LEAST DANGEROUS BRANCH, *supra* note 1, at 109; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 452 (1978); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 227 (1980) *and* Sandalow, *Constitutional Interpretation*, 70 MICH. L. REV. 1033, 1069 (1981) (courts should select and protect values in accordance with current conceptions of political morality), *with* J. ELY, *supra* note 1 *passim and* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 392-95 (1981) (courts, limited by original intent and precedent, should prescribe only process-related values).

[5] R. DWORKIN, *supra* note 1, at 1.

[6] *See infra* notes 10, 12 & 21-63 and cases discussed therein.

Evidentiary rules in every jurisdiction permit counsel, and judges acting on their own initiative, to call expert witnesses. *See generally* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 4-32 (2d ed. 1972); 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 555-71 (J. Chadbourne rev. ed. 1979); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 416-21 (1952). Under these rules, qualified experts have testified on diverse subjects lying beyond the average person's ken, including ballistics, Evans v. Commonwealth, 230 Ky. 411, 417-29, 19 S.W.2d 1091, 1094-99 (1929); manufacturing defects in metal casings, Wylie v. Ford Motor Co., 502 F.2d 1292, 1294-95 (10th Cir. 1974); insanity, State v. Eggleston, 161 Wash. 486, 297 P. 162 (1931); *see also* Diamond & Louisell, *The Psychiatrist as Expert Witness*, 63 MICH. L. REV. 1335 (1965) (noting limitations of expert testimony on issues of mental health science); the standard of care for medical malpractice, Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); the monetary worth of a homemaker's services, Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705, 711-12 (5th Cir. 1967); and foreign law, *e.g.*, Murphy v. Bankers Commercial Corp., 111 F. Supp. 608 (S.D.N.Y.), *aff'd*, 203 F.2d

ethics," entails informing the court about the beliefs that persons or groups actually hold.[7] Moralists also testify in a "metaethical" mode by aiding courts in analyzing complex concepts or arguments.[8] The moralist's most problematic function, however, consists of giving testimony on matters of "normative" ethics in cases of first impression.[9] Moralists providing such testimony purport to help courts make difficult moral choices by offering unadorned edicts on the goodness or badness of persons, acts, or rules of law.[10]

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645 (2d Cir. 1953); *see also* 2 J. WIGMORE, *supra*, § 564 (describing standards for the admission of expert testimony on questions of foreign law in the United States and elsewhere). No court, however, has yet addressed the evidentiary or policy issues raised by the use of a moralist as an expert witness.

[7] For a discussion of the moralist's descriptive function, see *infra* notes 18-35 and accompanying text.

[8] For a discussion of the moralist's metaethical role, see *infra* notes 36-43 and accompanying text.

[9] For a discussion of the moralist's normative role, see *infra* notes 44-63 and accompanying text.

[10] A number of these questions have arisen in connection with biomedical technologies. *E.g.*, Hart v. Brown, 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972) (discussed *infra* at notes 52-60 and accompanying text); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976); *see also* T. BEAUCHAMP & J. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (1979); T. BEAUCHAMP & L. WALTERS, CONTEMPORARY ISSUES IN BIOETHICS (1978); G. KEIFFER, BIOETHICS: A TEXTBOOK OF ISSUES (1979).

Saikewicz provides a useful illustration. In that case, the Massachusetts Supreme Judicial Court considered the state's obligation to treat, over his incompetent protest, a severely retarded adult inmate afflicted with fatal leukemia. Chemotherapy might have prolonged the patient's life, but only at the price of pain and increased sickness. Without treatment, death would come swiftly and relatively painlessly. At issue was the moral standing of an incompetent, moribund patient to choose the latter alternative.

In resolving this question, the court initially determined that the case was one of first impression. 373 Mass. at 747, 370 N.E.2d at 428. It then noted that the law often lags behind the most advanced thinking of "theologians and moral leaders," and sought guidance from "the framework of medical ethics which influence a doctor's decision," recognizing that such considerations were not controlling but "ought to be considered for the insights they give us." *Id.* at 737, 370 N.E.2d at 423. The court found that medical ethicists no longer believe that doctors should invariably prolong life by extraordinary means, *id.* at 738, 370 N.E.2d at 424, and that maintaining the ethical integrity of the medical profession was a cognizable state interest, *id.* at 741-45, 370 N.E.2d at 425-27. It consequently declined to order treatment. *Id.* at 759, 370 N.E.2d at 435.

In cases of this nature, the need for normative analysis is acute, since inaction merely resolves an ethical dilemma in favor of one outcome over another; a child dies, a moribund patient remains connected to life-support machinery for perhaps an

The use of moral experts by trial courts raises a number of vexing evidentiary and jurisprudential issues.[11] Can any type of testimony by a moral expert improve judicial decisionmaking, and if so, how? Does moral expertise, in fact, exist? If so, what forms does it take, who possesses it, and when can it be imparted in court without contravening the fundamental premises of our legal system? A few courts have implicitly recognized some of these difficulties and have rejected certain types of expert moral testimony.[12]

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indefinite period. *See* R. DWORKIN, *supra* note 1, at 4-5. Yet few writers have considered the process by which trial courts should make such value decisions. *Cf.* Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (legal decision-making procedures should accommodate substantive concerns at stake).

[11] In appellate practice, attorneys for parties and amici curiae often analyze societal values in the course of making policy-based arguments. *See infra* note 125 and accompanying text. This is a time-honored function which presents few, if any, evidentiary problems. An appellate advocate arguing morals or public policy makes no claim of expertise or impartiality and cannot excessively sway a jury. *Cf. infra* notes 110-36 and accompanying text (discussing potential obstacles to the use of expert moralists by trial courts).

In light of these considerations, appellate courts are unlikely to call upon expert moralists. Dilemmas are apt to lack the immediacy and poignancy at this level that they often have at the trial court level, and the need for an expert is apt to be less strongly felt. *Cf.* Hart v. Brown, 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972) (kidney transplant case requiring trial court to make an immediate life-or-death decision). Moreover, the likelihood that an advocate would consider ceding some of his or her limited time for oral argument to an expert witness of any sort seems remote, even if the rules of appellate practice permitted such testimony.

[12] *E.g.*, United States v. Kroncke, 459 F.2d 697, 704 (8th Cir. 1972) (upholding exclusion of testimony by moralists concerning moral status of defendant's beliefs and of the Vietnam war on the ground that justification was not a defense to a charge of draft disruption); Malnak v. Yogi, 440 F. Supp. 1284, 1326-27 (D.N.J. 1977) (on question of whether particular teachings were religious under the establishment clause, the court would be governed by prior judicial findings, and the testimony of experts on religion would not be helpful), *aff'd*, 592 F.2d 197 (3d Cir. 1979); *see* United States v. Brawner, 471 F.2d 969, 982-83 (D.C. Cir. 1972) (complaining of expert witnesses who in reality issue "ethical and legal conclusions . . . in a domain that is properly not theirs but the jury's"); Lilly v. Commissioner, 188 F.2d 269, 270-71 (4th Cir.) (Courts must decide issues of public policy "and it is immaterial that the question may be one of ethics rather than of law. . . . It is the judges themselves assisted by the bar, who . . . represent the highest common factor of public sentiment and intelligence.") (quoting Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 97 (1928) (footnotes omitted)), *rev'd*, 343 U.S. 90 (1951); *see also* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 757-59, 370 N.E.2d 417, 434-35 (1977) (accepting proposition that law must defer to considerations of medical ethics, but refusing to provide for hospital "ethics" committee to make decisions concerning termination of treatment for dying patients on the ground that decisions to order treatments are "[the courts'] responsibility . . . and not to be

Others have regarded the decision to hear expert testimony on moral or ethical matters as falling within the discretion of the trial court.[13] Neither courts nor commentators, however, have addressed systematically the evidentiary considerations that might argue for or against such testimony, or examined the larger implications of moral philosophy in the courtroom.[14]

This Article explores the various uses of moral experts by trial courts in an attempt to grapple with those issues. It first describes the potential functions

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entrusted to any other group"); *cf. In re* Quinlan, 70 N.J. 10, 49-50, 355 A.2d 647, 668-69 (authorizing establishment of a hospital "ethics" committee to consider moral dilemmas associated with patient care), *cert. denied*, 429 U.S. 922 (1976).

[13] *See infra* notes 18-63 and accompanying text.

[14] To the authors' knowledge, the only previous discussion of the moralist's role as an expert witness at trial is a brief reference in Spece, *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 S. CAL. L. REV. 1281, 1329-30 (1977). Commentators have noted that ethicists sometimes testify or present papers before legislative or executive committees. *E.g.*, Yesley, *supra* note 1, at 6-7 (theologians and ethicists submitted papers and contributed opinions on ethical aspects of research and human experimentation); Yesley, *supra* note 2, at 1457-63 (noting the same assistance by theologians and ethicists); Interview with Richard Wasserstrom, then Professor of Law & Philosophy, U.C.L.A., in Westwood, California (July 27, 1979) (Wasserstrom, an academic ethicist, supplied analyses and opinions for the benefit of federal committees in connection with abortion and fetal experimentation); *see also* Eagles v. Samuels, 329 U.S. 304, 313 (1946) (upholding Selective Service practice of referring certain files to panels of religious experts since "[w]ise administration may call for the expert advice they alone can offer"); Sullivan, *Hospitals Turn to Philosophers on Life Issues*, N.Y. Times, Mar. 19, 1982, at A1, col. 3 (philosophers with a "deeper insight into the 'meaning of life' and into . . . complex and conflicting moral and ethical questions" used in day-to-day operations of New York teaching hospitals).

Expert testimony on ethical matters before a legislative or executive committee, however, raises fewer questions than does similar testimony in a court of law. First, testimony before most legislative and executive bodies, even when sworn, involves partisan advocacy and differs somewhat from in-court testimony aimed at the ascertainment of truth. *See* C. MCCORMICK, *supra* note 6, § 245, at 582 (oath of truth). Second, legislators may invite whomever they wish to testify, but historical and doctrinal limitations relating to matters such as reliability of the testimony and the qualifications of the witness circumscribe testimony before a court. *See infra* notes 82-86 and accompanying text. Finally, legislative and executive processes receive greater public scrutiny than does judicial decisionmaking, and are more readily subject to later amendment. Courts consider themselves bound by the doctrine of *stare decisis*, and as a result, are reluctant to reverse themselves in light of moral reconsideration. *See* Parish v. Schwartz, 344 Ill. 563, 571-72, 176 N.E. 757, 761 (1931) ("If public policy does require such a change as that insisted upon, the remedy may be found through application to the legislature."); *cf. supra* notes 1-2 (discussing generally the role of moral rights analysis in appellate and constitutional litigation).

served by moral experts, subdividing these functions under the three conceptual headings just noted. Next, it reviews evidentiary rules relating to expert witnesses, and considers various doctrinal, institutional, and philosophical objections to the use of moral experts at trial. The Article then sets forth criteria designed to ensure that moral experts actually aid courts in reaching correct decisions without usurping their ultimate authority to decide controversies, and canvasses the views of leading moral philosophers to determine which schools of thought could meet the proposed criteria. Based on this analysis, it appears that moralists should be allowed to testify only in certain situations. In those situations, however, the moral expert can provide a service heretofore little recognized by courts.

II. FUNCTIONS OF THE MORALIST AS WITNESS

"Moral testimony" does not concern every form of testimonial assistance that an individual with specialized ethical training might offer. For example, the in-court statements of a moralist who witnessed a traffic accident and testified concerning the details of the crash would constitute ordinary, nonexpert testimony and would present no special problems. Expert moral testimony instead concerns trial testimony by a person with a claim of expertise, on issues of right, wrong, goodness, badness, wisdom, unwisdom, fairness, and the like, as well as on mixed questions of morals and fact or the application of moral principles to given facts.[15]

Within this broad and general definition of expert moral testimony it is possible to distinguish three branches of inquiry: descriptive ethics, metaethics, and normative ethics.[16] 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

[15] The line between "fact" and "value" is not easy to draw. This Article offers no such distinction, but includes under the heading "moral testimony" all cases presenting mixed questions of morals and fact. *See generally* Veatch, *Hospital Ethics Committees: Is There a Role?*, 7 HASTINGS CENT. REP., June 1977, at 22, 23 ("We have become increasingly aware of blurring between facts and values. When one is attempting to make a prognosis involving such vague terms as 'reasonable hope' and 'cognitive, sapient state,' questions of value may impinge upon even the determination of prognosis.").

[16] *See generally* P. NOWELL-SMITH, ETHICS (1954) (setting out three types of ethical reasoning as basis for discussion); Nielson, *Problems of Ethics*, in 3 ENCYCLOPEDIA OF PHILOSOPHY 117, 117-21 (P. Edwards ed. 1967) (distinguishing the three types of philosophical inquiry). We do not limit further the bounds of discourse properly regarded as moral. Thus, as we use the term, testimony on descriptive ethics, metaethics, and normative ethics would qualify as "moral" testimony.

subheadings depending upon the purpose of the ethicist's response.[17] Nonetheless, the suggested subdivision offers a useful starting point for illustration and analysis of the ethicist's potential functions.

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[17] Litigation under the Free Exercise Clause of the first amendment, U.S. CONST. amend. I, often illustrates the potential overlap among the categories of ethical inquiry. For instance, in Theriault v. Carlson, 547 F.2d 1279 (5th Cir. 1977), *on remand*, 453 F. Supp. 255 (W.D. Tex.), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979), federal prison inmates claiming membership in the "Church of the New Song" sought special privileges to enable the unhindered practice of their alleged religion—the "Eclatarian Faith." Vacating and remanding an earlier decision, the United States Court of Appeals for the Fifth Circuit instructed the trial court to ascertain whether "Eclatarianism" was a religion within the meaning of the first amendment through a "thorough study of the existing case law . . . [and] appropriate evidentiary exploration of philosophical, theological, and other related literature and resources . . . ." 547 F.2d at 1281. The trial court's resolution of this issue demonstrates that it considered descriptive, metaethical, and normative questions relevant to the issue at hand.

On remand, the trial court first found that "[t]he beliefs professed by the petitioner are not sincerely held . . . ." 453 F. Supp. at 264. Although the court might have rejected the first amendment claim on this basis alone, it also clearly regarded the finding as relevant in determining whether Eclatarianism itself would qualify as a religion under the first amendment. On this point, the court was apparently of the view that " 'so called religions . . . whose members are patently devoid of religious sincerity' " are not religions at all. *Id.* at 259 (quoting *Theriault*, 391 F. Supp. at 395). This would seem a metaethical—or metatheological—position. The court also expressed the opinion that "[t]he professed views" of the Eclatarian were "more closely akin to the megalomania of Adolf Hitler and the Nazis or Charles Manson and his 'family' than any 'belief . . . that occupies a place parallel to that filled by the orthodox belief in God.' " *Id.* at 261. This proposition seems to include, tacitly, the following: a metaethical and theological judgment that religious doctrine is not evil, a descriptive judgment that the Eclatarian doctrine is like Nazism, and a normative judgment that Nazism and Eclatarianism are evil. Based on these judgments, the court emphatically rejected the petitioner's claim. *Id.* at 265. For another example, see Malnak v. Yogi, 440 F. Supp. 1284, 1303-10 (D.N.J. 1977) (testimony concerning the status of transcendental meditation as a religion under the first amendment), *aff'd*, 572 F.2d 197 (3d Cir. 1979).

Questions of this nature often arose during the Vietnam era whenever persons sought conscientious objector status under the Universal Military Service and Training Act, § 6(j), 50 U.S.C. app. § 456(j) (1976). That Act grants immunity from combat training and service in the armed forces for persons whose objections arise from "religious training and belief" rather than "essentially political, sociological, or philosophical views, or a merely personal moral code." *Id.* Thus, a court or draft board applying the statute would seemingly have to consider the sincerity of potential inductees' religious beliefs (a question mixing descriptive, metaethical, and normative elements), the distinctions between "religious" and "merely personal moral codes" (metaethics), and whether given religions within the meaning of the statute are "opposed to participation in war in any form" (descriptive ethics). *Id.*

A. *Descriptive Ethics*

Beliefs vary from person to person and culture to culture. Thus, the moralist's role in many trials is to cast an empirical eye over the field of morality and describe the normative beliefs held by a person or a society.[18] A moralist testifying descriptively might inform the court about the morality or immorality of an act according to the tenets of some ethical, philosophical, or religious system to which the expert may or may not subscribe.[19] Alternatively, the moralist might testify as to the nature of an act or a person's "moral standing" according to the mores of a particular community.[20] Finally, a moralist testifying descriptively might perform a canvassing function by identifying the morality or immorality of an act according to the tenets of some or all ethical, philosophical, or religious systems worthy of serious consideration,[21] or by informing the court that a particular issue has

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[18] For example, a carnivore's observation that Hindus think it immoral to eat meat would represent an exercise in descriptive ethics. Views have differed, however, as to how sharp a distinction can be drawn between normative and descriptive ethics. At one extreme, some philosophers have insisted that no number of "merely" descriptive statements will ever entail a normative conclusion. *E.g.*, R. HARE, THE LANGUAGE OF MORALS 79-83 (1952); G. MOORE, PRINCIPIA ETHICA 9-21 (1903); Hare, *Descriptivism*, in THE IS-OUGHT QUESTION 240, 240-47 (W. Hudson ed. 1969). Writers at the other extreme have supposed it possible to draw normative conclusions from descriptive premises, and have argued that doing so is a routine part of moral reasoning. *E.g.*, Searle, *How to Derive an Ought from an Is*, 73 PHIL. REV. 43 (1964). For several perspectives on this issue, see THE IS-OUGHT QUESTION, *supra*.

[19] *See infra* notes 23-35 and accompanying text; *see also* Veatch, *Professional Ethics: New Principles for Physicians?*, 10 HASTINGS CENT. REP., June 1980, at 16, 18 (new AMA guidelines place medical ethics within general system of philosophical ethics); Yesley, *supra* note 2, at 1466 (National Commission resolved difficult moral problems by reference to principle of utilitarianism—that we seek the greatest good of the greatest number).

[20] Testimony concerning the obscenity of films or books sometimes combines normative and descriptive elements. A statement that something is obscene according to a community standard is descriptive; a pronouncement that something is simply "obscene" is normative. Hence, it is crucial to consider the witness's testimonial context and purpose in examining cases of this nature. *See* United States v. One Carton Positive Motion Picture Film, 367 F.2d 889, 894-95 (2d Cir. 1966) (one minister testified that film was "offensive throughout the entire Community"; another maintained that it did not "arous[e] lustful desire"). *See generally* McGaffly, *A Realistic Look at Expert Witnesses in Obscenity Cases*, 69 NW. U.L. REV. 218 (1974) (arguing that both practical experience and communications research support the conclusion that experts probably have little effect in value-oriented areas such as obscenity).

[21] *See* United States v. Kroncke, 459 F.2d 697, 703 n.9 (8th Cir. 1972) (citing views of Socrates, St. Thomas Aquinas, Sir Thomas More, Gandhi, Martin Luther King, Jr., Bayard Rustin, and the Lutheran and Episcopal Churches in support of the proposition that justification of civil disobedience depends upon actor's nonviolence

"no right answer" in light of disagreement among moral systems.[22]

A New York case, *Friedman v. New York*,[23] provides a graphic illustration of the moralist's descriptive function. In that case, a sixteen-year-old girl and her male companion became stranded in mid-air when the mountainside chair-lift in which they were descending closed for the evening without prior announcement.[24] The girl, reared in an ultra-orthodox Hebrew tradition and thus believing herself morally compelled not to spend the night alone with a man, became hysterical and fell to the ground, sustaining facial injuries.[25] In the girl's subsequent action against the state for negligent operation of the lift, a rabbi trained in Hebrew law testified that, under the circumstances, the girl's reaction had been consistent with her religious principles.[26] Based

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and acceptance of the consequences for such disobedience); Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1147 n.11 (1980) (descriptive ethics in debate over death penalty); Yesley, *supra* note 2, at 1460 (HEW Ethics Advisory Board (hereinafter Ethics Advisory Board) decided issues of fetal experimentation by obtaining papers "presenting the range of philosophical opinion . . . and a synthesizing analysis of those papers"); *see also* Yesley, *supra* note 1, at 5 (Information gathering helps sharpen issues, "but their resolution is still dependent upon the establishment of moral priorities." The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (hereinafter National Commission), for example, "gathered substantial evidence on the use of prisoners as research subjects . . . but the recommendations . . . were primarily a reflection of ethical positions regarding vulnerable populations." In another instance, the right-to-know issue was analyzed by comparing outcome under three contemporary schools of moral philosophy).

[22] Roe v. Wade, 410 U.S. 113, 131-40 (1973) (reviewing contemporary and historical attitudes toward abortion); *id.* at 160-61 (describing conflicting views of various ethical systems on question of when life begins); Yesley, *supra* note 1, at 7 (decisions must be based on practical considerations when abstract moral imperatives fail to dictate a response). *But see* Dworkin, *No Right Answer*, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58 (P.M.S. Hacker & J. Raz eds. 1977); Rachels, *Can Ethics Provide Answers?*, 10 HASTINGS CENT. REP., June 1980, at 32, 34-35 (both discussing and rejecting the view that morality is purely subjective or simply a system of disguised imperatives). *See generally* MacIntyre, *Why is the Search for the Foundations of Ethics so Frustrating?*, 9 HASTINGS CENT. REP., Aug. 1979, at 16, 18 (it is difficult to establish any moral point, but the opposite is not true: it is often possible to refute an opponent's moral argument by showing that it is either inconsistent with other moral positions the opponent holds or internally inconsistent).

[23] 54 Misc. 2d 448, 282 N.Y.S.2d 858 (N.Y. Ct. Cl. 1967).

[24] *Id.* at 451-52, 282 N.Y.S.2d at 860-61.

[25] *Id* at 453, 282 N.Y.S.2d at 862-63.

[26] *Id.* at 452-53, 282 N.Y.S.2d at 862. The rabbi testified that the Hebrew Law, or Shulchan Arukh, contained a specific law, the Jichud, which "absolutely forbids a woman to stay with a man in a place which is not available to a third person" at the risk of overwhelming sin and reputational ruin. *Id.* at 452, 282 N.Y.S.2d at 862.

on this testimony, the court rejected the state's defense of contributory negligence and awarded damages.[27]

Other courts have heard descriptive testimony from moralists in a variety of settings. Members of the clergy have testified that a dying patient's refusal of medical treatment was not in accordance with Scripture,[28] that Black Muslim prisoners may not eat pork,[29] that certain religious observances would be offensive to Jews,[30] and that a parent's decision to remove life support systems from his comatose daughter conformed to Roman Catholic belief.[31] Descriptive ethicists also have helped courts assess the sincerity of individuals seeking to avoid military service.[32] Indeed, the variety of descriptive contexts is practically limitless; in *Peninsula Covenant Church v. San Mateo*,[33] a professor of social ethics testified that the use of swimming pools and tennis courts by a church group was necessary for its "formal worship . . . and study,[34] and contributed to its "evangelical activity."[35] In such cases, the expert purports to offer objective, factual analysis, and refrains from making any sort of normative value judgment.

B. *Metaethics*

Ethical reasoning is often vexingly complicated and opaque, and the meaning of ethical discourse often obscure. As a result, trial courts seeking

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[27] *Id.* at 456, 459, 282 N.Y.S.2d at 865, 868.

[28] Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1007 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

[29] Barnett v. Rogers, 410 F.2d 995, 998 (D.C. Cir. 1969).

[30] School Dist. v. Schempp, 374 U.S. 203, 209-10 (1963) (school prayer). For a more complete version of the descriptive testimony in *Schempp*, see the lower court opinion, 177 F. Supp. 398, 401 n.13, 402 n.15 (E.D. Pa. 1959); *see also* Allen v. Morton, 495 F.2d 65, 78 (D.C. Cir. 1973) (Leventhal, J., concurring) (Roman Catholic priest, Methodist minister, and professor of Christian ethics testified that nativity scene in government sponsored Christmas pageant had "deeply religious significance" to Christians); Lanner v. Wimmer, 463 F. Supp. 867, 879-80 (D. Utah 1978) (content of study aids used in public school's off-campus seminars stressed Mormon tenets and thus violated the first amendment).

[31] *In re* Quinlan, 70 N.J. 10, 30-31, 355 A.2d 647, 658, *cert. denied*, 429 U.S. 922 (1976).

[32] *See* Eagles v. Samuels, 329 U.S. 304, 310 (1956) (religious panel advised draft board that a seminary student seeking a draft deferment was not preparing "in good faith" for a career as a rabbi); Ramadass Naturalization Petition, 445 Pa. 86, 92-93, 284 A.2d 133, 136-37 (1971) (professor of religion with expertise in the area of Hindu theology testified concerning the "depth and extent" of conscientious objector's religious beliefs).

[33] 94 Cal. App. 3d 382, 156 Cal. Rptr. 431 (1979).

[34] *Id.* at 390, 156 Cal. Rptr. at 435.

[35] *Id.* at 391, 156 Cal. Rptr. at 435. For yet another descriptive context, see L.A. Times, April 15, 1981, pt. 1, at 2, col. 4 (describing a case in which a professor testified on Sicilian beliefs in damages action brought by a bride dishonored by her husband's public declaration that she was not a virgin on their wedding night).

resolution of questions that are ethical in nature might call upon experts to provide metaethical analysis.[36] Experts testifying in this mode explicate relationships among ethical concepts and principles without attempting to prescribe particular rules of conduct.[37] A metaethicist might, for example, testify that certain evidence would or would not support a descriptive claim, or that specified conduct would conform to, or violate, a normative rule. In cases in which the distinction between descriptive and normative questions is elusive or ill-defined, a metaethicist might help the court sort out the various concepts.[38] Through this testimony, the ethical expert would assist the court in asking the right questions by sharpening its perception of the issues.[39]

Metaethical analysis can be particularly useful in certain types of case. Courts confronting ethical dilemmas associated with novel biomedical technologies, for example, might call upon a moralist to distinguish moral issues from medical ones.[40] The moralist could similarly help identify a particular belief as moral rather than religious or philosophical, or a particu-

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[36] *See generally* P. NOWELL-SMITH, *supra* note 16 (describing metaethics); P. TAYLOR, NORMATIVE DISCOURSE 298-99 (1961) (same); Nielson, *supra* note 16, at 117-21 (same). As recently as 20 years ago, English-speaking philosophers regarded metaethics as the only proper concern for academic moralists. "Today this attitude has been almost completely abandoned; the best writing . . . combines ethical theory with concern for concrete ethical issues." Rachels, *supra* note 22, at 32.

[37] Some moralists have combined metaethics with normative and descriptive analysis. For example, Plato's ethical writings offer an account of what it means to say that this or that thing is good (metaethics), a great deal of positive moralizing (normative ethics), and a certain amount of description, sometimes implicit, of Athenian views of morality. *See generally* PLATO, THE REPUBLIC (G. Grube trans. 1974).

[38] *See* Radin, *supra* note 21, at 1157-59 (sorting out normative and descriptive claims in context of debate over the death penalty).

[39] *See* J. ELY, *supra* note 1, at 54, 56, 58-59 (moral philosophers can aid courts in the choice of fundamental values); Yesley, *supra* note 2, at 1457-58, 1462 (National Commission created by Congress because philosophers and ethicists can bring special expertise to the examination of complex issues presented by newly developed technologies); *see also* A. BICKEL, THE SUPREME COURT, *supra* note 1, at 87 (moral philosophy's method of reasoning can aid the Supreme Court in making principled judgments); J. RAWLS, *supra* note 1, at 46-47 (emphasizing the role of "considered" moral judgments); Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 712 (1963) (amicus briefs used to "sensitize" court to moral issues); *cf.* Finkelstein & Fairlie, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970) (courts should use Bayesian analysis to appraise the significance of identification evidence); Tribe, *Trial by Mathematics*, 84 HARV. L. REV. 1329 (1971) (discussing testimony based on mathematical reasoning).

[40] *See* Stein, *The Bioethicists: Facing Matters of Life and Death*, 9 SMITHSONIAN, Jan. 1979, at 107, 115 (analyzing right-to-die issues addressed by the New Jersey Supreme Court in *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976), from a metaethical viewpoint).

lar question as moral rather than pedagogical or scientific.[41] In cases in which the correctness of an individual's planned course of action is debatable, a metaethicist might testify that the action is arguably or sufficiently "moral" to warrant respect for the individual's authority to decide.[42] Finally, a metaethicist might offer insight on the morality or immorality of certain acts in light of a given set of objectives.[43] By performing these functions, the moralist facilitates the court's preliminary analysis of the relevant issues without engaging in positive moralizing.

C. *Normative Ethics*

Normative ethics concern moral rules, either in general or particular terms, that govern the conduct of individuals and societies.[44] A code of normative rules may be prescriptive, proscriptive, or a combination of both. A particular normative system may be very detailed, very general, or

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[41] The current debate about what should be taught in the public schools contains arguments over whether a given position is a moral position or a scientific one. Is a school district that resolves the controversy over Creationism versus Darwinism making a scientific, or a religious and moral judgment? *See* Epperson v. Arkansas, 393 U.S. 97 (1968) (statute prohibiting the teaching of evolution theories violates the first amendment); McLean v. Arkansas Bd. of Educ., 50 U.S.L.W. 2412 (E.D. Ark. Jan. 5, 1982) (statute requiring "creation-science" to be taught in public schools invalid under the first amendment); *see also* Font v. Laird, 318 F. Supp. 891, 893 (D. Md. 1970) (ministers and professor of theology characterize army lieutenant's objection to Vietnam war as religious in nature; however, selective opposition to a particular war held insufficient grounds for discharge).

[42] *See* Karp v. Cooley, 493 F.2d 408, 415 (5th Cir. 1974) (rabbi evaluated the genuineness of an individual's consent to risky and morally problematic open-heart surgery); *cf.* Serbian Eastern Orthodox Diocese v. Milivojevich, 60 Ill. 2d 577, 592-98, 328 N.E.2d 268, 276-80 (1975) (diverse testimony concerning the validity of a bishop's defrockment under relevant church law; testimony contains elements of descriptive and metaethical analysis). *See generally* Delgado, *Religious Totalism as Slavery*, 9 N.Y.U. REV. L. SOC. CHANGE 51 (1980).

[43] *See In re* Adoption of "E," 59 N.J. 35, 49-50, 279 A.2d 785, 792 (1971) (court may take religion into account in adoption proceedings as indication of would-be parents' moral fitness; amici church groups had argued that religious membership be *required* as a matter of law); *cf.* Yesley, *supra* note 2, at 1455-64 (National Commission, charged by Congress with practical objectives, approached issues from utilitarian ethical perspective and applied scientific data to determine "impacts"). *Compare* Yesley, *supra* note 1, at 5 (National Commission recommended against ban on psychosurgery in prison research, largely on the basis of "empirical research . . . that found some . . . benefit . . . and little indication of untoward side effects"), *with* Cooper v. Nix, 343 F. Supp. 1101, 1108 (W.D. La. 1972) (Methodist lay minister testified concerning the educational and moral impact of a university requirement that students live in on-campus housing), *aff'd in part, rev'd in part*, 496 F.2d 1285 (5th Cir. 1974).

[44] Nielson, *supra* note 16, at 117-21; *see also* M. SCHLICK, PROBLEMS OF ETHICS 1-30 (D. Rynin trans. 1939); P. TAYLOR, *supra* note 36, at 60-65.

mixed—detailed in some areas and general in others.[45] Trial courts necessarily engage in normative analysis in cases of first impression,[46] and often reason normatively in cases governed by *stare decisis* when they overrule settled precedent in favor of more desirable rules of law.[47]

Trial courts seeking resolution of ethical dilemmas occasionally have called upon moral philosophers for normative advice. Testifying in the normative mode, the moralist declares acts or rules of law under consideration by the court right or wrong per se, or right or wrong according to the values that underlie our legal system.[48] Moralists perform a similar function when they offer advice on the moral standing of actors to make certain decisions. For example, a moralist might testify about the standing of parents to subject a child to a given degree of risk for the benefit of another, or society generally.[49] Or, a moralist might testify about the standing of a parent, child, doctor, friend, or other person to decide that the life of a terminally ill patient, unborn fetus, endangered pregnant woman, deformed newborn, or healthy newborn in an overpopulated society is not worth preserving, either in absolute terms or on balance against benefits associated with termination.[50] These functions merge when the moralist advises the

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[45] For an example of a system illustrating all of these possibilities, see the ethical code laid out in the Ten Commandments, *Exodus* 20:3-17.

[46] *See supra* note 10 and accompanying text (describing issues associated with biomedical technologies).

[47] *See* sources cited *supra*, note 2; *see also* M. SHAPIRO & R. SPECE, BIOETHICS AND LAW 72 (1981) (identifying points at which normative analysis enters into judicial reasoning).

[48] *See, e.g.*, Hart v. Brown, 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972) (proposed organ transplant from incompetent donor); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (discontinuation of life support), *cert. denied*, 429 U.S. 922 (1976). In a criminal context, an expert might testify that an agreement to perform certain acts constituted a conspiracy because the proposed conduct would have been immoral had it been carried out. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 470-73 (1972) (agreement to commit immoral acts punishable, in some jurisdictions, as a conspiracy); *see also* R. DWORKIN, *supra* note 1, at 208 ("The Constitution makes our conventional political morality relevant to the question of validity [of laws]; any statute that appears to compromise that morality raises constitutional questions."); *cf.* Yesley, *supra* note 1, at 6 (ethicist testified that course of action before the National Commission would contravene the "values of the First Amendment").

[49] *See, e.g.*, Hart v. Brown, 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972) (standing of parents to authorize kidney transplant between identical twins); Yesley, *supra* note 1, at 5 (moralists debated issue of moral standing in connection with fetal research).

[50] *See, e.g.*, *In re* Quinlan, 70 N.J. 10, 355 A.2d 547, *cert. denied*, 429 U.S. 922 (1976) (upholding standing of parent, doctor, and hospital ethics committee to authorize removal of life support system from comatose patient); Dockery v. Dockery, 559 S.W.2d 952 (Tenn. 1977) (lower court ruled that physician had no authority to use extraordinary means to sustain life of comatose patient without family consent;

court about the morality or immorality of a course of action planned by a party with standing to decide.[51]

Hart v. Brown[52] illustrates the close relationship among the various types of moral testimony. In *Hart*, the parents of seven-year-old twin girls sought a court order authorizing an isograft kidney transplant between the children after physicians had refused to perform the operation.[53] No case law in the jurisdiction approved nontherapeutic medical treatment for patients incapable of consent.[54] The parents were prepared to give proxy consent for the

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patient's death rendered case moot on appeal). *Compare In re* McNutly, 4 FAM. L. REP. (BNA) 2255, 2256 (Essex County, Mass. Prob. Ct. Feb. 15, 1978) (surgery for deaf, blind, and retarded rubella baby ordered despite refusal of consent by parents), *with* Press, *Who Speaks for the Child?*, 94 NEWSWEEK, Sept. 3, 1979, at 49 (doctor testified that life of child suffering from Down's syndrome was "devoid of those qualities which give it human dignity"). *See generally* Veatch, *supra* note 15 (discussing use of court-ordered hospital "ethics" committees to make difficult decisions regarding dying patients); Yesley, *supra* note 2, at 1459-61 (National Commission analyzed rights of fetuses vis-à-vis parents, experimenters, and society); Sullivan, *supra* note 14 (use of philosophers as ethical advisors in New York hospitals); Interview with Judy Ross, Associate, Program in Medicine, Law & Human Values, University of California at Los Angeles, in Westwood, CA (May 29, 1980) (ethicists in UCLA Program in Medicine, Law & Human Values testified in trial of physician charged with homicide of unborn fetus, and as advisors to court in case of aged patient who refused lifesaving medical treatment).

[51] In general, testimony concerning the morality of a decision by a party with standing is identical to testimony concerning the morality of an action under consideration by the court itself. *See supra* note 48 and accompanying text. The functions may differ, however, when the witness testifies that the individual should be permitted to make the decision, even though the contemplated action may appear wrong to the witness or others. For example, some who condemn abortion as immoral also believe they may be wrong in their judgment, and that the mother, or mother and doctor, have better moral standing to decide particular cases. Slavery, by contrast, is so wrong that society does not tolerate it, even though the volunteer slave—the individual with the (presumably) best moral standing—is willing to become a slave. *See generally* Delgado, *supra* note 42, at 54, 60-63. In cases of this nature, the moral expert may help the court decide when to respect, and when to override, the wishes of those immediately concerned.

[52] 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972).

[53] *Id.* at 369, 289 A.2d at 387. An isograft is a transfer of tissue between one-egg twins who carry the same genetic material. A homograft, by contrast, involves a transfer of tissue between a donor and a donee who carry different genetic material, creating the danger of rejection by the donee. *Id.* at 370, 289 A.2d at 388.

[54] *Id.* at 370, 289 A.2d at 387-88. The court did, however, rely upon cases from other jurisdictions for precedential support, including Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941) (consent of parent necessary for a skin graft from a 15-year-old boy to his severely burned cousin); Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969) (authorizing parental consent to kidney transplant from a mentally incompetent adult to the incompetent's brother), and three unreported Massachusetts cases, Foster v. Harrison, No. 68674 (Mass. Nov. 20, 1957); Hushey v. Harrison, No. 68651 (Mass.

operation, but the court questioned the morality of their decision.[55] Forced to decide whether the parents had standing to make such a choice, the court sought to balance "the rights of the natural parents and rights of minor children—more directly, the rights of the donor child," and invoked the aid of various experts.[56]

One of the experts the court heard was a clergyman, who testified that the Harts' authorization was "morally and ethically sound."[57] In the court's view, the clergyman's testimony helped ensure a "close, independent and objective investigation" of the parents' motives and reasoning.[58] Indeed, review by a "community representation" that included the clergyman seemed to place the court's opinions in stark relief: an isograft would almost certainly enable both donor and donee to lead normal and happy lives, while nonauthorization would force the donee to endure continued dialysis treatment or the "cruel and inhuman" consequences of a homograft transfer from one of the parents.[59] Convinced that the parents' choice was morally justified under the unusual facts and circumstances of the case, the court upheld their standing to give proxy consent.[60]

Aug. 30, 1957); Masden v. Harrison, No. 68651 (Mass. June 12, 1957) (equity court may permit parents to consent to kidney transplant between minor twins). *But see* In re Guardianship of Pescinski, 67 Wis. 2d 4, 8-9, 226 N.W.2d 180, 182 (1978) (refusing to authorize guardian's consent to a lifesaving kidney transplant from a 39-year-old mental incompetent to his 38-year-old sister on the ground that "no advantage should be taken of [the incompetent]" when he was incapable of consenting himself and "no benefit to him [had] been established").

[55] 29 Conn. Supp. at 369, 289 A.2d at 386-87.

[56] *Id.* at 375-76, 289 A.2d at 390.

[57] *Id.* at 371, 289 A.2d at 389. The court also heard testimony from medical experts who testified concerning the relative risklessness of an isograft as compared with alternative treatments, and from a psychiatrist who testified that the donor strongly identified with her twin and would derive long-term benefit from undergoing the procedure. *Id.*, 289 A.2d at 389.

[58] *Id.* at 372, 289 A.2d at 390.

[59] *Id.* at 373, 289 A.2d at 391.

The court noted that patients undergoing homografts must take suppressive drugs to combat rejection, and that such drugs often cause bone marrow toxicity, liver damage, Cushing syndrome, and other severely debilitating effects. *Id.* at 371, 289 A.2d at 389.

[60] *Id.* at 373, 289 A.2d at 391; *cf.* In re Quinlan, 70 N.J. 10, 30, 355 A.2d 647, 658 ("[I]t is not usual for matters of religious dogma to enter a civil litigation . . . [nonetheless, the views of Roman Catholic Church on termination of life support devices] were rightly admitted in evidence . . . [insofar as they bore upon] the character and motivations in all respects of Joseph Quinlan as prospective guardian."), *cert. denied*, 429 U.S. 922 (1976). *But see* In re Guardianship of Pescinski, 67 Wis. 2d 4, 12, 226 N.W.2d 180, 184 (1975) (rejecting the doctrine of substituted judgment; dissent maintained that authorizing kidney transplant from an incompetent donor would "endow[ ] him with the finest qualities of his humanity, [and] assume[ ]

Moralists also have performed an essentially normative function by acting as character witnesses, or "vouchers" for individuals charged with certain crimes and offenses. For example, members of the clergy and professors of ethics have testified that persons as diverse as a prospective attorney seeking admission to the bar and a heroin distributor possessed "good" moral character.[61] In this context, the expert in effect asserts: "I am a moralist; I am testifying for X; hence X must be a good person since I would not otherwise have testified in his behalf."[62] Of course, character assessment generally does not require commentary on what might be termed the central issue of the case, and thus differs from the type of testimony offered in *Hart*.[63] It nonetheless fits within the normative mode because it presents a broad declaration of morality or immorality by a witness with a supposed mastery of such concepts.

III. The Law of Expert Testimony

Whether courts should permit moralists to testify in any of these modes is initially a question of evidence law.[64] Evidentiary rules in almost every

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the goodness of his nature instead of assuming the opposite").

[61] In re United States v. Wright, 542 F.2d 975, 979 (7th Cir. 1976) (heroin distributor), *cert. denied*, 429 U.S. 1073 (1977); In re Anastaplo, 18 Ill. 2d 182, 207-09, 163 N.E.2d 429, 442-43 (1960) (Bristow, J., dissenting) (attorney), *aff'd*, 366 U.S. 82 (1961); *see also* Estate of Toomes, 54 Cal. 509, 511-17 (1880) (reversible error to exclude testimony of Catholic priest on issue of testatrix's mental competence to make a will); State v. Wangberg, 272 Minn. 204, 206-07, 136 N.W.2d 853, 854-55 (1965) (rejecting prosecutor's argument that court should hold clergyman's son to a higher standard of conduct due to familiarity with Scripture, and should reject insanity defense as not in accord with Divine Law); Burt v. State, 38 Tex. Crim. 397, 439, 40 S.W. 1000, 1003 (1897) (court accepted clergyman's testimony that defendant was insane, but refused to qualify him as an expert because having "read some authors on moral and intellectual science, but nothing on insanity or medical jurisprudence" did not constitute sufficient qualification).

[62] Interview with Richard Wasserstrom, *supra* note 14 (proposing "voucher" role).

[63] Courts often reject offers of proof relating to character on grounds of irrelevance. *See* United States v. Moore, 486 F.2d 1139, 1145-48 (D.C. Cir. 1973) (rejecting argument that heroin addict's absence of free will constituted a defense to a criminal charge for possession); *cf.* United States v. Kroncke, 459 F.2d 697, 701 (8th Cir. 1972) (testimony concerning morality of defendants' acts held not admissible as a defense to a charge of disrupting Selective Service operations); United States v. Berrigan, 283 F. Supp. 336, 338 (D. Md. 1968) (similar holding).

[64] Expert testimony is a form of exception to the evidentiary rules requiring personal knowledge, *see* FED. R. EVID. 602, barring hearsay, *see* FED. R. EVID. 802, and forbidding certain forms of opinion testimony, *see* FED. R. EVID. 701. Courts would likely evaluate testimony from expert moralists under the rules relating to expert testimony, although other rules and doctrines could pose problems in particular cases. *See infra* notes 227-39 and accompanying text (first amendment limitations).

jurisdiction permit admission of expert testimony when it is relevant to the particular case[65] and necessary or helpful to the trier of fact's understanding of the issues.[66] Beyond this, the law requires only that the particular expert called to testify possess sufficient skill or knowledge to provide an illuminating opinion, inference, or observation.[67] In cases involving expert moralists, courts have applied this standard without considering the potential differences between morality and more traditional subjects of expert testimony, particularly those bearing on ascertainment of expertise.[68] Examination of these issues requires a brief overview of the law of expert testimony, and then a discussion of the applications of this law to the descriptive, metaethical, and normative modes of ethical analysis.

A. *Subjects of Expert Testimony*

Certain matters are provable *only* by means of expert testimony. These subjects are generally unfamiliar to ordinary judges and jurors, and "so far partake[] of the nature of a science, art, or trade" as to require explication by persons with special skill, training, or experience.[69] The trial court has

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[65] *See* FED. R. EVID. 401; C. MCCORMICK, *supra* note 6, § 13, at 29-30. *See generally* 2 J. WIGMORE, *supra* note 6, §§ 555-563 (rule of experiential capacity requires qualification as expert for testimony on certain subjects); Ladd, *supra* note 6, at 416-17.

[66] *E.g.*, FED. R. EVID. 702.

[67] *See id.* 702; C. MCCORMICK, *supra* note 6, § 13, at 30; *cf.* FED. R. EVID. 602 (witness must demonstrate personal knowledge of a matter or qualify as an expert to give testimony).

[68] In few, if any, cases in which moral experts have testified have qualifications of the witness been disputed, perhaps because of deference to the cloth, the impressiveness of the witnesses' qualifications, the court's wish for help in an acute dilemma, or the lack of a timely objection. *See supra* Section II. Greater awareness of the differences in the types of function these experts perform may lead to an increased number of challenges.

[69] H. ROGERS, THE LAW OF EXPERT TESTIMONY § 29 (B. Werne ed. 1941); *see, e.g.*, United States v. Johnson, 575 F.2d 1347, 1361 (5th Cir. 1978) (admitting testimony by an experienced smoker and seller of marijuana on source of seized contraband, a subject not "likely to be within the knowledge of an average juror"); Kurkuruza v. General Elec. Co., 510 F.2d 1208, 1211-14 (1st Cir. 1975) (testimony by electrical engineer that "jolt" experienced by plaintiff was an electric shock); Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84, 88 (5th Cir. 1966) (expert testimony on market value of natural gas); Baenitz v. Ladd, 363 F.2d 969, 971 (D.C. Cir. 1966) (expert testimony on highly technical matters of chemistry); Central Trust Co. v. United States, 305 F.2d 393, 399 (Ct. Cl. 1962) (expert opinion on market value of stock in a closely held corporation); Taylor v. Town of Monroe, 43 Conn. 36 (1875) (professional road builders permitted to testify as to safety of a road; persons who travelled the road daily were not); cases cited at *supra* note 6; *see also* Gisriel v. Uniroyal, Inc., 517 F.2d 699, 701-02 (8th Cir. 1975); New Mexico Sav. & Loan Ass'n v. United States Fidelity & Guar. Co., 454 F.2d 328, 335 (10th Cir. 1972)

discretion to decide whether a given subject fits this description,[70] although precedent and statutes[71] may guide the determination. Due to advances in technology and learning, the class of subjects requiring expert analysis constantly changes.[72] Within the class, however, the testimonial requirements are constant: no witness may testify without first establishing qualifications as an expert in the particular field.[73]

The rules are slightly different for subjects falling within the scope of common understanding. Any person is presumably competent to testify on such matters under the rule of experiential capacity,[74] and earlier decisions usually excluded expert testimony on that basis.[75] Most modern courts, however, apply a "helpfulness" test, which gives courts discretion to admit expert testimony whenever it will aid the trier's understanding of the evidence or issues.[76] Under this standard, that the trier has a general understanding is not determinative so long as the expert's testimony can better equip the trier to decide.[77] Courts have applied the helpfulness test in

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(both emphasizing highly technical nature of issues requiring expert testimony); 2 J. WIGMORE, *supra* note 6, § 13, at 30; Ladd, *supra* note 6, at 417 (on certain matters, judges and juries are "helpless without [the] aid" of experts).

[70] United States v. Fosher, 590 F.2d 381, 382 (1st Cir. 1979); Maastchappij Voor Industriele Waarden v. A.O. Smith Co., 590 F.2d 415, 418 (2d Cir. 1978); United States v. Johnson, 575 F.2d 1347, 1360-61 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979); C. MCCORMICK, *supra* note 6, § 13, at 30 & n.67.

[71] *See, e.g.*, N.C. GEN. STAT. § 14-190.1 (1981) (permitting expert testimony in obscenity cases).

[72] J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, CASES AND MATERIALS ON EVIDENCE 250-51 (5th ed. 1965).

[73] 2 J. WIGMORE, *supra* note 6, § 556, at 751.

[74] *Id.* ("sufficient experience [on these matters] is possessed by *every person of ordinary fortunes in life*") (emphasis in original).

[75] H. ROGERS, *supra* note 69, § 36; *see, e.g.*, Patterson v. Mayor of Baltimore, 130 Md. 645, 652-53, 101 A. 589, 591 (1917); Shaw v. Natural Handle Co., 188 N.C. 222, 233, 124 S.E. 325, 330 (1924); *see also* Steinberg v. Indemnity Ins. Co., 364 F.2d 266, 274 (5th Cir. 1966) ("If the question is one which the layman is competent to determine for himself, the [expert's] opinion is excluded; if he reasonably cannot form his own conclusion without the assistance of the expert, the testimony is admissible."). Courts generally presume that subjects of testimony fall within common knowledge and experience, and require a showing of expertise only if the circumstances of the case so demand. 2 J. WIGMORE, *supra* note 6, § 559.

[76] *E.g.*, Miller v. Pillsbury Co., 33 Ill. 2d 514, 516, 211 N.E.2d 733, 734 (1965); Currier v. Grossman's of New Hampshire, Inc., 107 N.H. 159, 161, 219 A.2d 273, 274-75 (1966); Swartley v. Seattle School Dist. No. 1, 70 Wash. 2d 17, 22, 421 P.2d 1009, 1013 (1966); FED. R. EVID. 702; *see* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[01] (1981); 7 J. WIGMORE, *supra* note 6, § 1923 (J. Chadbourn rev. ed. 1978); Ladd, *Expert and Other Opinion Testimony*, 40 MINN. L. REV. 437, 443 (1956); Ladd, *supra* note 6, at 418-19.

[77] *See* C. MCCORMICK, *supra* note 6, § 13, at 30 (helpfulness test emphasizes "true function of expert testimony"); *cf.* Salem v. United States Lines Co., 370 U.S. 31, 35

admitting both expert and nonexpert testimony on a variety of matters, including questions of valuation[78] and questions of general health, physical appearance, and sanity in the area of medical and psychological judgments.[79]

The modern tendency to admit expert testimony whenever it is helpful is subject to one important qualification, however. At any point in the development of human knowledge, certainty on some matters, such as the mechanism of cancer causation,[80] may be impossible. Even the best experts are not competent to form reliable opinions on these matters, and thus, testimony by either lay or expert witnesses is inadmissible.[81] Outside of this category, however, both the admissibility and credibility of expert testimony turns upon the qualifications of the witness.

B. *Establishment of Qualifications*

The requirements for qualification as an expert witness vary from case to case. On some matters, such as medical judgments, case or statutory law may require that the witness be a member of a profession.[82] Generally,

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(1962) ("[E]xpert testimony not only is unnecessary, but indeed may be properly excluded in the discretion of the trial judge 'if all the primary facts can be accurately and intelligently described to the jury . . . .' " (quoting United States Smelting Co. v. Parry, 166 F. 407, 415 (8th Cir. 1909)).

[78] *See, e.g.*, Maryland-National Capital Park and Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1038-39 (D.C. Cir. 1973) (nonexpert assessment of aesthetic impacts by defendant's building agent taken at face value); Corcoran v. Hartford Fire Ins. Co., 132 N.J. Super. 234, 244-45, 333 A.2d 293, 299 (Super. Ct. App. Div. 1975) (admitting expert testimony on value of ring); L. DUBOFF, THE DESKBOOK OF ART LAW 525-30, 606-15 (1977) (courts prefer testimony of experts on questions of value of art objects and antiques). *But cf.* King v. United States, 292 F. Supp. 767, 775-76 (D. Colo. 1968) (refusing to admit expert testimony to establish price a museum might pay for weapons used in the assassination of President Kennedy).

[79] *See, e.g.*, Moore v. Parks, 458 S.W.2d 344, 348 (Mo. 1979) (admitting testimony by qualified expert on extent of disability suffered); Stanley v. Ford Motor Co., 49 A.D. 2d 979, 980, 374 N.Y.S.2d 370, 372 (App. Div. 1975) (lay witnesses may testify "as to a person's strength, vigor, feebleness and illness and his comparative condition from day to day"); 2 J. WIGMORE, *supra* note 6, § 568.

Lay witnesses need not establish competence before testifying, *id.* § 556, at 751, but are subject to more stringent limitations on the scope and form of their testimony than are experts, *see infra* notes 87-90 and accompanying text.

[80] Tonkovich v. Department of Labor & Indus., 31 Wash. 2d 220, 226-27, 195 P.2d 638, 641-48 (1948) (rejecting expert's testimony as to the origin of claimant's cancer on the ground that cause of cancer is unknown to medical science).

[81] C. MCCORMICK, *supra* note 6, § 13, at 31; 3 J. WEINSTEIN & M. BERGER, *supra* note 76, ¶ 702[03]; Ladd, *supra* note 6, at 419.

[82] *See* LA. REV. STAT. ANN. § 37:1284 (West Supp. 1981) ("Unlicensed physicians [sic] shall not be . . . allowed to testify as a medical or surgical expert in any

however, courts do not prescribe any minimum standard of education, professional level, or experience, and ask only whether the expert can provide a helpful inference or opinion.[83] If the expert cannot, the testimony is superfluous and hence inadmissible.

The cases illustrate the flexibility of analysis in this area. Some witnesses with little or no formal training have qualified as experts on the basis of experience in an area.[84] Other witnesses lacking practical experience have qualified on the basis of systematic training or education.[85] Most experts seek to qualify by demonstrating both qualities; the determination of a particular witness' qualifications lies within the broad discretion of the trial court.[86]

C. *Form and Scope of Testimony*

Once qualified, an expert enjoys greater testimonial freedom than does an ordinary witness. A lay witness must provide a factual report based on personal observation, and may offer an opinion only to facilitate communication to the jury.[87] Qualified experts, by contrast, may convey factual observations, state opinions or inferences, and provide generalizations from which others can form opinions. Courts traditionally have required that testimony of this nature be based upon the expert's firsthand observation,

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court . . . ."); 7 J. WIGMORE, *supra* note 6, § 2090; *cf.* MISS. CODE ANN. § 41-21-7 (Supp. 1980) (examination by two reputable, licensed physicians or one physician and one psychologist required to commit any person for mental treatment).

[83] *See* C. MCCORMICK, *supra* note 6, § 13, at 30; Ladd, *supra* note 6, at 421-22.

[84] *See, e.g.*, Santana Marine Serv., Inc. v. McHale, 346 F.2d 147, 148 (5th Cir. 1965) (witness with six years of experience in designing, manufacturing and installing boat lift held qualified despite lack of professional education); Grohusky v. Atlas Assurance Co., 195 Kan. 626, 629-30, 408 P.2d 697, 700-01 (1965) (witness with 17 years of experience in insurance business held qualified as an expert despite a lack of formal training).

[85] *See* Yarborough v. City of Warren, 383 F. Supp. 676, 682-83 (E.D. Mich. 1974) (witness with a doctorate in sociology and several years teaching experience permitted to testify as expert as to impact of city referendum). *See generally* 3 J. WEINSTEIN & M. BERGER, *supra* note 76, ¶ 702[04] (discussing admissibility of expert testimony based on qualifications of the expert).

[86] *See* C. MCCORMICK, *supra* note 6, § 13, at 30; Ladd, *supra* note 6, at 421-22.

The testimony of an expert witness typically begins with a recital of his or her qualifications unless the opposing side has stipulated the witness' expertise. *See* Ladd, *supra* note 6, at 422. If the opposing side is not satisfied with the credentials of the expert, it may lodge an objection and demand additional evidence concerning the witness' qualifications. *See* 2 J. WIGMORE, *supra* note 6, § 562.

[87] *See* FED. R. EVID. 701 (limiting opinion evidence by lay witness to opinions "rationally based on the perception of the witness and . . . helpful to a clear understanding of his testimony . . . ."); UNIFORM R. EVID. 701 (1974) (similar rule). *See generally* C. MCCORMICK, *supra* note 6, §§ 11-12; 7 J. WIGMORE, *supra* note 76, §§ 1918, 1924.

facts in the record, or hypotheses presented at trial.[88] The Federal Rules of Evidence go further, however, and permit reliance on otherwise inadmissible data or authorities so long as they are "of a type reasonably relied upon by experts in the particular field."[89] Disclosure of underlying facts or data prior to testimony is generally not required under the Federal Rules, although opposing counsel may demand disclosure on cross-examination.[90]

Other liberalizations of modern evidence law broaden the scope of permissible expert testimony. For example, courts at one time permitted no opinion testimony on the "ultimate issue" in a case.[91] The Federal and Uniform Rules of Evidence,[92] as well as a majority of states,[93] reject this view and permit witnesses to offer opinions on issues as central as causation.[94] Modern evidentiary codes also contain provisions governing court appointment of impartial expert witnesses and providing for their compensation.[95] The drafters of these provisions recognized that court appointment in some circumstances might cloak an expert with an undeserved aura of infallibility, but nonetheless encourage the practice as a means of avoiding an unseemly "battle of the experts."[96]

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[88] *See* C. MCCORMICK, *supra* note 6, § 14; Ladd, *supra* note 6, at 426.

[89] FED. R. EVID. 703 advisory committee note; *see* 3 J. WEINSTEIN & M. BERGER, *supra* note 76, ¶ 703[02].

[90] FED. R. EVID. 705.

[91] C. MCCORMICK, *supra* note 6, § 12, at 27. The common law rule, justified on the ground that testimony on the "ultimate issue" would invade the province of the jury, *id.*, drew criticism from the commentators, *see* 7 J. WIGMORE, *supra* note 6, §§ 1920-1921; Ladd, *supra* note 6, at 423-25.

[92] FED. R. EVID. 704; UNIF. R. EVID. 704 (1974).

[93] C. MCCORMICK, *supra* note 6, § 12, at 27; *see, e.g.*, CAL. EVID. CODE § 805 (West 1966).

[94] *See, e.g.*, Clifford-Jacobs Forging Co. v. Industrial Comm., 19 Ill. 2d 236, 243, 166 N.E.2d 582, 586 (1960) (medical expert permitted to give opinion on cause of death); *But see* Schweiger v. Solbeck, 191 Or. 454, 472-73, 230 P.2d 195, 203 (1951) (testimony of expert on land movements in a particular geographic region relating to cause of a landslide held inadmissible as speculative under the circumstances). The Federal Rules jettisoned the "ultimate issue" prohibition because it was "unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information." FED. R. EVID. 704 advisory committee note.

[95] *See* FED. R. EVID. 706; UNIF. R. EVID. 706 (1974); CAL. EVID. CODE §§ 730-733 (West 1966); *see also* 3 J. WEINSTEIN & M. BERGER, *supra* note 76, ¶ 706[04] (canvassing state evidentiary rules governing appointment of neutral experts). These provisions codify the well-recognized inherent power of trial judges to call experts. *See* Scott v. Spanjer Bros., Inc., 298 F.2d 928, 930-31 (2d Cir. 1962); Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witnesses*, 29 S. CAL. L. REV. 195 (1956).

[96] *See* FED. R. EVID. 706; C. MCCORMICK, *supra* note 6, § 17; *cf.* People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (excluding expert scientific testimony on probability theory in criminal case on the ground that it would lead to paralysis of jury's function).

The law of expert testimony thus provides several general principles for assessing the appropriateness of testimony by moralists. Even when judges and jurors possess a general understanding of a particular moral question, expert testimony is potentially admissible under the helpfulness standard. Moreover, to the extent that a particular question lies beyond the understanding of untrained lay persons and does not rest upon ordinary observation,[97] any person who testifies should have to qualify as an expert. In either circumstance, the fact that the witness offers an opinion on an "ultimate moral issue" or relies on a body of ethical principles received out of court would not constitute a bar in most jurisdictions. Questions of moral philosophy involving mere speculation and conjecture, however, would not seem amenable to testimony of any sort, and to the extent that moral expertise is impossible, no witness could qualify as an expert.[98]

IV. MORAL EXPERTISE: PROMISE AND LIMITATIONS

The foregoing analysis suggests that the moralist's purely descriptive function fits most comfortably within our existing jurisprudence. For example, a person familiar with a moral or religious system can testify competently on the way acts would be viewed in that system.[99] Because lay persons are often more or less ignorant on such questions, the testimony of an expert sometimes will be necessary to ensure that the trier of fact is adequately informed.[100] Experts on these matters are usually identifiable—

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[97] Some moral philosophers believe that moral properties of things and acts may be ascertained by a process similar to perception. *See infra* notes 185-203 and accompanying text (ethical intuitionism). *Compare* Sibley, *Aesthetic and Nonaesthetic*, 74 PHIL. REV. 135, 138 (1965) (aesthetic properties of objects are "emergent" in that they come from nonaesthetic properties of the objects themselves), *with* Ginzburg v. United States, 383 U.S. 463, 499 (1966) (Stewart, J., dissenting) (hard-core pornography is a distinct and easily identifiable class of material which has been characterized uniformly as obscene; "It is that, and that alone, which . . . government may constitutionally suppress . . . .") *and* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (admitting uncertainty concerning definition of obscenity but positing that "I know it when I see it . . . ."). *But see* R. HARE, *supra* note 18, at 79-93 (1952) (criticizing "ethical naturalist" view that ethical attributes reside in things or acts in the natural world).

[98] A skeptical view of morality has had its adherents through the ages. *See infra* note 147 (Nietzschean disdain of all conventional morality); note 148 and accompanying text (Socratic skepticism). For a discussion of its impact in the area of normative expert testimony, see *infra* notes 110-122 and accompanying text.

[99] *See supra* notes 23-35 and accompanying text (discussing *Friedman v. New York*).

[100] In the area of foreign law, by analogy, some English courts have required witnesses to be in "an occupation, making necessary familiarity with law," although many take a case-by-case approach to experiential competence. 2 J. WIGMORE, *supra* note 6, § 564, at 777. To the extent that courts view morality as an integrated system of rules and laws, they might also seek expert testimony on ethical matters.

persons trained in a body of religious law, for instance. Moreover, when the subject of the testimony is well-defined and clearly descriptive, the kind of showing necessary to establish the expert's qualifications generally will be obvious.[101]

Friedman v. New York illustrates the appropriateness of descriptive ethical testimony under evidence law.[102] The question of morals before the court—whether the plaintiff's behavior conformed with her "ultraorthodox" religious principles—was clearly relevant to the case and not a subject of common understanding. If the rabbi's qualifications to testify as an expert had been called into question, they could have been established by evidence that his training and years of experience made him knowledgeable about the moral beliefs of persons raised in that tradition. The actual correctness of the Jichud's normative prohibition, or of the rabbi's own moral views, would have been irrelevant. Thus limited, the moralist's testimony was helpful, subject to verification on cross-examination,[103] and properly admitted. Testimony of this kind seems to be no different in principle from expert testimony on such subjects as ballistics or mental fatigue.[104]

Similar reasoning supports admitting testimony on the conformity or nonconformity of an act to a community's moral standard from a witness with a polltaker's or sociologist's expertise.[105] Although we all presumably have some familiarity with the moral standards of the communities in which we reside, a properly trained person who has applied scientific or statistical methods to that question can help the court by providing objective analysis. Because such testimony rests on identifiable factual data, it is more easily subjected to critical evaluation through cross-examination than lay testimony based on personal observation alone, and for that reason is likely to be more reliable.

Expert metaethical analysis, too, although less common in the trial context, should usually be admissible under the law of expert testimony. It is difficult for lay witnesses and even courts to be sure of the nature of the interests at stake when confronted by complex moral dilemmas. A person trained in moral or practical reasoning could help reduce such uncertainty by unravelling complex moral argumentation, explaining moral concepts or terms, and identifying fallacies. Untrained jurors are ordinarily unfamiliar with this type of analysis, but it is potentially useful for a thoughtful resolution of issues in difficult cases of first impression.

The situation presented in *Hart v. Brown* illustrates how a witness might convey metaethical expertise in a courtroom setting. In that case the court had to decide whether to authorize nontherapeutic treatment for an incom-

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[101] The expert witness need not be a social scientist; a nonscientist with longstanding acquaintance with the group might well qualify. *See supra* note 84.

[102] *See supra* notes 23-27 and accompanying text.

[103] *See Friedman*, 54 Misc. 2d at 452, 282 N.Y.S.2d at 862.

[104] *See supra* note 6.

[105] *See supra* notes 19-20 and accompanying text.

petent, and might well have appointed a metaethicist to analyze the moral principles and interests implicated by the proposed transplant. A sound decision seemingly required separation of non-normative questions (What is the purpose of the operation? Will it succeed? What will the donor's attitude towards the decision be upon reaching maturity?) from normative ones (Does morality permit—or require—a person to sacrifice a measure of his or her own physical well-being to improve that of another? Does morality permit—or require—a person to extract such a sacrifice from a second person to benefit a third person?). An expert trained and experienced in the analysis of complex moral problems can perform this preliminary analysis without presuming to suggest answers to any of the normative questions that the analysis discovers. The trier thereafter retains complete autonomy to resolve the normative questions as it wishes.

Thus, existing principles of evidence law seem to provide for the admission of either descriptive or metaethical testimony. Indeed, descriptive ethicists have long played an important role in the trial process,[106] and metaethicists may come to the fore as moral issues facing trial courts grow increasingly complex. Courts should encourage the use of these moralists in appropriate situations.

The legitimacy of using moralists to provide normative testimony is far less certain. One could argue that no one possesses special "knowledge" of normative ethics;[107] that if anyone does, such a person would not possess it to a degree warranting the designation "expert"; or that if anyone is a moral expert of this type, we are all moral experts and hence not in need of special testimony. Under this view "moralists" could not possibly help courts since they would be no more fit to resolve ethical issues than anyone else. Further, even if normative expertise exists, courts might have difficulty identifying who has it. Unlike expertise in mathematics, engineering, or other technical fields, normative moral expertise might not correlate with any particular training or formal qualifications. If moral expertise requires instead a virtuous character or wise moral judgment, it may be difficult to qualify anyone as an expert. Also, if moral expertise exists and those who possess it are identifiable, it must be transmissible through a process approximating courtroom testimony.[108] Finally, resort to normative ethical testimony may

[106] *See* Phillips v. Gregg, 10 Watts 158, 159-62 (Pa. 1840) (witnesses familiar with marriage customs of Protestant settlers permitted to testify on marriage arrangements in what is now Mississippi); The Sussex Peerage, 8 Eng. Rep. 1034, 1046-47 (H.L. 1844) (Roman Marriage law provable by testimony of Catholic bishop).

[107] *Compare* R. DWORKIN, *supra* note 1, at 138-40 (skeptical view of morality, citing statement of Learned Hand that moral rights are merely expressions of judges' personal preferences), *with* Rachels, *supra* note 22 (discussing and rejecting the view that morals are purely subjective, or merely disguised imperatives).

[108] In some cases, the requirement that experts base opinions or inferences on sources "reasonably relied upon by experts in a particular field" might present problems. FED. R. EVID. 703. Experts testifying on matters of physical science base conclusions on experimental evidence, and the authority of a work or methodology

present subtle dangers at an institutional level not posed, or at least not so acutely, by descriptive or metaethical expert testimony—problems not adequately met by the mundane requirements of the law of expert testimony.[109]

These problems potentially undermine the admissibility of normative ethical testimony. Yet the novelty and problematic nature of normative testimony should not cause its rejection out-of-hand; courts in cases like *Hart* have apparently found resort to normative experts useful, albeit without careful analysis. Assessment of the moralist's normative role thus requires further inquiry. The remainder of this Article addresses the various objections, and considers when and from whom courts might hear testimony on matters of normative ethics.

V. NORMATIVE EXPERTS IN THE COURTROOM

A. *Potential Barriers to Normative Expert Testimony*

1. The Relativist Objection

One objection that is likely to be raised against normative testimony is that all morals are "relative." Moral relativism can take a number of different forms, but whatever form it takes, it tends to call all normative testimony into question.[110] In its extreme form, relativism maintains that one ethical view is no better than any other, and that moral statements are nothing more than expressions of personal preference.[111] On this view, there is no room for moral experts because there is nothing to be an expert about. The search for objectively "moral" results is therefore futile, and morality is irrelevant to the judicial process.

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remains intact only so long as its conclusions and predictions accord with the evidence. *See* Baumholser v. Amax Coal Co., 630 F.2d 550, 552-53 (7th Cir. 1980). For many, however, moral views are not derived from, or confirmed by, any kind of public data. *See generally* J. ELY, *supra* note 1, at 58 (lack of a single, agreed-upon method of moral philosophy is demonstrated by conflicting conclusions of J. RAWLS, *supra* note 1, and R. NOZICK, ANARCHY STATE AND UTOPIA (1974)). Thus, courts might have reservations about the reliability of outside sources relied upon by a moralist. For a further discussion of these issues, see *infra* notes 110-44 and accompanying text.

[109] *See infra* notes 123-36 and accompanying text.

[110] For a concise discussion of various types of ethical relativism, see M. SHAPIRO & R. SPECE, *supra* note 47, at 73-77.

[111] *Id.* at 73-74. Shapiro and Spece classify relativist positions into three categories: those that urge that moral judgments are mere interjections of approval or disapproval; those that see moral statements as descriptions of the preferences of the person making the judgment; and those that see them as statements of cultural approval or disapproval. In each case, "[t]he relativist totally rejects the notion of objective moral standards." *Id.* at 74.

Our legal system has not embraced this radically skeptical position.[112] Indeed, the very existence of moral dilemmas such as the one posed in *Hart* implies a rejection of extreme relativism, for such dilemmas would not exist if all choices were equally right or wrong.[113] Our jurisprudence is instead committed to the idea that moral analysis is at least relevant to many types of legal decisionmaking. The entire course of the common law, as well as the practice of selecting judges for both wisdom and moral sensitivity, supports this view.[114] In addition, our constitutional jurisprudence seems committed

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[112] *See* authorities cited at *supra* notes 1-2; *infra* note 128 and accompanying text (legal system presupposes that moral mistakes are possible, citing cases on slavery, segregated schooling, and the death penalty).

As a result, we need not reach the difficult question whether this extreme form of moral skepticism is true. Our inquiry only concerns the forms of moral expert testimony appropriate under the general assumptions of our jurisprudential heritage. Radical moral skepticism, if taken seriously, would not be content with those assumptions, but would demand a complete reconstruction of the legal system. The task of charting and arguing for such a reconstruction must be left to the true skeptics.

[113] M. SHAPIRO & R. SPECE, *supra* note 47, at 74.

[114] Common law theories of fraud, duress, estoppel, mistake, criminalization, and moral consideration, *see* Manwill v. Oyler, 11 Utah 2d 433, 361 P.2d 177 (1961), for example, seem grounded, at least in part, in judicial notions of right and wrong, *e.g.*, LORD DEVLIN, *supra* note 1 (punishability of homosexuality); Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978) (common law is based on various "good" reasons which are derived from moral, economic, political and other social concerns). Similarly, the development of tort concepts of negligence cannot be satisfactorily explained solely by theories of economic efficiency. *See* J. HENDERSON & R. PEARSON, THE TORTS PROCESS 277 (1975) (in developing tort theories, judges should "be guided by 'the accepted standard of the community, the *mores* of the times' ") (emphasis in original) (quoting B. CARDOZO, *supra* note 2, at 108); *cf. Introduction* to THE CONFEDERATION AND THE CONSTITUTION at x (G. Wood ed. 1973) (purely economic analysis of Charles Beard's AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913), rejected as overly simplistic by modern historians). Yet even if common law rules totally lacked moral underpinnings, the entire body of equity principles would compel acceptance of the claim that ethics plays some role in our jurisprudence. *See* E. RE, *Preface* to CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES at xvii (5th ed. 1975) ("[E]quity is that part of our legal heritage that has given the law an ethical dimension. In extolling virtues of candor and good faith, it reaffirms the moral element of a just society."). Moreover, extreme relativism cannot account for legislative regulation under the police power that concerns not only safety and material welfare but also morals in the most general sense. For an example of such regulation, see MASS. GEN. LAWS ANN. ch. 272 (West 1970) (proscribing "Crimes against Chastity, Morality, Decency, and Good Order," including, *inter alia*, polygamy, incest, sodomy and buggery, buying or selling dead bodies, removal of flowers from graves, pigeon shooting, and mutilation of horses).

to seeking answers to complex moral problems, and is to that extent committed to the proposition that such answers exist.[115] A court confronting a difficult moral problem may therefore rely upon jurisprudential tradition in rejecting extreme relativism as a reason for excluding expert moral testimony.

The relativist objection, however, need not be raised in such absolute terms. Advocates of a more moderate position seem to concede the existence of moral dilemmas, but assert that their proper resolution is merely a function of the morality of a given culture.[116] According to these cultural relativists, moral beliefs vary from time to time and place to place. A moral dilemma confronting a court thus requires a relatively narrow inquiry: what do the values of *this* society dictate in this case?[117] A cultural relativist would assert that these veiled questions concerning the actual values of a society are better entrusted to polltakers or sociologists than to experts in normative ethics.

The existence of a variety of beliefs about a matter, however, does not establish that the search for "objective truth" is futile. Views about astronomy and physics vary from one society to another; yet we do not believe that all such views should receive equal weight. Similarly, the observation that moral views seem to differ from culture to culture and age to age does not entail the rejection of moral analysis, nor with it the possibility of ethical expertise. If one society sanctions removal of organs from live members for the benefit of others, while another society does not, it does not follow that organ-robbing is morally neutral. One view might be right and the other wrong, or both views might be wrong.[118] Standing alone, then, this cultural relativist thesis is a non sequitur.

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[115] *See supra* notes 1, 4; *infra* note 128.

[116] *See* H. SHAPIRO & R. SPECE, *supra* note 47, at 74 (describing and evaluating the "metaethical cultural relativis[t]" objection).

[117] Some of the values enshrined in the Constitution may vary in this way. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 361 (1972) (Marshall, J., concurring):

> [W]hether or not a punishment is cruel and unusual depends, not on whether its mere mention "shocks the conscience and sense of justice of the people," but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.

Under this standard, Justice Marshall found that the death penalty "violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history." *Id.* at 360.

[118] The conflict could also prove illusory. For example, members of one society may kill their parents when they attain a certain age, while members of another society venerate them and expend large amounts of resources keeping them alive and well. The apparent difference between the two value systems may be less than it appears, however, if the first society believes that persons survive for eternity in the condition in which they find themselves at the times of their deaths. Both societies would then subscribe to the moral principle that one ought to treat one's parents kindly, disagreeing only on the factual question about the nature of the afterlife. *See* H. SHAPIRO & R. SPECE, *supra* note 47, at 74 (Fiji Islanders example). *See generally* R. BRANDT, ETHICAL THEORY 271-84 (1959) (discussing ethical relativism).

Proponents of yet a third form of relativism do not deny that moral expertise might exist, but assert that courts have no sure way of knowing who possesses it.[119] These epistemic moral relativists contend that, in contrast to statements in sciences such as physics or mathematics, ethical judgments are inherently incapable of validation by agreed-upon procedures. The absence of such criteria leads them to the conclusion that no ethical proposition is more worthy of belief than any other.[120] Epistemic relativism is consistent with, and usually incorporates, the cultural relativist thesis just discussed. Together, the two doctrines present a serious challenge to the use of normative expert witnesses in trial settings. If there are no criteria by which to test ethical judgments, and none is more worthy of credence than any other, then the court apparently will be left without any way to ensure that proffered "expert" ethical testimony is bringing it any closer to objective moral truth—if indeed such truth exists at all.

Admittedly, normative statements differ from statements about the physical world in certain respects. Many, indeed, do not depend on external data in the way that some assertions of science do. Yet difficulty of verification does not mean that moral statements are inherently unsupportable, or that persons trained in ethical reasoning cannot help courts in given situations. Philosophical abstractions aside, judges and jurors will universally, or nearly universally, accept some fundamental norms. The prohibition against pointless, intentional killing of the innocent is an example. Normative experts whose testimony is at odds with these fundamental principles are unlikely to be of any use or interest to a trier of fact grappling with a genuine moral problem. However, normative experts who can demonstrate the validity of their assertions by reference to such "ethical data" might provide acceptable and enlightening opinions.[121] Courts or counsel can refer to these data on cross-examination in deciding how far to credit any particular moralist's views. Moreover, because such norms in fact underlie all judicial analysis, philosophical doubts about their status as "objective moral truths" can be overcome for practical purposes. A relativist is free to insist, for example, that the basic principles of equality or mercy lack objectively verifiable moral force; a trial court is not.[122] Thus, normative experts may avoid the

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[119] *See* M. SHAPIRO & R. SPECE, *supra* note 47, at 75. The authors trace the origin of this view to logical positivism and its insistence on a verifiability theory of meaning, in which a sentence has meaning only if it is verifiable, or a tautology.

[120] *Id.* at 76 ("But scientific laws and theories are in the same case: None . . . is entailed or required by observational evidence alone") (citing R. BRANDT, *supra* note 118, at 242-44).

[121] A court might require, for example, that ethical views accord with the "considered moral judgments" that persons in our society actually make. These judgments could serve as data against which moral views and generalizations are validated, just as the repeated observations of scientists validate scientific theories. H. SHAPIRO & R. SPECE, *supra* note 47, at 78. For further discussion of this possibility and its effect on the use of normative moralists, see *infra* notes 137-44 and accompanying text.

[122] *See supra* note 2 (moral analysis as an inevitable part of the trial court's function).

relativist's objections so long as their underlying moral assumptions are consistent with ethical norms incorporated in our existing jurisprudence.

2. Subversion of Judicial Roles

Apart from relativist objections, an opponent of normative testimony might raise a second set of related arguments. These concern the danger that testimony by normative experts might invade the province of the judge or jury, or, more generally, might discourage active public scrutiny of the judicial process. There are several possible responses to such objections.

(a) *Invading the Province of the Judge or Jury.* The "ultimate issue" rule formerly excluded testimony by any witness on the ultimate issues in a case.[123] The theory underlying this rule—that "ultimate issue" testimony was liable to usurp the province of the judge or jury—"is aptly characterized as 'empty rhetoric' " according to the notes of the Advisory Committee on the Federal Rules of Evidence.[124] Yet the rhetoric might be a little less empty in the case of a normative "expert" admonishing the judge or jury to reach the "right" result on a moral question central to the decision of a case.

Our system has charged judges with the task of developing law that is both doctrinally consistent and just, and jurors with representing the moral consensus of the larger community. From jury verdicts in criminal cases, to jury verdicts calling for sophisticated application of law to fact, and to judges applying the "conscience of the chancellor" in equity jurisdiction, we have developed a highly complex legal system designed in large part to work out what is right and wrong. Yet some judges or jurors might wish to avoid their heavy responsibility for making difficult moral choices. They can do so if they can simply adopt the view of a persuasive and qualified normative expert, effectively trading a difficult moral choice for the simple choice of whether or not to follow the advice of the particular expert.[125] Expert witnesses are neither drawn from the community the way jurors are nor selected through a political process the way judges are, and to the extent

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[123] *See supra* note 91 and accompanying text.

[124] FED. R. EVID. 704 advisory committee notes (quoting 7 J. WIGMORE, *supra* note 6, § 1920, at 17).

[125] Moreover, should the decision turn out to be unpopular, a court could shift the blame to the expert, who would then play the role of the scapegoat. *Compare* Krislov, *supra* note 39, at 711-12 (amici curiae as target for disapprobation of novel or eccentric views), *with* T. WOLFE, RADICAL CHIC AND MAU MAUING THE FLAK CATCHERS (1970) (satirical observation that some social institutions employ "flak catchers" to absorb and defuse criticism by angry militants). *See generally* N. MACHIAVELLI, *The Prince* in THE PRINCE & OTHER WORKS 93 (A. Gilbert trans. 1941) (ideal ruler, or "prince," would manipulate functionaries to deflect criticism toward others and thereby solidify own position); Yesley, *supra* note 2 (use of Ethics Advisory Commission to still controversy and achieve consensus in sharply divided areas).

they unduly influence judicial decisions, those decisions could cease to reflect the considered judgment of society. Were it to occur, the resulting abdication would be a disturbing and unacceptable form of institutional failure.[126]

It is very difficult to assess this objection in the abstract, since the likelihood of a normative expert's excessively swaying a judge or juror will vary with the particular facts of the case, and with the exact use to be made of the normative testimony. Yet the dangers, despite their legitimacy, should not require a ban on all normative testimony. They are instead among the considerations that a court should weigh in exercising its discretion to permit or exclude a moralist's testimony. In complex medical malpractice cases, by analogy, an expert's opinion that a physician exercised less than due care might significantly affect a juror's ultimate decision. The testimony nonetheless is admitted together with all other evidence adduced in the trial because it helps the trier reach an informed decision. By the same token, to permit testimony by normative experts is not to deny the average juror's capacity for moral insight and independent thought—the expert, trained in analysis of morals, simply improves the likelihood of a correct decision.[127] Fears that moralists will usurp the province of the judge and juror, then seem to be a very speculative basis upon which to exclude normative moralists absent any kind of judicial experience to validate them.

(b) *Creating an Illusion of Infallibility.* Another danger of normative testimony concerns the effect that such testimony might have on society at large as opposed to the judicial process itself. It is no secret that judges and jurors can and do make mistakes. This important fact affects the design of democratic institutions and processes, and tempers the public attitude toward the functioning of the courts. It encourages members of society to

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[126] Resort to normative experts could conceivably pose other, related problems. Overreliance, once begun, might expand, and society could begin to entrust all, or many, difficult decisions to experts. Trials could become longer and more expensive, and in the long run the idea of the moral equality of all persons could be eroded.

[127] In resolving this issue, a court might reason that the familiar practice of turning to moral advisors when difficult choices arise, *see, e.g.*, Sullivan, *supra* note 14 (use of philosophers as moral advisors in New York hospitals); *Advice for the Lonely Heart*, Time, Jan. 19, 1981, at 56, col. 1 (the advice-to-the-lovelorn columnists, "Dear Abby" and her sister "Ann Landers," are the most widely syndicated columnists in the western world, appearing in more than 2,000 newspapers), recommends bringing the practice into the courtroom. Of course, one might question whether the efficacy of this everyday practice depends on the moral expertise of the advisor. The value of the practice may stem instead from the feelings it generates—that someone understands and cares, for instance. The value also may lie in the opportunity to seek approval and reassurance prior to undertaking an action, or because the exercise of talking about our decision forces us to examine it more closely. Viewed in this light, the line between genuine helpfulness in a courtroom setting and mere symbolic value grows hazy. *See infra* notes 134-36 and accompanying text (rejecting symbolic value as a basis for admitting normative testimony).

scrutinize judicial decisions, and to take legislative or constitutional action when they disapprove of those decisions. When courts rely on the testimony of experts in reaching their conclusions, however, the danger of underemphasizing the possibility of error may arise. This danger is seemingly present with any kind of expert testimony, but may be more acute when the proffered expertise is normative rather than, for example, metallurgical.

Again, however, the potential negative effects of expert testimony at a societal level should not preclude its use in all cases. The present system has its costs; many judges, jurors, and lawyers are not well versed in moral analysis, and may make mistakes.[128] Moreover, the spectacle of trained attorneys arguing opposing views of morality and of judges deciding moral questions differently in similar cases may prove demoralizing. Experts in moral philosophy may disagree somewhat less often on moral issues than nonexperts. Moreover, testimony from normative experts in appropriate cases can render judicial decisionmaking on ethical issues more open and explicit than at present. To the extent that courts require that the testimony actually aid analysis of the issues and "map" adequately onto normal courtroom functions,[129] the danger of underemphasizing the possibility of error should be mitigated and the potential gain may outweigh any remaining costs.

One might of course move from this limited form of approval to the position that normative experts should testify precisely because such a practice will foster societal acceptance of judicial decisions. Courts utilize a number of symbolic or ritualistic devices for the purposes of reassuring society that they are acting soberly and responsibly.[130] Normative testimony might have value for this reason alone even when it does not significantly aid a court in resolving moral issues.[131] From this perspective, traditional

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[128] Indeed, our legal system recognizes the view that moral mistakes are possible. *Compare* Brown v. Board of Educ., 347 U.S. 483 (1954) (racial segregation in public schools ruled unconstitutional), *with* Plessy v. Ferguson, 163 U.S. 537 (1896) ("separate but equal" upheld). *See generally* Witherspoon v. Illinois, 391 U.S. 510, 518, 523 n.22 (1968) (death-qualified jury unconstitutional; decision made "fully retroactive"); Rachels, *supra* note 22, at 33 (discussion of "moral systems" changing over time); Radin, *supra* note 21, at 1157-59 (views of the death penalty).

[129] *See infra* notes 137-44 and accompanying text (proposing standards for admission of normative testimony).

[130] For example, courts conduct proceedings in public, and issue written opinions. We impanel juries of twelve persons, appoint judges for life, and stand when the judge enters the courtroom. Judges wear robes; witnesses take oaths. These measures are aimed, at least in part, at assuring that judicial proceedings are open, fair, and serious, but may have the effect of clothing the judicial system in a mantle of infallibility.

[131] Anthropologists maintain that every social group subscribes to myths and rituals that solidify group cohesiveness, and particularly so in times of stress. *See, e.g.*, M. GLUCKMAN, LAW AND RITUAL IN TRIBUNAL SOCIETY (1977); V. TURNER,

evidentiary standards become irrelevant; the normative testimony is justified not because it actually improves the court's analysis, but because it enables the court to perform functions such as dissipating the anxiety citizens might feel if moral certainty were in fact unobtainable,[132] or preserving the myth that moral certainty is discernible by some even if it is beyond the grasp of most.[133] Participants in the courtroom drama—the judge, the parties, and the experts themselves—would perhaps not consciously and openly justify resort to moral experts on these grounds. Nevertheless, such motivations may sometimes lie behind decisions to offer or admit expert testimony.

The implications of permitting expert testimony solely on the basis of its symbolic value are troubling, however. An examination of the role of myths in our society illustrates the potential hazards. As a society, we hold a large number of "substantive" myths—for example, that the United States is a more or less pure democracy, that individual industry produces individual success, and that free market capitalism is superior to socialism[134]—but

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THE RITUAL PROCESS: STRUCTURAL AND ANTI-STRUCTURAL (1977); G. VANN, MYTH, SYMBOL AND REVELATION (1962). Plato advocated myths as social control devices, *see* PLATO, *supra* note 37, at 376e-383c, 414b-415d, as did Machiavelli, *see* N. MACHIAVELLI, *supra* note 125, and at least one classical utilitarian writer, *see* H. SIDGWICK, THE METHODS OF ETHICS 489, 489-92 (7th ed. 1907) (principle of utility best served if public kept ignorant of it). In our day, Calabresi speaks of resolving "tragic choices" to preserve the myth that life is a pearl beyond price. *See* G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1978); *see also* W. NOLEN, A SURGEON'S WORLD 161 (1972) (doctors cultivate a bedside manner to create an outward impression of confidence, and prescribe placebos knowing they will work only if the patient believes they will). In this sense, normative testimony might be useful to improve a court's credibility, thereby enhancing its effectiveness as a social institution.

[132] *Compare* A. CAMUS, THE STRANGER (1946) (existential anxiety over moral ambiguities in modern life), *with* PLATO, *supra* note 37, at 414b-415d (use of anxiety-allaying myths in ideal republic to justify allocation of roles to citizenry). *See generally* R. DWORKIN, *supra* note 1, at 147 ("progress . . . is moral progress, and though history may show how difficult it is to decide where moral progress lies . . . it cannot follow . . . that those who govern us have no responsibility to face that decision"), 186 (moral truths cannot be proved, but can be "taken seriously"); Yesley, *supra* note 2, at 1458 (National Commission created in part because of difficulty in achieving agreement on matters that affect " 'the sensibilities and the ethics of the people of this country' ") (quoting 119 CONG. REC. 29,219, 29,228 (1973) (statement of Sen. Kennedy)).

[133] *Cf.* PLATO, *supra* note 37 (complex scheme of government for ideal state, in which individuals with moral insight would be placed in charge, while others with less moral knowledge would occupy subordinate positions); Veatch, *supra* note 15 (discussing hazy role of court-ordered "ethics" committees in hospitals); Yesley, *supra* note 2, at 1452, 1457 (discussing use of ethics advisory commissions to achieve moral consensus otherwise unobtainable by citizenry or legislature).

[134] *Cf.* H. LONDON & A. WEEKS, MYTHS THAT RULE AMERICA (1980) (arguing that United States has substantive myths about greatness, power, and mission, but needs even more).

relatively few "procedural" ones. Because substantive myths are held overtly, they are subject to analysis, challenge, dissent, and abandonment if found pernicious. Procedural myths, however, are less visible than substantive myths and therefore less easily corrected.[135] Procedure is translucent, if not transparent. Everyone cares about substantive values, but few persons, other than lawyers and political scientists, concern themselves with the process by which values are formed.[136] The potential for uncritical public acquiescence to judicial choices therefore increases when we build new myths into our judicial procedures, and especially so when those additions profoundly affect the decisions reached in novel cases of great social importance. Hence, the danger that underarticulated or perhaps unconscious symbolic or ritualistic motivations lie in the background should temper decisions to admit normative testimony even when its use seems warranted under standard rules of evidence law.

B. *The When, Why, and How of Normative Testimony: A Theoretical Model*

Under what circumstances, then, should courts permit testimony by moralists on matters of normative ethics? This question to some extent resists before-the-fact analysis, for different types of problems attend the various uses of normative testimony. Yet the case for admission is theoretically strongest when three basic indicia of helpfulness and reliability are present. These concern the nature of the case, the source of the testimony, and the manner in which the witness interacts with the judicial process.

A court considering whether to permit normative ethical testimony should initially assess the potential helpfulness of the testimony in the particular case;[137] normative testimony has no place in the courtroom unless it is likely to provide genuine and significant help in resolving a moral dilemma. If ethical considerations are not relevant at all, or if the issues are not sufficiently difficult to require the analysis of an expert moralist, the court should bar the witness as a matter of evidence law. By contrast, when the

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[135] In a trial setting, the adversary system tends to protect against excessive mythmaking of the substantive variety. When one side seeks to establish a proposition by introducing the testimony of any expert, the other side can rebut by introducing an expert who will testify to the opposite proposition. The adversary system would seemingly provide little built-in protection, however, against the procedural version of this myth—that a colloquy between expert moralists will produce a better decision than one rendered by a judge or jury.

[136] *Cf.* J. ELY, *supra* note 1, at 102 ("Lawyers are experts on process writ small, the processes by which facts are found and contending parties are allowed to present their claims. And to a degree they are experts on the process writ larger, the processes by which issues of public policy are fairly determined . . . .") (emphasis omitted).

[137] *See supra* notes 69-79 and accompanying text (discussion of the helpfulness standard used by courts to determine whether or not to admit expert testimony).

issues are novel, difficult, and normative in nature, testimony by individuals with normative expertise can supplement the judge's and jurors' general understanding, and thus facilitate principled decisionmaking.[138]

Analysis under the helpfulness standard, however, cannot end the inquiry. In light of the special problems associated with normative testimony, courts should require additional safeguards. Specifically, to avoid problems of relativism,[139] courts should demand that any expert who testifies represent a school of thought that meets certain standards of adequacy, including: logical consistency, impartiality, concern for factual evidence and reasoned analysis, consonance with the "considered moral judgments" of persons in our society, and consonance with norms already incorporated into law.[140] A witness meeting these requirements will be likely to share many of the court's underlying ethical assumptions, and should be able to support opinions that go beyond settled law with reasons that are open to analysis and criticism through cross-examination.[141]

Finally, a decision to admit normative testimony should require a court's judgment that the testimony will "map" adequately onto existing courtroom functions and will not subvert judicial roles.[142] Problems of mapping might arise if the witness met the aforementioned criteria but refused to take the assignment seriously, believed that ethical knowledge is impossible or that the Good is ineffable, or viewed moral knowledge as a matter of intuition and

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[138] For example, normative ethical testimony might have its greatest value in cases involving bioethical dilemmas. *See supra* note 10. Such cases often present unprecedented fact patterns, and the expert's ethical perspective can help the court examine explicitly the moral concerns implicated by its judgment.

[139] *See supra* notes 110-22 and accompanying text.

[140] These criteria are adopted from M. SHAPIRO & R. SPECE, *supra* note 47, at 78.

[141] Shapiro and Spece address the concern that requiring consonance with considered moral judgments and norms incorporated in law fails to provide a logically compelling justification for any moral assertion, and thus, merely enforces a form of reactionary conventionalism:

> In talking about shared judgments as forming the data (the 'facts') upon which moral philosophy is built, are we not simply saying that morality is after all a kind of social convention? The answer to this worry . . . is the following: That morality is conventional in this sense is a harmless kind of conventionality, one which does not threaten the rational credibility of moral philosophy, because this kind of conventionality is to be found in all *rational areas of human discourse—even empirical science*. Empirical science could not proceed, for example, if it were not agreed by all participants in scientific discussion that certain things had to be accepted as important—e.g., observation, predictability, and noncircularity. For this is simply the banality that rational discussion between two persons cannot proceed if those persons agree on nothing. . . . Thus, if morality turns out to be relative or conventional only in some sense in which science is also relative or conventional, the rational attack on morality is dissipated.

M. SHAPIRO & R. SPECE, *supra* note 47, at 79 (quoting J. Murphy, The Possibility of Moral Philosophy 23-24 (unpublished essay) (emphasis in original)).

[142] *See supra* notes 123-36 and accompanying text.

consequently beyond cross-examination. Normative testimony originating from religious doctrine might also fail to map adequately because it would raise Establishment Clause problems.[143] When these problems arise, courts should exclude the testimony. To further guard against subversion dangers, courts in each case should assess the relative merits of court appointed experts and adversarial presentation,[144] and should decline to hear testimony in areas characterized by a complete lack of moral consensus.

These proposed criteria can help minimize the danger that normative expert testimony will supplant rather than supplement moral analysis by courts. The theoretical requirements are stringent, however, and may be difficult to meet in practice. Even so, we do not mean to suggest that any testimony satisfying the standards proposed here will be free of all the problems associated with normative expert testimony; we doubt that any test could provide such assurance. These criteria merely represent a first step toward analysis of the use of normative testimony. But they can be applied constructively to evaluate leading schools of ethical thought to determine which might qualify to give normative testimony.

C. *Particular Schools of Ethical Thought as Sources of Normative Testimony*

Philosophers from a number of schools of thought would be poor candidates for service as normative experts under any circumstances. Some would not qualify because they would reject the possibility of such testimony, while others would fail because of something intrinsic to their ethical system. Thus, a court would reject testimony from a present-day Sophist—if one exists—because the witness' position would not be impartial and would lack consonance with the considered moral judgments of our society.[145] For the same reasons, courts should reject the unadorned self-

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[143] *See infra* notes 227-39 and accompanying text.

[144] Testimony from appointed experts may well prove attractive to courts wishing to hear moral or ethical testimony on difficult issues, but desiring to avoid unseemly "battles of the experts." On the other hand, a court's stamp of approval might pose heightened risks of paralyzing judge and jury so that they cease to perform an independent function. *Cf.* People v. Collins, 68 Cal. 2d 319, 330-33, 438 P.2d 33, 40-41, 66 Cal. Rptr. 497, 504-05 (1968) (introduction of expert mathematical testimony relating to probability theory in criminal case constitutes prejudicial error; jurors are undoubtedly impressed by the "mystique" of such evidence and accord it disproportionate weight). Whenever this danger seems acute, it might be advisable to have moral experts appear in adversarial roles.

[145] The Sophists were early Greek philosophers who flourished about 450-400 B.C. They were professional teachers of virtue and moral wisdom. *See, e.g.*, 3 W. GUTHRIE, A HISTORY OF GREEK PHILOSOPHY 255-56 (1975); H. SIDGWICK, OUTLINES OF THE HISTORY OF ETHICS 17-22 (4th ed. 1896); *see also* B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 59-63, 73-82 (1945). Like a number of today's professional advice givers, they believed that the skill of conducting oneself properly could be

interest of Machiavellian moral philosophy[146] or the anarchistic ethical view of Nietzsche[147] as sources of ethical expertise. Socratics, like other moral skeptics, might offer helpful metaethical analysis, but probably would refuse to testify on normative matters because they do not believe that human knowledge on morals represents more than speculation and conjecture.[148]

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taught. Nonetheless, Sophists would provide little help to courts on normative matters since their teaching seems to have been almost entirely prudential in its concerns with helping the student succeed in the practical affairs of life. *See* 3 W. GUTHRIE, *supra*, at 255-56. Indeed, according to one commentator, the Sophists' ability to attract clients was due to their insistence that self-interest and virtue coincide. H. SIDGWICK, *supra*, at 255-56; *see also* PLATO, THE PROTAGORAS 328b (W. Guthrie trans. 1957) (attributing to Protagoras the observation that Sophists viewed the willingness of their pupils to pay as the best evidence of their competence as teachers of virtue).

[146] *See* N. MACHIAVELLI, *supra* note 125 (ethical system in which the end—consolidation of the monarch's power—justifies the means used to achieve it).

[147] *See* F. NIETZSCHE, BEYOND GOOD AND EVIL §§ 60-65, at 203-17 (M. Cowan trans. 1955) [hereinafter cited as "F. NIETZSCHE, BEYOND GOOD AND EVIL"]; F. NIETZSCHE, ON A GENEALOGY OF MORALS (W. Kaufmann trans. 1969) [hereinafter cited as "F. NIETZSCHE, GENEALOGY"]; F. NIETZSCHE, WILL TO POWER 509-10 (W. Kaufmann & R. Halligdale trans. 1967) [hereinafter cited as "F. NIETZSCHE, WILL TO POWER"]. *See generally* Kaufmann, *Friedrich Nietzsche*, in 5 ENCYCLOPEDIA OF PHILOSOPHY 504, 511-12 (P. Edwards ed. 1967). Nietzsche believed that life has no meaning other than "the meaning that man gives [it]" and that "the aims of most men have no surpassing dignity." Kaufmann, *supra*, at 512. He accordingly developed the concept of Ubermensch—the overman or superman—who is guided by neither of the predominant moralities, "master morality" and "slave morality," *id.*; F. NIETZSCHE, BEYOND GOOD AND EVIL, *supra*, at 203-17, and who instead creates his own rules of conduct, Kaufmann, *supra*, at 511-12; F. NIETZSCHE, WILL TO POWER, *supra*, at 510. Nietzschean moral philosophy thus rejects the possibility of ethical norms grounded in an ethical system. On this view, normative testimony would never be impartial, and would not likely be in accord with the considered moral views of persons in our society or the norms already enshrined in our legal system.

[148] *See supra* notes 80-81 and accompanying text (evidentiary rules barring testimony on subjects as to which even the best experts are not competent to form opinions). Socrates believed that moral expertise was in theory transmissible, and hence, perhaps, communicable to a court. However, he also believed that the only way to impart such instruction was for the listener or student to draw conclusions independently through a process of dialectical examination of prior beliefs, *see* PLATO, APOLOGY 21b-d, *reprinted in* THE LAST DAYS OF SOCRATES 45, 50-51 (Penguin ed. H. Tredinnick trans. 1969) [hereinafter cited as "PLATO, APOLOGY"]; H. SIDGWICK, *supra* note 145, at 25, and thought it useless simply to tell another how to live or that a given thing or course of conduct was right or wrong, *see* Vlastos, *The Paradox of Socrates*, in THE PHILOSOPHY OF SOCRATES 1 (G. Vlastos ed. 1971). The Dialogues thus indicate that even the best Socratic philosophers might be unable to convey moral wisdom to others, for in many cases, reflection and discussion can do no more than reveal the inconsistencies in our moral beliefs and actions. *Id.* In fact,

Radical existentialists would pose problems because they believe that there are no right and wrong answers, and that each individual must choose what is "right" for himself or herself.[149] Similar concerns would justify excluding ethical egoists in the tradition of Hobbes.[150] This is not to say that members of these schools might never enter the trial process; to the contrary, courts might seek their aid in assessing the qualifications or credibility of other normative witnesses on cross-examination.[151] Yet philosophers who deny

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Socrates was openly contemptuous of the Sophists for their claim to be able to teach virtue, and made no stronger claim for himself than that he knew how ignorant he was. PLATO, APOLOGY, *supra*, at 20b-c.

Socrates was not a complete moral skeptic, however. He held that moral expertise could exist in the form of knowledge of the Good—an awareness which gives the holder an infallible capacity to judge and act rightly, *see Plato*, *supra* note 37, at 352b-356c (the Protagoras); Santas, *Plato's Protagoras and Explanations of Weakness*, 75 PHIL. REV. 3, 4-20 (1966), but which is insuperably difficult to attain. Moreover, in his actions, Socrates was not a moral skeptic. He was prepared to make moral choices, often unorthodox ones, and to adhere to them even at great personal cost. *See generally* PLATO, THE LAST DAYS OF SOCRATES (H. Tredennick trans. 1969) [hereinafter cited as "PLATO, LAST DAYS"]. Yet despite these attributes, the skepticism of Socratic moral philosophy would make a philosopher in the tradition of Socrates an unlikely candidate for courtroom testimony in the normative mode.

[149] *See, e.g.*, A. CAMUS, *supra* note 132; S. KIERKEGAARD, EITHER-OR (W. Lowrie trans. 1971) (1st ed. Copenhagen 1843) [hereinafter cited as "S. KIERKEGAARD, EITHER-OR"]; S. KIERKEGAARD, THE SICKNESS UNTO DEATH (H. Hong & E. Hong trans. 1980) (1st ed. Copenhagen 1849) [hereinafter cited as "S. KIERKEGAARD, SICKNESS UNTO DEATH"].

[150] Hobbes, a moral relativist, embraced an egoistic psychology that reduced all human motives to the pursuit of pleasure and the preservation of self. To Hobbes, "good" was simply a name individuals assigned objects to which they happened to be drawn by inclination or appetite. *See* J. HOBBES, LEVIATHAN pt. I (M. Oakeshott ed. 1962) (1st ed. London 1651); SCHLICK, PROBLEMS OF ETHICS 162-65 (D. Rynin trans. 1939); Hampshire, *Hobbes*, in THE AGE OF REASON 34-37 (S. Hampshire ed. 1956). Hobbesian moral philosophy thus would be of little use in the trial process since it lacks completeness, impartiality, and consonance with the considered moral judgments of contemporary society.

[151] That our legal system holds certain moral beliefs, *supra* notes 1-2 and accompanying text, does not warrant rejecting all testimony from moral philosophers who reject some, or even all, of these beliefs. The expert testifying in the primary mode is likely to be going beyond the settled bounds of existing law. *See Hart*, 29 Conn. Supp. at 368, 289 A.2d at 386. Although a court may not be free to reject the moral principles built into that law, it should certainly consider the criticisms and attacks of moral skeptics in deciding whether or not to add to the edifice on the advice of moral nonskeptics. To this end, skeptical moralists might aid courts by rebutting the testimony of, or commenting on the qualifications of, other moralists.

Although moralists have not previously served this secondary function, the practice would probably develop if the use of normative experts were to become widespread. In light of the unsettled questions in this area, courts should be liberal in

the possibility of reaching "morally sound decisions" reject the fundamental premises of courts in cases like *Hart*,[152] and thus can provide little primary assistance.

Primary assistance might come, however, from members of other schools of thought. Moralists from these schools hold views that are generally consonant with both the considered moral judgments of persons in our society and moral norms incorporated into law, and that, subject to qualification, seem transmissible in court. The expert moralists most likely to satisfy this standard would seem to be members of the utilitarian school of ethics, deontologists of various types, moral intuitionists, and representatives from the various religious traditions.[153] The analysis of these and other schools set forth below illustrates how normative experts might play a role in the trial process.

1. Utilitarian Theories

Many experts who could helpfully testify on matters of normative ethics would be likely to subscribe to a version of utilitarianism,[154] perhaps the leading secular ethical theory in the western world today. Utilitarians judge actions by their consequences, but differ in certain respects. For example, one of the school's leading historical exponents, John Stuart Mill, espoused a theory of "act utilitarianism," under which an act's rightness depends on whether it produces a greater balance of pleasure over pain for all sentient creatures throughout all future time than any other alternative available to the agent.[155] Mill's focus on particular acts contrasts with the view of rule

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admitting such testimony. Of course, questions concerning the helpfulness of secondary testimony will not arise in the absence of a decision to admit normative testimony of a primary type. This is the more central, and more difficult, question.

[152] *See supra* notes 52-60 and accompanying text.

[153] This list is not exhaustive, for courts should be willing to hear normative testimony from members of any school of thought meeting the proposed requirements. These well-known schools are merely offered as examples.

[154] For general discussions of utilitarianism, see J.S. MILL, UTILITARIANISM (Bobbs-Merrill ed. 1957) (1st complete ed. London 1863); Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST 3 (J. Smart & B. Williams eds. 1973) [hereinafter cited as "Smart, *An Outline*"]; Smart, *Utilitarianism*, 8 ENCYCLOPEDIA OF PHILOSOPHY 206 (P. Edwards ed. 1967) [hereinafter cited as "Smart, *Utilitarianism*"].

[155] J.S. MILL, *supra* note 154, ch. II ("What Utilitarianism Is"). *But see* Urmson, *The Interpretation of the Moral Philosophy of J.S. Mill*, in THEORIES OF ETHICS 128 (P. Foote ed. 1967) (arguing that Mill should be classified as a rule utilitarian). Mill's brand of utilitarianism is sometimes referred to as "universalistic hedonistic act utilitarianism." The view is universalistic because it considers irrelevant who will experience the pleasure or pain produced, whereas an egoistic utilitarian focuses on future pleasure and pain of the agent. It is hedonistic because, in evaluating the consequences of acts, it assumes that the only thing valuable in itself is experiential

utilitarians, who emphasize evaluation of general rules of action. In the century since Mill, major utilitarian philosophers, such as Sidgwick,[156] Moore,[157] Nowell-Smith,[158] Smart,[159] and Rawls[160] have adopted one or the other view, but retained a common approach to the analysis of moral problems.

Normative ethical testimony from a qualified act or rule utilitarian would seem to meet evidentiary requirements in a number of situations. In a case like *Hart*, for example, a court could deem the consequences of alternative courses of action relevant to the decision to approve or disapprove the transplant, and might call upon a utilitarian to provide reasoned, normative analysis.[161] A utilitarian's cause and effect calculations might require con-

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pleasure, and that anything else is of value only to the extent that it produces pleasure. An idealistic utilitarian, by contrast, acknowledges the intrinsic value of things other than pleasure, such as beauty, knowledge, human dignity, equality, or fairness.

Bentham was also an act utilitarian.

[156] H. SIDGWICK, *supra* note 131. Sidgwick was a universalistic hedonistic utilitarian. Smart, *Utilitarianism, supra* note 154, at 208.

[157] G. MOORE, *supra* note 18. Moore was an idealistic universalistic utilitarian. Smart, *An Outline, supra* note 154, at 12-13; Smart, *Utilitarianism, supra* note 154, at 208.

[158] P. NOWELL-SMITH, *supra* note 16. Nowell-Smith is a rule utilitarian. Smart, *Utilitarianism, supra* note 154, at 208.

[159] *See* Smart, *An Outline, supra* note 154; Smart, *Utilitarianism, supra* note 154.

[160] Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955). Rawls has been classified as a rule utilitarian. Smart, *Utilitarianism, supra* note 154, at 208. In his later *Theory of Justice*, however, Rawls argues against utilitarian normative theories and offers what he views as a Kantian, contractarian foundation for a liberal democratic theory of justice. *See* J. RAWLS, *supra* note 1; *see also* Lyons, *Rawls Versus Utilitarianism*, 69 J. PHIL. 535 (1972); Teitelman, *The Limits of Individualism*, 69 J. PHIL. 545 (1972); *cf.* Rawls, *Reply to Lyons and Teitelman*, 69 J. PHIL. 556 (1972).

[161] Some utilitarians, including Hume, believe that human beings are motivated to act by a natural spirit of benevolence. *See* D. HUME, TREATISE OF HUMAN NATURE, bk. 3, pt. I, § I, at 468-69 (Selby-Bigge ed. 1978) (1st ed. London 1739); H. SIDGWICK, *supra* note 145, at 204-18. Since human motivation contains this "fellow feeling with the happiness and misery of others," H. SIDGWICK, *supra* note 145, at 207, much human happiness and unhappiness will be vicarious, causing the calculation of consequences to become exceedingly complex. Hume observed, for instance, that it makes us happy to see a worthy person rewarded, or an unworthy person punished. In contrast, it makes us unhappy to see an innocent person punished, or to see the evil person prosper. The utilitarian thus cannot stop his or her analysis at the level of the individual who is rewarded or punished; he or she must consider all of the secondary or vicarious happiness or sorrow that an action will produce. Hume's analysis would also require taking into account tertiary pleasures and sorrows—"I'm glad you are glad he is being punished"; "I wish you did not have to know that those people are so miserable"—and so on.

The fact that secondary concerns play an important role in cases like *Hart* provides further support for calling upon expert utilitarian analysis. Thus, a court might

sultation with a second expert from another discipline—sociology, economics, physics—to support the assertion that certain effects are in fact likely to result, but would nonetheless satisfy the current helpfulness test of evidence law.[162] Utilitarianism also should satisfy the proposed tests of adequacy as an ethical system since its method of analysis is internally consistent, reasoned, impartial, and seemingly consonant with the considered moral judgment of many members of our society.[163] As a largely secular school of ethical thought, moreover, it poses no problem of establishment of religion.

In practice, both normative and metaethical testimony from utilitarian ethicists would map adequately onto a number of judicial functions. Indeed, one school of legal analysis—the law-and-economics school—holds that most if not all legal rules should promote overall need-satisfaction, plainly a type of utilitarian analysis.[164] Unlike members of certain skeptical schools, utilitarian ethicists probably would accept the challenge to provide assistance to courts and would approach the task with the requisite seriousness and sense of common venture, although rule utilitarians might have reservations about the practice in general. These moralists might feel obliged to consider not only the utility of permitting expert testimony in particular cases, but also whether the short- and long-term effects of resorting to such testimony promise a net gain.[165] For example, an expert's correct judgment

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instruct the expert to consider a variety of concerns—How will the healthy child feel years from now if the transplant is performed successfully? Performed unsuccessfully? How will the parents feel about having brought about these feelings in the donor?—in assessing the morality of various primary alternatives.

[162] The helpfulness test also would permit metaethical analysis by utilitarian experts, such as sorting out the general rules which the facts of the case bring into conflict. Indeed, a rule utilitarian would submit that resolution of moral dilemmas requires attaching appropriate priorities to the many rules that bear on the case, and that this is impossible without first identifying the rules.

[163] Ordinary observation demonstrates that many persons believe that the good or bad consequences of actions are important considerations in determining their rightness or wrongness. For example, most of us would severely criticize a parent who refused to permit a sick child to receive lifesaving medical treatment when the consequence of refusal would be the child's death. Some writers, however, have argued that to equate moral goodness or rightness with the consequences of actions is at odds with certain commonly held and deeply felt moral ideas. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 62-70 (1968) (arguing that notions of fairness and justice limit what punishment may be exacted to promote utilitarian goals).

[164] *See, e.g.*, G. CALABRESI, THE COST OF ACCIDENTS (1970); R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1970); Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960).

[165] The rule utilitarian might agree that caclulations of the good or evil effects likely to result from certain judicial decisions are appropriately consigned to experts, but nevertheless find that such consignment is unacceptable because, as a practice, it produces too many evil results. *See* H. SIDGWICK, *supra* note 131, at 489-92 (utilitarianism best served by keeping public ignorant of it). *But see* Williams, *A*

may provoke such social consternation that the pain produced outweighs the benefit of a morally correct judgment. Further, the moralist might be concerned that if ethical testimony becomes accepted and routinely relied on, it could conceivably erode individuals' inclinations to decide for themselves on moral questions.

Act utilitarians will insist upon addressing these issues on a case-by-case basis. In some trials, the dangers of expert testimony will seem small and the gains great. Under these conditions, the principle of utility will be served by allowing the moral expert to testify. The attitude of a rule utilitarian to the prospect of moral expert testimony seems less certain. Presumably, it would take the form of a rule justified by the probability that such testimony would over the long run produce a greater balance of pleasure over pain than would adherence to any alternative rule. The contours of any such rule are unclear.

2. Deontological Ethics

Deontologists are ethical theorists who believe, with Kant, that the important element in moral conduct is to conform one's actions to duty.[166] Adherence to duty supersedes all other goals, such as securing happiness or any other kind of consequence, or acting on the basis of any type of motive, whether egoistic or altruistic. As an illustration, Kant maintained that it would be wrong to make a false promise even if by so doing one could save one's own life.[167] Kant was also a rationalist who believed that duty in any given situation could be deduced, through practical reason, from fundamental principles that were knowable independently of experience. Reflection, according to Kant, informs us "with unwavering certainty that duty is distinct from pleasure, . . . that moral virtue . . . is the supreme good, . . . and that moral worth is not measured either by the consequences of a person's actions or by his natural benevolence, but by the agent's intention to obey moral laws."[168] From these self-evident truths, the single most fundamental moral principle—the categorical imperative[169]—could be deduced. Armed

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Critique of Utilitarianism, in UTILITARIANISM: FOR AND AGAINST 77, 123-24 (J. Smart & B. Williams eds. 1973) (criticizing lack of openness between ruler and ruled).

[166] For excellent discussions of deontological ethics, see, e.g., W. FRANKENA, ETHICS 14-15 (2d ed. 1973); H. PATON, THE CATEGORICAL IMPERATIVE (1948); B. RUSSELL, *supra* note 145, at 710-12; Olson, *Deontological Ethics*, in 2 ENCYCLOPEDIA OF PHILOSOPHY 343 (P. Edwards ed. 1967). For examples of moral duties that flow from the adoption of the categorical imperative, see I. KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 37-47 (T. Abbott trans. 1949) (1st ed. Riga 1785).

[167] I. KANT, *supra* note 166, at 37-47.

[168] Abelson, *History of Ethics*, in 3 ENCYCLOPEDIA OF PHILOSOPHY 81, 95 (P. Edwards ed. 1967); *see* I. KANT, *supra* note 166, at 11-13, 20, 36-49 (categorical imperative).

[169] I. KANT, *supra* note 166, at 36-49.

with these principles, a rational being could then judge any particular action against unvarying standards.

Contemporary deontologists include followers of Kant, as well as a number of religious moralists.[170] Like utilitarians, these deontologists subscribe to both act and rule theories.[171] Act deontologists hold that specific acts or situations are governed by duty-based imperatives, while rule deontologists hold that rules apply to classes of action or situation. Examples of act deontological systems are Joseph Fletcher's *Situation Ethics*[172] and various "natural law" theories.[173] Examples of rule deontological systems are Kant's work, that of W.D. Ross,[174] and the Ten Commandments.[175] The later work of the contemporary legal philosopher, John Rawls, is sometimes classified as rule deontological.[176]

An examination of major deontological systems indicates that many could fulfill the evidentiary requirements for expert testimony. Deontological testimony could aid a court confronted by issues of distributive justice, for example.[177] Questions of entitlement, discrimination, "reverse descrimination," and conflicts among major ordering principles are also particularly amenable to deontological analysis, and resort to deontologists might be

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[170] *See, e.g.*, J. CALVIN, ON THE CHRISTIAN FAITH (J. McNeil ed. 1957) [hereinafter cited as "J. CALVIN, CHRISTIAN FAITH"]; J. CALVIN, SERMONS ON THE TEN COMMANDMENTS (B. Farley ed. 1980) (1st ed. London 1581) [hereinafter cited as "J. CALVIN, SERMONS"]; J. KNOX, WORKS OF JOHN KNOX (D. Laing ed. 1895). Not all religious moralists are deontologists in ethics, however. Some are radical existentialists who emphasize the role of personal choice, *see, e.g.*, M. BUBER, BETWEEN MAN AND MAN (R. Smith trans. 1965); S. KIERKEGAARD, EITHER-OR, *supra* note 149, while others fit more squarely within the utilitarian tradition of western moral thought, *see, e.g.*, R. NIEBUHR, AN INTERPRETATION OF CHRISTIAN ETHICS (1935) [hereinafter cited as "R. NIEBUHR, INTERPRETATION"]; R. NIEBUHR, MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS (1932) [hereinafter cited as "R. NIEBUHR, MORAL MAN"].

[171] *See, e.g.*, T. BEAUCHAMP & J. CHILDRESS, *supra* note 10, at 22-41; M. SHAPIRO & R. SPECE, *supra* note 47, at 81.

[172] J. FLETCHER, SITUATION ETHICS (1962).

[173] For discussion of natural law theories, see H. HART, CONCEPT, *supra* note 1, at 182; Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 595 (1958) (the "Hart-Fuller" debate). Natural law theorists hold, generally, that ethical relations should inform legal obligations and that norms of both types can be discerned by reason from mankind's "inherent nature," *see* M. SHAPIRO & R. SPECE, *supra* note 47, at 90.

[174] *See* W. ROSS, THE RIGHT AND THE GOOD (1930).

[175] *See Exodus* 20:3-17.

[176] *See* M. SHAPIRO & R. SPECE, *supra* note 47, at 88; Murphy, *Rights and Borderline Cases*, 19 ARIZ. L. REV. 228, 232-33 (1977) (discussing Rawls' *Theory of Justice*).

[177] *See Hart*, 29 Conn. Supp. at 368, 289 A.2d at 386.

helpful when the issue before the court is or could be framed in those terms.[178] Much deontological testimony would seem capable of critical evaluation by the court; most deontological views are relatively complete and concerned with factual evidence and reasoned analysis. Moreover, most major deontological systems are tightly organized, internally consistent, hierarchically arranged sets of belief that pose few problems of consistency or impartiality. Finally, since many of us are deontologists in our view of right and wrong[179]—at least in certain areas—deontological ethics could meet the standard of consonance with the considered judgments of persons in our society.[180] In general, then, deontological testimony would satisfy the requirements of a minimally adequate ethical system.

Deontological views vary, however, and some would map onto courtroom functions more effectively than others. Secular systems of rule deontological ethics would appear to map adequately, although some deontologists, including Kant and certain moral intuitionists, might have reservations about their own testimony. Kant, for example, held that all persons are theoretically capable of knowing the fundamental principles from which the rules of right conduct are to be deduced, as well as being capable of deducing those rules and conforming their conduct to them.[181] Yet Kant and other deontologists recognize that deducing rules is not a simple matter, and most believe that actual conformity of conduct to duty is difficult because of the passion and temptation that the individual must overcome.[182] Told that their testimony need only be helpful rather than conclusive, and that the court

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[178] In appropriate cases, a deontologist might show that the issue before the court can in fact be framed in such terms, or deduce ethical conclusions from prima facie obligations or various categorical or conditional imperatives. Metaethical testimony of this nature would meet the helpfulness standard. *See supra* notes 74-79 and accompanying text.

[179] Everyday observation discloses that many persons feel we should obey the law even if there is no chance of being caught; that promises should be kept even if this entails pain or effort; and that property, organs, and bodily parts should not be taken from one person for the benefit of another even if the transfer results in a net gain in utility. *Cf.* Brennan & Delgado, *Death: Multiple Definitions or a Single Standard?* 54 S. CAL. L. REV. 1323, 1351-53 (1981) (proposing that multiple definitions of death, by specifying different standards for different purposes permit courts to accommodate a broader range of interests than is possible under a single standard).

[180] Of course, a particular deontologist might hold that we are duty-bound to obey rules that seriously contravene society's considered moral judgments or the moral values incorporated in existing law. A white supremacist who advocates racism based on a perceived collection of moral duties—for example, to further the welfare of one's own race, to hinder the advancement of persons of other races, and to treat dark skin as evidence of sinfulness and inferiority—would present such a case. Under these circumstances, courts must assure that a genuine consonance exists between the views of the expert and the considered moral judgments of society.

[181] *See supra* notes 167-69 and accompanying text.

[182] I. KANT, *supra* note 166, at 40-41, 45-48.

remains free to draw its own conclusions, most rule deontologists would probably agree to testify.

Other deontological views might encounter more substantial obstacles. Religious deontologists who testify purely from scriptural or other religious sources might violate the first amendment's prohibition against establishment of religion and thus fail to qualify.[183] Act deontologists, who evaluate the goodness or rightness of acts and rules in particular settings, also pose special problems. Although their testimony might "map" adequately in connection with bioethical dilemmas that present unusual, nonrecurring fact settings calling for unique value judgments,[184] the act deontologist's notion of rules and norms tailored to each case might undermine the stability of expectations that the legal system demands. Indeed, it might be impossible to cross-examine an expert who purports to find a unique ethical obligation in every new situation. A judge or juror might have difficulty evaluating the credibility of such testimony, or understanding why it is more persuasive than testimony that produces a diametrically opposite recommendation. For these reasons, a court might find the testimony of an act deontologist unacceptable and exercise its discretion to exclude it.

3. Moral Intuitionism

Moral intuitionists, although not in agreement on all questions, hold in one form or another that morality is accessible to all through a form of insight or moral sense.[185] Locke,[186] Clarke,[187] and Hobbes,[188] for example, believed

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[183] For a discussion of establishment of religion problems inherent in certain forms of normative testimony, see *infra* notes 227-39 and accompanying text.

[184] *See* M. SHAPIRO & R. SPECE, *supra* note 47, at 85.

[185] The earliest—and perhaps greatest—moral intuitionist, Plato, is omitted from textual discussion because relatively few contemporary moral philosophers would describe themselves as Platonists. Nevertheless, many are in his debt. *See generally* A. WHITEHEAD, PROCESS AND REALITY 63 (1929) (western philosophy consists of "a series of footnotes to Plato").

Plato's moral philosophy is difficult to classify. *See* J.S. MILL, *supra* note 154, ch. II (claiming Plato as the world's first utilitarian). He is perhaps best known for his view that the ideal government would be one governed by "philosopher kings," *see* PLATO, *supra* note 37, at 519e-541b, and in *The Republic* he offered a theory of human virtue and its relation to political justice that purports to explain what moral expertise is, how it is fostered, how to tell whether someone has it, and why it is important for both persons and political institutions to be guided by it. In formulating this theory, Plato drew a sharp distinction between genuine knowledge, or wisdom, and mere opinion—regardless of the truth of the opinion. He maintained that the best kind of ruler was one with genuine knowledge of the Good, and that such a person could not help but conduct both personal and public affairs in perfect accord with principles of right conduct. Plato also argued that the vast majority of people, although unable to achieve true moral wisdom, might nonetheless be guided by these principles of right conduct, adherence to which would produce happiness for the individual and harmony, prosperity, and stability for the state and its citizens. *See id.*

in the possibility of deducing morality from fundamental principles.[189] Hobbes derived his principles from psychology and metaethics,[190] while Locke and Clarke thought morality was self-evident.[191] Other intuitionists, such as Shaftesbury, Hume, and Butler, believed that all persons possess a special faculty for discerning right from wrong,[192] whether in the form of a "moral sense"—a natural inclination toward the pursuit of social good[193]—

Plato was convinced, as indicated by his own efforts to reform the rulers of Syracuse through moral counsel, that the philosopher had an important contribution to make even short of his role in the ideal republic. He describes himself as going to Syracuse with the hope that "if anyone were ever to attempt to realize my ideals in regard to laws and government, now was the time for the trial. If I were to convince but one man, that in itself would assure complete success." PLATO, *Seventh Letter*, in THIRTEEN EPISTLES OF PLATO 328b-c (L. Post trans. 1925). Such a claim bespeaks a very strong faith indeed in the power and value of moral knowledge.

Given this faith, it is clear that Plato would fully approve the idea of moralists as expert witnesses. In Plato's view, achieving reliable knowledge on difficult questions of morality *requires* expertise. *See generally* PLATO, *supra* note 37. Plato would concede that lay persons might have the capacity to form opinions on normative questions so long as the questions are not too far afield from the kinds of practical decisions they must handle on a day-to-day basis, and would further insist that such lay opinions will be fairly accurate and reliable if the society as a whole is stable and well-regulated, and if the populace has proper habits of thought and conduct. *Id.* at 419c-445e. Yet Plato would hold that lay opinions on normative questions are worthless if the questions presented require difficult balancing of competing principles, or if the society has not successfully instilled proper values and discipline into its citizens. The Platonic account also implies that only the moral philosopher can speak with assurance on metaethical questions. *See id.* at 580b-583a. In all of this, Plato is quite clear as to what constitutes moral expertise—it requires a very special combination of natural talent, careful nurturing, good physical and mental health, and years of intensive training in many fields of study. *Id.* at 521d-540c.

[186] For a discussion of Locke's views on morals, see H. SIDGWICK, OUTLINES OF THE HISTORY OF ETHICS 175-78 (6th ed. 1931).

[187] *See* H. SIDGWICK, *supra* note 145, at 179-84; Sprague, *Samuel Clark*, in 2 ENCYCLOPEDIA OF PHILOSOPHY 118 (P. Edwards ed. 1967).

[188] *See supra* note 150.

[189] *See* H. SIDGWICK, *supra* note 145, at 175-84; Sprague, *supra* note 187, at 119-20; *supra* note 150.

[190] *See supra* note 150.

[191] *See* Sprague, *supra* note 187, at 119. Clark hoped, by analogizing morality to mathematical systems, to put conventional Christian morality on as firm a footing as that of Newtonian science, and to defeat Hobbesian moral relativism. *Id.* at 118-20; *see also* H. SIDGWICK, *supra* note 145, at 177, 184.

[192] *See* J. BUTLER, *Three Sermons on Human Nature*, in BUTLER'S FIFTEEN SERMONS 117 (T. Roberts ed. 1970); D. HUME, *supra* note 164, at 468-69; Sprague, *Joseph Butler*, in 1 ENCYCLOPEDIA OF PHILOSOPHY 432 (P. Edwards ed. 1967).

[193] *See generally* Shaftesbury, *An Inquiry Concerning Virtue*, in 1 BRITISH MORALISTS 3 (L. Selby-Bigge ed. 1897).

or a Creator-designed conscience.[194] Most intuitionists have developed elaborate ethical systems by deriving duties such as altruism from basic principles, which, in turn, are supplied by our moral sense.

In theory at least, moral intuitionists could satisfy the helpfulness standard of evidence law by serving as a check on the court's own ethical intuition. Nonetheless, a number of problems potentially undermine the school's usefulness as a source of normative testimony. The first difficulty is intuitionism's lack of coherence as an ethical system. Most intuitionists arrive at similar results, but the intermediate data from which they derive those results are unsettlingly diverse—rational self-interest, psychological principles of ego-satisfaction, fellow-feeling, knowledge of the Good.[195] Some deontological intuitionists, moreover, are inattentive to relevant factual evidence, further reducing the helpfulness of testimony they might offer.[196]

The views of some intuitionists would not map onto legal roles and modes of operation because they leave little scope for expertise. Clarke and Butler, for example, believed that the moral sense which all persons possess operates unerringly.[197] In this view, an expert's testimony would be of little value to the court other than as proof that what the judge or jury's conscience indicates about the morality of certain conduct is, in fact, correct. This, of course, would be metaethical, rather than normative ethical testimony.

Not all intuitionists, however, would reject the possibility of normative ethical expertise. Locke, for example, maintained that fundamental principles—the duty to keep promises, to aid others, to control and direct the upbringing of one's children, and the right to the fruit of one's labor, for example—are "intelligible and plain to any rational being who will contemplate the relations of men . . . to each other and to God."[198] Locke also believed that moral ideas are not innate; they do not "offer themselves to [our] view without searching."[199] Thus, while every person has the ability to

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[194] *See* J. BUTLER, *Sermon I*, in FIVE SERMONS BY JOSEPH BUTLER 20, 20-23 (Little Library of Liberal Arts ed. 1950).

[195] *See supra* notes 185 (knowledge of the Good), 188 (psychological egoism) & 192 (fellow-feeling) and accompanying text.

[196] Kant, for example, held that ethical duties are absolute. "The law concerning punishment is a categorical imperative, and woe unto him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or reducing the amount of it . . . ." I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (J. Ladd trans. 1965) (1st ed. Königsberg 1797); *see also* MacIntyre, *supra* note 22, at 196 ("Kant argues that my duty is my duty irrespective of the consequences.").

[197] *See* J. BUTLER, *supra* note 194, at 22-23; Sprague, *supra* note 192, at 432-34 (views of Butler); Sprague, *supra* note 187, at 118-20 (views of Clark).

[198] *See* H. SIDGWICK, *supra* note 186, at 177-78.

[199] 1 J. LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING, bk. I, ch. II, § 1, at 65 (A. Fraser ed. 1894) (1st ed. London 1690). In his commentary on this passage, Fraser quotes a letter from Molyneux to Locke, August, 1692:

discern the way to happiness and the good life,[200] not everyone uses that ability properly. Furthermore, careful use of moral reason to draw correct conclusions from self-evident fundamental principles may require not merely a few minutes, but rather days, weeks, months, or years. Under this interpretation, complex and difficult deduction may be necessary when the matter for decision goes beyond the fundamental principles of morality, and only the expert can provide such analysis.[201]

Yet Locke's view would present problems of its own. These do not concern the ability of intuitionists to testify consistently with their own notions of the source and derivation of morality, so much as the judicial system's difficulty with evaluating and using their contribution. It is difficult to cross-examine or rebut an intuition, especially when the witness takes the view that those who do not share it are simply benighted or persons "whose reason has been either clouded by education or bad habits or overborne by selfish desires."[202] In a trial setting, moral testimony is useless unless supported by reasons and open to analysis and criticism.[203] Hence, the inexact match between intuitionist ethics and the adversary system of adjudication could lead many courts to reject it completely as a source of normative testimony.

4. Moral Stages and Development

The view that persons are naturally equipped to discover moral truths suggests another area of possible inquiry—the development, from birth to adulthood, of the faculties that operate in the process of drawing normative conclusions. Inspired by the work of Piaget on intellectual and moral development of children,[204] Lawrence Kohlberg[205] and others have recently

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One thing I must needs insist on to you, which is, that you would think of obliging the world with a Treatise on Morals, drawn up according to the hints you frequently give in your *Essay* of their being demonstrable according to mathematical method. This is most certainly true; but then the task must be undertaken only by so clear and distinct a thinker as you are, and there is nothing I should more ardently wish for than to see it.

Id. n.2. Locke never undertook the task, explaining in reply to Molyneux that "I saw that morality might be *demonstratively* made out, yet whether I am able so to make it out is another question. Every one could not have demonstrated what Mr. Newton's book hath shown to be demonstrable." *Id.*

[200] *See id.*, bk. II, ch. XXI, § 72.

[201] The idea of morality as a complex deductive system like Newtonian physics suggests that a moral expert would perform a function similar to that of a metallurgist explaining the significance of evidence relating to automobile parts. *See* Wylie v. Ford Motor Co., 502 F.2d 1292, 1294-95 (10th Cir. 1974).

[202] Sprague, *supra* note 187, at 119.

[203] *See supra* notes 137-40 and accompanying text; *infra* note 253 and accompanying text (reasoned-analysis requirement for expert moral testimony).

[204] *E.g.*, B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (1958); J. PIAGET, MORAL JUDGMENT OF THE CHILD (1932); J. PIAGET, THE ORIGINS OF INTELLIGENCE IN CHILDREN (1952).

[205] Kohlberg, *The Development of Children's Orientation Toward a Moral Order,*

attempted to explain the development of moral consciousness in precisely these terms.[206] Kohlberg identifies five stages of moral development, which he classifies into three levels—preconventional, conventional, and principled.[207] The stages range from simple obedience to rules at level one to an "internal commitment to principles of conscience [and a] respect for the rights, life and dignity of all persons," based on an awareness that "[p]articular moral/social rules are social contracts, arrived at through democratic reconciliation of differing viewpoints and open to change."[208] A related view identifies moral development in group rather than individual terms, and equates normative worth or goodness with evolutionary fitness.[209] Such "social Darwinism" today may be giving way to E.O. Wilson's sociobiology,[210] which equates human ethical behavior with the propensity to perpetuate one's genetic heritage.[211]

Proponents of moral-stage ethics will have, at most, a limited scope for testimony under current evidence law. It is tempting to think that those adults—according to Kohlberg's findings, about 25 percent of the population—who have advanced to the highest stage of ethical development possess a type of expertise that courts should recognize through admission of their testimony on ethical questions.[212] Yet Kohlberg offers no justifica-

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in 6 VITA HUMANA 11 (1963) [hereinafter cited as "Kohlberg, *Children's Development*"]; Kohlberg, *Moral Stages and Moralization: The Cognitive-Development Approach*, in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES 39 (T. Lickona ed. 1976) [hereinafter cited as "Kohlberg, *Moral Stages*"]; Kohlberg, *Stage and Sequence: The Cognitive Development Approach to Socialization*, in HANDBOOK OF SOCIAL THEORY AND RESEARCH, ch. 6 (D. Goslin ed. 1969) [hereinafter cited as "Kohlberg, *Stage and Sequence*"]; *see also* J. RAWLS, *supra* note 1, § 46 (development of moral sense).

[206] For a general discussion of this movement, see Lickona, *How to Encourage Moral Development*, in ANNUAL EDITIONS READINGS IN EDUCATION 89, 89-93 (instructor's copy F. Schutz ed. 1978).

[207] Kohlberg developed his theory by analyzing the responses of many subjects, aged 10, 13, and 16 at the outset of the study, to a number of moral dilemmas over a long period. The study, which began in 1958, was still in progress in 1980. *See* H. ROSEN, THE DEVELOPMENT OF SOCIOMORAL KNOWLEDGE 68-69 (1980) (describing Kohlberg's study).

[208] Lickona, *supra* note 206, at 90. Lickona asserts that the practical value of Kohlberg's moral stages thesis is its definition of "a natural, non-relativistic good for moral education: progress through the developmental stages." *Id.* at 91.

[209] *See generally* Flew, *Evolutionary Ethics*, in NEW STUDIES IN ETHICS 31 (A. Flew ed. 1967).

[210] E. O. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS (1975).

[211] Ethics is thus "biologized"—goodness is that which promotes genetic survival. Mattern, *Altruism, Ethics, and Sociobiology*, in THE SOCIOBIOLOGY DEBATE 462 (Caplan ed. 1978).

[212] Moral stages theories have a metaethical analogue in "ideal observer" theories. Mentioned as long ago as 1759 by Adam Smith, *see* Smith, *The Theory of Moral*

tion in his work for the assertion that "more mature" and "better" are synonymous.[213] Similarly, Wilson does not—and, perhaps, cannot[214]—substantiate the view that behavior that promotes genetic survival is, on that account, good. The insights of these authors, therefore, describe only what certain persons believe rather than what they should believe. Accordingly, a court might find their testimony helpful on matters of descriptive ethics but of little value on normative or metaethical questions.

5. Religious Ethics

To many, morality and religious doctrine are closely linked. Thus, courts in search of advice on ethical matters might naturally turn to religious

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Sentiments, in 1 BRITISH MORALISTS 257, 257-77 (L. Selby-Bigge ed. 1897), ideal observer theories hold that "X is right" means "an ideal observer would be disposed to approve of X." Although the apparent circularity of such theories has prevented their wide acceptance as accounts of normative ethics, recent efforts, such as that of Roderick Firth, are instructive for the light they shed on the problem of selecting and qualifying moral experts. *See* Firth, *Ethical Absolutism and the Ideal Observer*, in READINGS IN ETHICAL THEORY 200 (W. Sellars & J. Hospers eds. 1970); *see also* Kneale, *Objectivity in Morals*, 25 PHIL. 149 (1950) (discussing the difference between morality and the law according to both objective and subjective philosophers). The ideal observer, Firth says, is omniscient with respect to nonethical facts, *id.* at 212, omnipercipient and able to visualize all actual facts as vividly as if he were actually perceiving them, *id.* at 213-14, disinterested, *id.* at 214, dispassionate, *id.* at 217, consistent, *id.* at 218, and normal in other respects, *id.* at 220.

An intriguing aspect of Firth's criteria is that they closely track existing rules and practices concerning the selection of, and presentation of factual information to, judges and jurors. In theory, then, the ideal observer approach is a strong endorsement of the position that courts do not need moral experts because they are already as well-equipped as possible to resolve moral dilemmas. Yet Firth's view would still permit the use of moralists to make up for deficiencies in judges or jurors with respect to sensitivity, imagination, intellectual power, or practice at bringing those faculties into play in making moral judgments.

[213] At most, findings such as Kohlberg's indicate that individuals tend statistically to give different responses to moral dilemmas as they become older. Yet any of a number of factors, including socialization, indoctrination, moral growth or deterioration may explain the fact and direction of the change. There is no reason to suppose at the outset that answers given by older people in a particular social, political, and economic setting are morally better than answers provided by the young. *See* ALA. CODE § 16-40-3(c) (1977), which provides that instruction in the public schools:

> shall emphasize the free-enterprise-competitive economy of the United States of America as the one which produces higher wages, higher standards of living, greater personal freedom and liberty than any other system of economics on earth. It shall lay particular emphasis upon the dangers of communism, the ways to fight communism, the evils of communism, the fallacies of communism and the false doctrines of communism.

[214] G. MOORE, *supra* note 18, at 9-21 ("naturalist fallacy" of attempting to derive "ought" statements from "is" statements).

figures—priests, rabbis, ministers—as sources of normative expertise. This practice raises difficulties not implicated by secular moralists, but nonetheless sheds light on the relationship between evidence law and moral philosophy. Because analysis is relatively easy in the case of Catholic orthodoxy, our brief examination is limited to that narrow field,[215] and within that field to a single central authority—Aquinas.[216]

Aquinas held that men and women generally would act morally if they undertook a reasoned pursuit of their natural inclinations.[217] This is so partly because all persons possess an inclination toward "universal goods, such as consideration of the interests of other persons and the avoidance of ignorance," as well as inclinations toward self-preservation, physical well-being, sexual reproduction, and the care of offspring.[218] In choosing appropriate means in the pursuit of these ends, "the proximate rule is the human reason, the supreme rule is the Eternal Law."[219]

The "Eternal Law" thus guides moral action.[220] It is known to in some

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[215] It is difficult to generalize about Protestant and Jewish views of morals. Unlike Catholicism, with its hierarchical organization and strongly centralized traditions, the theology and morals of the Protestant and Jewish worlds are too fragmented to permit group treatment. Some Protestant and Jewish moralists approach ethics deontologically, emphasizing duty and conformity to Scriptural authority, *see, e.g.*, J. CALVIN, CHRISTIAN FAITH, *supra* note 170; J. CALVIN, SERMONS, *supra* note 170; J. KNOX, *supra* note 170, while others allow wide scope for conscience and personal decision-making, and emphasize the need to balance conflicting sources of moral obligation, *see, e.g.*, D. BONHOEFFER, ETHICS (1955); M. BUBER, *supra* note 170; S. KIERKEGAARD, EITHER-OR, *supra* note 149; S. KIERKEGAARD, SICKNESS UNTO DEATH, *supra* note 149. Still others seem to fit more squarely within the utilitarian tradition of Western moral thought. *See, e.g.*, R. NIEBUHR, INTERPRETATION, *supra* note 170; R. NIEBUHR, MORAL MAN, *supra* note 170.

[216] The views of St. Thomas Aquinas on the nature of morality and moral truth are significant because of the great respect accorded his teachings by the Catholic Church. Although Aquinas is not the source of infallible doctrine that the Pope is, *see* ST. THOMAS AQUINAS, *Summa Contra Gentiles*, bk. IV, ch. 76 (C. O'Neil trans. Notre Dame 1975) (first published under the title *On the Truth of the Catholic Faith*, Hanover House, 1957) (1st ed. 1264) (supremacy and infallibility of the Pope); *see also* Bourke, *St. Thomas Aquinas*, in 8 ENCYCLOPEDIA OF PHILOSOPHY 105, 113-14 (P. Edwards ed. 1967), his thought is nonetheless an indication of the trend of Catholic theology on any given point.

[217] Aquinas' views on morality are complex. *See generally* Bourke, *supra* note 216, at 105. Their essentials, however, so far as they concern us here, may be stated as follows: Right action is action which tends toward a good end. The good end for man is happiness or well-being, which comes from reasoned pursuit of natural inclinations. *Id.* at 112.

[218] *Id.* at 112.

[219] ST. THOMAS AQUINAS, *Summa Theologiae*, 1a2ae, q. 21, art. 1 (The Dominican Fathers trans. 1964-66) (1st ed. 1265-72).

[220] Aquinas held that an individual should go about the pursuit of his or her natural inclinations in as rational a way as he or she can, "keeping in mind the kind of agent

degree, because a "knowledge of [it] is imprinted [upon] us by God."[221] Yet this knowledge does not include perfect comprehension,[222] and some of the ends that constitute the good are only dimly and imperfectly known.[223] For these reasons, some elements of Eternal Law are made available as Divine Law—the law revealed in Scripture and interpreted by the Church.[224] Aquinas holds that Divine Law is often a better guide for moral conduct than natural inclinations and intellect as aided by Eternal Law, and thus concludes we should follow it in every precept it lays down.[225]

At one level, Aquinas' metaethical view leaves a broad scope for the operation of moral expertise. For example, a religious ethicist or theologian might usefully assist the court with the metaethical functions of moral reasoning and explication of concepts, or with the provision of descriptive testimony. In addition, a person who has studied scripture carefully and who is well-versed in the Church's interpretation of that scripture will be able to apply the interpretations authoritatively on a variety of normative questions. Most major religious systems would meet the requirements of consistency, completeness, respect for reason and facts, and consonance with society's notion of right and wrong, and would seem to map onto judicial functions, since most religionists are neither skeptics who would approach the courtroom with a sense of hopelessness, nor situation-bound intuitionists unable to justify their testimony with reasons and principles.[226]

There is, however, one major obstacle which might preclude resort to religious ethicists: the Establishment Clause of the first amendment. The first amendment bars governmental action "respecting an establishment of religion."[227] The Establishment Clause concerns both potential and actual fusion of church and state,[228] and requires that states remain neutral and

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that he is and the position that he occupies in the total scheme of reality." Bourke, *supra* note 216, at 112. The Eternal Law, however, always takes precedence in case of any conflict, and is always available in case of uncertainty.

[221] ST. THOMAS AQUINAS, *supra* note 219, 1a2ae, q. 93, art. 2 (citing Augustine, De lib. arbit. 1, VI, *reprinted in* 6 AUGUSTINE: EARLIER WRITINGS 102, 121 (J. Burleigh trans. 1953)); *cf. supra* notes 185-94 and accompanying text (ethical intuitionism).

[222] ST. THOMAS AQUINAS, *supra* note 219, 1a2ae, q. 93, art. 2.

[223] *Id.* q. 91, art. 4.

[224] *See id.*

[225] *Id.* arts. 4-5.

[226] Some religionists, however, might decline to testify on the ground that the judge and jurors can draw their own moral conclusions without the aid of an expert through reflection on their own natural inclinations, study of scripture, and resort to conscience.

[227] U.S. CONST. amend. 1. The Establishment Clause applies to the states as well as to the federal government. Everson v. Board of Educ., 330 U.S. 1, 8 (1947); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[228] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (Establishment Clause was intended to afford protection against three main evils: " 'sponsorship, financial

noninvolved with respect to religious matters.[229] In scrutinizing laws under the clause, courts generally require that governmental action have a secular purpose, a primary effect that neither advances nor inhibits religion, and avoid excessive entanglement with religion.[230]

A court seeking to justify the use of religious moralists would first need to establish that neither the purpose nor primary effect of such testimony is advancement of religion. In many cases, these requirements could be easily satisfied—the purpose of the testimony is to render a decision in accord with morality and sound social policy; the primary effect is the wise resolution of a secular moral question. Of course, one might respond that religious figures on the witness stand may so effectively sway jurors that they will merely adopt the expert's religiously-based view, thereby institutionalizing religious beliefs.[231] Yet cases upholding various abortion and Sunday closing laws against charges of undue religious influence on legislatures support the view that hearing from religionists is not necessarily synonymous with instituting a particular sect's precepts.[232] So long as the expert's testimony is secular in

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support, and active involvement of the sovereign in religious activity.' ") (citing Walz v. Commission, 397 U.S. 664, 668 (1970)).

[229] School Dist. v. Schempp, 374 U.S. 203, 222 (1953).

Of course, courts generally reject religious belief or disbelief as a requirement for giving testimony, *see* FED. R. EVID. 601; C. MCCORMICK, *supra* note 6, § 63, and as grounds for impeachment, *see* FED. R. EVID. 610; C. MCCORMICK, *supra* note 6, § 48; *cf.* Government of the Virgin Islands v. Peterson, 553 F.2d 324, 329 (3d Cir. 1977) (evidence of religious belief inadmissible to enhance credibility of witness).

[230] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13. *See generally* J. NOWAK, P. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 852-71 (1978).

[231] Similarly, to the extent qualification depends on the sect's consonance with norms and values incorporated in law, *see supra* note 140 and accompanying text, the court might impermissibly "prefer one religion over another" in determining who is qualified to testify. Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947); *cf.* Torcaso v. Watkins, 367 U.S. 491, 495 (1961) (statute requiring an oath professing belief in God violates the first amendment; states may not force persons "to profess belief or disbelief in any religion," or favor theistic religions over nontheistic religions and nonbelievers).

[232] *See* Harris v. McRae, 448 U.S. 297, 319-20 (1980) (upholding the Hyde Amendment's limitations on the use of federal funds to reimburse the cost of abortions under the Medicare program; that legislation happens to coincide with religious tenets does not violate the first amendment); McGowan v. Maryland, 366 U.S. 420, 442, 452 (1961) (upholding Sunday closing laws); Womens Servs., P.C. v. Thorne, 483 F. Supp. 1022, 1032-40, 1037 & n.14 (D. Neb. 1979) (upholding an abortion law sponsored by a group "embracing the 'pro-life philosophy' " and passed after legislators had heard the views of "expert[s] in religion"), *aff'd per curiam*, 636 F.2d 206, 209 (8th Cir. 1980). In these cases, the courts noted that coincidence of religious views and secular legislation did not contravene the Establishment Clause, for such a standard would stifle the public expression of religious groups and necessitate invalidation of many laws, including prohibitions against murder and incest. *But cf.* Epperson v. Arkansas, 393 U.S. 97 (1968) (striking a statute forbidding the teaching

nature, one might contend, any enhancement of the expert's sect is merely incidental.

In practice, however, moralists trained in religious disciplines may be unable to separate secular views and religous doctrine, thus raising entanglement problems.[233] Assume, for example, that a parent in a child custody dispute introduced testimony by a priest concerning the moral unfitness of the other parent, an avowed homosexual. Assume further that cross-examination revealed that the priest's recommendation rested squarely upon biblical interpretation.[234] The homosexual parent might then seek to respond by introducing a minister from another denomination to testify that the passage relied on by the priest incorrectly states Divine Law, or that the priest misapplied it to the child custody context. To the extent that a court gave weight to one of these views in deciding the case, it would seem to be taking sides in a religious dispute[235] and thus violating the first amendment.[236]

In cases of this nature, courts might assess constitutional objections within the framework proposed by Professor Jane Friedman.[237] Professor Friedman's test attempts to set workable limits for legislation in areas in which moral and religious motivations interpenetrate. It requires that states not place their authority "behind a moral precept . . . not buttressed by any societal consensus, but . . . the subject of widespread controversy and debate . . . ."[238] Further, the action must not force nonadherents "to shape

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of evolution theories on grounds of no secular purpose or effect); Grendel's Den, Inc. v. Goodwin, 662 F.2d 102 (1st Cir. 1981) (statute permitting churches to veto certain liquor license application has impermissible effect of advancing religion), *aff'd sub nom.* Larkin v. Grendel's Den, 51 U.S.L.W. 4025 (U.S. Dec. 13, 1982).

[233] The nonentanglement requirement reflects a "desire to preserve the autonomy and self-government of religious organizations" as well as "a conviction that government must never take sides in religious matters." L. TRIBE, *supra* note 4, at 871.

[234] *See* I *Corinthians* 6:9-10 ("Do not be deceived; neither the immoral, nor . . . homosexuals . . . will inherit the kingdom of God.").

[235] *See supra*.note 233.

[236] Courts considering entanglement issues often emphasize the history of the church-state relationship in question, and are more willing to uphold long-established practices since upholding them appears neutral. *See* Bogen v. Doty, 598 F.2d 1110, 1114 (8th Cir. 1979) (upholding prayers by clergy at public meetings). *But see* McDaniel v. Paty, 435 U.S. 618, 628-29 (1978) (Tennessee's prohibition against ministers or priests serving as representatives at limited constitutional conventions violates the Free Exercise Clause; state failed to show that historical fears of church-state entanglement remain compelling); Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947) (emphasizing the importance of appearance of neutrality). Thus, that courts have not regularly invoked the aid of religious ethicists might further an entanglement claim.

[237] Friedman, *The Federal Fetal Experimentation Regulations: An Establishment Clause Analysis*, 61 MINN. L. REV. 961, 976-85 (1977).

[238] *Id.* at 977.

their behavior in accordance with the beliefs of adherents," and must not result from a "debate . . . waged in religious terms . . . [nor from] strong religious pressures."[239] Under this standard, testimony from religiously trained ethicists is permissible only in cases requiring a choice among rules of decision which are supported by a respectable body of secular opinion. When this condition is not met, or when it is met but there is a likelihood that allowing the religious moralist to testify would foster a contest in the courtroom among competing religious doctrines, the court should exclude the testimony. Moreover, whenever an adverse party ferrets out a sectarian basis for the expert's testimony through cross-examination, the court should order the testimony stricken from the record. Thus, although courts need not establish a per se prohibition against the use of religious moralists, the practical incidence of such testimony may be severely limited by first amendment concerns.

VI. CONCLUSION

Courts of law have permitted expert moralists to perform functions ranging from description of community mores, to metaethical analysis of terms and modes of argument, to substantive resolution of normative problems. In the past, this has occurred with little controversy and little recognition that such testimony might present unique problems not presented by more familiar types of expert testimony. It seems likely, moreover, that resort to expert ethicists and moralists will increase as advancing technology, especially in the medical and biomedical sciences, poses human problems never encountered before.[240] Further acceleration may come from the increased readiness of other branches of government to assign major roles in ethical decisionmaking to individuals and groups believed to be expert at moral and policy analysis[241] and from the general trend of courts and attorneys in favoring expert testimony of all sorts under the helpfulness standard.[242] Thus, careful examination of the issues posed by expert ethical testimony is essential.

Based on the analysis undertaken in this Article, the results appear mixed—certain types of ethical testimony are far more problematic than others. For example, the law of evidence poses little obstacle to any type of descriptive testimony on questions concerning the morality or immorality of acts or policies according to specified ethical systems, the morality or im-

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[239] *Id.*

[240] *See* cases cited at *supra* note 10; *see also* MacIntyre, *supra* note 22, at 16-17 (society's need for ethical guidance presently at one of three historical peaks); Yesley, *supra* note 1, at 5 (ethics advisory boards in areas of biomedical and behavioral science now permanent institutions in the federal government).

[241] *See supra* note 14 (use of moralists and ethicists in advisory commissions and as advisors to legislative committees).

[242] *See supra* notes 74-79 and accompanying text; 32 C.J.S. *Evidence* § 546(62), at 265 (1964 & Supp. 1980).

morality of acts or policies according to most or all moral systems, or the morality or immorality according to contemporary standards in given communities.[243] Expert analysis also may reveal lack of agreement among moral systems about particular questions, leaving the court free to draw its own conclusions. Similarly, metaethical functions such as assisting the court with respect to moral reasoning or analysis seem relatively uncontroversial.

The case is much closer, however, with respect to the ethicist's normative functions—declaring certain actions or rules right or wrong absolutely or determining that one individual rather than another ought to be entrusted with making a moral decision. Review of leading schools of ethical and metaethical thought suggests that expert witnesses drawn from their ranks could serve as acceptable witnesses. Although these various ethical schools analyze moral problems differently, and at times come to disparate conclusions,[244] lack of unanimity need not pose an insurmountable barrier. After all, courts continue to find expert testimony from warring schools of psychiatry, medicine, and art criticism helpful.[245] Yet disagreement on moral questions may exceed that found in other areas, and for that reason, a court might well exclude normative testimony on "state of the art" grounds.[246]

Courts might also disagree on the manner and extent to which ethical experts can transmit advice to nonexperts. A number of highly regarded

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[243] In each of these examples, the expert merely reports a correspondence between acts and norms in a case in which the law makes this relevant.

[244] *Compare supra* note 145 and accompanying text (Sophists' view that goodness is equivalent to enlightened self-interest), *with supra* notes 217-24 and accompanying text (Aquinas' position that rightness consists of promoting certain universal goods, as guided by conscience and scripture) *and supra* notes 166-82 and accompanying text (deontological view that right conduct consists in following the path of duty).

[245] *See, e.g.*, Maryland Casualty Co. v. Industrial Accident Comm'n, 64 Cal. App. 2d 162, 166-67, 148 P.2d 95, 97 (1944) (expert testimony sufficient to support Commission's finding despite conflict with other expert testimony); Sanborn v. Elmore Milling Co., 152 Me. 355, 359, 129 A.2d 556, 558 (1957) (conflicting expert testimony regarding the cause of death of certain turkeys considered by jury with all other relevant evidence); C. MCCORMICK, *supra* note 6, § 18 at 40 n.31 (psychiatric experts may be "dynamically" or "organically" oriented).

[246] *Compare* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) ("Just when a scientific principle . . . crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized . . . [as] sufficiently established to have gained general acceptance in the particular field to which it belongs."), *with* MacIntyre, *supra* note 22, at 17 (ethical schools proceed from different premises and are hence "incommensurable," citing diametrically opposed premises and conclusions of Rawls and Nozick).

One of the authors of this Article believes that on matters of normative ethics, speculation and conjecture set in at approximately the point where general consensus among ordinary persons leaves off. Expert normative testimony would be useful only up to this point, although experts may still be able to assist on matters of descriptive ethics and metaethics.

moral philosophers believe that normative truths exist objectively and that individuals who are able to discern them may help others do so.[247] Experts who hold these views are likely to welcome the opportunity to testify in court, and to have no objection to the testimony of others.[248] Other equally renowned moral philosophers, however, hold that normative truths are not transmissible under circumstances approximating those found in a typical courtroom.[249] Still others view moral truths as linked with religious doctrine and training in a way that poses problems of church-state entanglement. What standard then, should guide the courts?

Mindful of problems inherent in this area, we propose that courts permit expert moral testimony on questions of normative ethics when the expert's testimony satisfies the proposed three-part test, when the other side is free to introduce experts of its own, and when no strong countervailing reason militates against such testimony.[250] Under these criteria, the testimony of the clergyman in *Hart* appears to have been proper.[251] The issue confronting the court was one of morals or policy.[252] No existing case law guided the judge's discretion. The witness had training in moral philosophy and his testimony promised to prove helpful to the court in resolving the dilemma before it. Moreover, he apparently testified on nonreligious grounds and had it wished, the opposing party could have cross-examined the witness and introduced experts of its own.[253]

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[247] *See supra* notes 166-76, 185 and accompanying text (views of various deontologists).

[248] *See supra* notes 182-83, 185 and accompanying text.

[249] *See supra* notes 148, 202-03 and accompanying text (views of Socratic skeptics and moral intuitionists); *cf.* Burch, *Are There Moral Experts?*, 58 MONIST 646 (1974). Burch defends the idea that there are "moral experts"—but not in the legal sense—against various schools of moral skepticism. He analyzes the "repulsive" quality of this view, concluding that the repulsiveness arises from the mistaken tendency to see the expert as "some sort of arrogant philosopher-king, a king of Mustapha Mond and Grand Inquisitor rolled into one." *Id.* at 658. Instead of issuing imperious edicts, Burch's moral experts would transmit their expertise indirectly by example, as "figures like Confucius' 'superior man,' Christianity's 'saint,' or Philosophy's 'wise man.' " *Id.* Moral expertise, therefore, would not be an exotic quality possessed by a favored few, but a quality that "ordinary men striving to live a morally better life [may] keep before their minds as the moral ideal." *Id.* Unfortunately, Burch never addresses the problem of how we can tell when we have before us one of these exemplars.

[250] *See supra* notes 123-36 and accompanying text (discussing potential invasion of the judge's or jury's province).

[251] *See supra* notes 52-60 and accompanying text.

[252] A rule permitting operations under these circumstances keeps the donee alive at relatively little cost to the donor. On the other hand, it treats the incompetent minor donor as an organ bank for the benefit of the relative.

[253] *See* Dworkin, *supra* note 1, at 994-1004 (legal norms, to be defensible, must be supported by reasons; otherwise laws are indistinguishable from quirks, preferences,

In summary, qualification and examination of an expert introduced to testify on a question of normative ethics should center around the following questions: (1) Does the witness derive conclusions from sources other than religious doctrine?; (2) Is the testimony impartial?; (3) Are the witness' recommendations "considered," and supported by adequate reasons?; (4) Does the witness' testimony promise to illuminate the issue at hand and help the judge or jury decide?; and (5) Are the expert's moral views consistent with the considered moral judgments of thoughtful members of our society? Negative answers to many of these questions should lead a court to exclude the testimony, while positive answers to all of them would suggest admission. In either case, merely phrasing the inquiry in such terms should lead to more explicit recognition of the importance of ethical analysis in legal decisionmaking.

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and prejudices, and are inadequate bases for regulating human conduct in a free society).

Other cases of normative ethical testimony would not fare so well. For example, although moralists might offer metaethical testimony that reasons underlying acts of civil disobedience are religious and moral in nature, *see* Font v. Laird, 318 F. Supp. 891, 893 (D. Md. 1970), they should not be permitted to demonstrate that those acts are in fact, moral, by reciting Scripture. Such testimony would likely violate the first amendment prohibition against religious testimony. *Cf.* Rachels, *supra* note 22, at 40 (arguing that theologians are most helpful "when they are least theological").

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