Giles R. Scofield, "Ethics Been Very Good to Us," *The Journal of Clinical Ethics* 23, no. 2 (Summer 2012): 165-8.

Ethics Been Very Good to Us

Giles R. Scofield

ABSTRACT

This commentary asks whether ongoing efforts to accredit, certify, and credential hospital ethics consultants are nothing other than an illegal restraint on trade masquerading as an effort to protect the public from harm.

THE HORROR! THE HORROR!

Arguably, if there's one thing worse than not allowing anyone to be a hospital ethics consultant, that is and would be allowing just anyone to be a hospital ethics consultant. That being given, it follows like night after day that something must be done to see to it that someone, but not just anyone, may do that which hospital ethics consultants do—whatever *that* is. Hence the clarion call to do something, especially given that some 29,000 unqualified individuals are—or may be—devoting 314,000 hours to performing 36,000 consultations *per annum,* to doing that which only qualified persons can, should, and may do.[1] To do nothing would be to enable, if not encourage and invite, the long-predicted—and just as long awaited—"ethics disaster" to occur. *Ergo*, we must accredit the programs that train individuals to be ethics consultants, and either certify or credential individuals to be hospital ethics consultants. (I think it really is and eventually both/and and not either/or, but that, given the situation in which the field finds itself, some are reaching for this, others for that, way of seeing to it that everyone practices "safe ethics.") If ethics consultants simply do all of the above, they'll be able to rest easy, having dodged the "ethics disaster" bullet.

IF IT DOESN'T GEL, IT ISN'T ASPIC

Cogent though this line of reasoning seems to be, its appeal lasts only for as long as one does not think about it. After all, given that hospital ethics consultants have been known to disagree among themselves, it neither is nor can be the case that to merely disagree with a metaphysician constitutes an "ethics disaster," any more than merely disagreeing with a physician renders one incompetent. On the contrary, given that we live in a democratic, pluralistic society, one in which, *qua* Kant, individuals are expected to have the courage to think for themselves, one should expect such disagreements to occur, and *not* expect the presence of such disagreements to be bemoaned. So, where *is* the "ethics disaster," that is, the specific and iden-

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tifiable harm that has been, is, or will be caused by the presence of some unqualified individual and by the absence of a qualified one?

Moreover, for years now, everyone's been talking about how very important "capacity building" is. If it is the case that all those people are spending all that time doing all those consults—and the earth *still* has not fallen into the sun—I'd say that it looks like capacity building is working, as well it should be 20 years after the *Cruzan* case. To the extent that ethics is part of a healthcare professional's training, and is regarded as integral to one's professional development, anyone who believes in capacity building should be pleased, not dismayed, with the results of the study by Fox and colleagues.[2] That the results of that study have given rise to the call to accredit programs, and to certify and/or credential hospital ethics consultants, suggests that there is and must be something more to all of this than meets the eye, and that the "ethics disaster" must be something other than what qualified ethicists profess it to be.

What else might that something be?

FOLLOW THE MONEY

Given the preceding analysis, one cannot rule out the possibility that the move to accredit programs, and to certify and/or credential hospital ethics consultants, has more to do with protecting market share than it does with protecting patients and the public from the harm that supposedly could and pre-supposedly would befall them otherwise. In other words, the only "ethics disaster" that everyone is really worried about is that somebody other than certified, credentialed hospital ethics consultants from accredited programs might not have much work to do, and find themselves less than fully employed. And because, as every ethics consultant knows, the best defense is a good offense,[3] the best way to do something about the competition is to do something about the fact that there even is competition; and the best way to do that is to simply close ranks, that is, by making it more difficult for anyone other than a fully and properly qualified ethics consultant—whatever *that* means—to enter the market (credentialing) and by having the various existing producers of these "professional" services agree amongst themselves who it is that may—and who it is that may not—market their ethics "wares." Basically, the message is: "It's our way or the highway." Either everybody plays by our rules—that is, rules that we created and by ourselves (and that we've already modified once, in the case of the so-called *Core Competencies*,[4] haven't finished yet, in the case of the so-called Code of Ethics,[5] and have yet to work out, in the case of exams, tests, et cetera)—or they don't get to play at all.

The problem with this approach is that it means that the producers and suppliers of hospital ethics consultation services use their existing market power in order to "corner," that is, monopolize, the market. And that they are doing so not by asking the state to legitimate this monopoly, which it does by creating a new profession, which is then subject to public and private regulation, but by taking it upon themselves to do so; *and* by doing so when there is no reason to believe that the public is at risk or has suffered harm, but when there is every good reason to believe that hospital ethics consultants believe that they themselves are at risk, that they themselves have suffered harm—just think of how much income they would have had if they themselves could have taken 314,000 billable hours to provide 29,000 consultations! The *real* ethics disaster is not simply that somebody else is doing some of this, but that *these* as yet unlicensed individuals are doing it instead of *those* unlicensed professionals. In short, the market has spoken, and hospital ethics consultants don't like what the market is saying. Therefore, instead of simply allowing the market to "do its thing," they are going to determine what the market's answer should be, one that, coincidentally, preserves their power by eliminating their competitors. And how are they going to do that? By rigging the game, that's how. Instead of moving the goalposts, they're going to establish the rules of the game, the rules that determine how the game ought to be played—by pre-determining who gets to play it; and do so in a manner that, not surprisingly, gives them a competitive edge. If eliminating the competi-

tion requires doing violence to how the game of free market competition gets played, then so be it. After all, it's a matter of survival, isn't it?

While it remains to be seen what, if any, the anti-trust implications of this situation prove to be, off the top of my head, I'd say that getting together to create and protect an ethics cartel by private, non-transparent means—instead of asking a state legislature, by public, and transparent means—to "do something" about this situation may not be a reasonably prudent way to pursue professionalization.[6] Complex and uncertain though the anti-trust laws are and anti-trust analysis can be, one thing is both certain and irrefutable: those laws exist to protect competition, not competitors.[7] That being the case, then to the extent that all these private instances of concerted action[8] have a demonstrable anti-competitive effect without a justifiable pro-competitive effect, one would have to have lived under a rock for the past 100 years to think that there might not be—that there cannot possibly be—an anti-trust issue lurking in there somewhere.[9] And, further, given that the First Amendment is, among other things, supposed to protect the "free market of ideas," especially moral ideas, and that all of this is supposed to occur within the "rough and tumble" of a democratic society, I'm not sure that the argument that a small group of ethics consultants have built a "better truth trap," that is, improved upon the First Amendment itself, is going to find a lot of buyers.

IN YOUR FIELD OF DREAMS

Ethics consultation is not simply the philosopher-king's new clothes. It's also the new philosopher's stone. Instead of turning lead into gold, it turns metaphysical capital into real capital, that is, cultural and symbolic capital, the kind of capital that one can make real money with. Now that "expertise is commodified,"[10] ethical expertise is just one more commodity, and ethics experts the purveyors of "fine food for thought." As Daniel Callahan once observed: "To put the matter bluntly, I make my living as a specialist in ethics. Some people sell shoes, while others peddle computers and automobiles. I purvey ethics: it is my profession and trade. People pay money to hear me give lectures, visit me to solicit my views, and buy my books with the expectation that I will have something useful to say about making good moral judgments."[11] He immediately also said, "I like this kind of life, but I have never been entirely comfortable with it."[12]

Instead of asking, "What's not to like?"—the answer being obvious—the field might be well served by paying attention to what Callahan said a few years later. "Ethics is full of the possibility for self-deceit, for ideological captivity, and—of late—for succumbing to the lure of money. It takes more than clear thinking to deal with those traps."[13]

It takes more than clear thinking to dodge all of the bullets that one encounters on the path to professionalization. Ethics consultants seem to have avoided two bullets, namely, the democratic controls that are supposed to govern professionalization—licensure[14] at the macro-level and informed consent[15] at the micro-level—only to find themselves confronting and confronted by another bullet: the anti-trust laws. But, who knows? Maybe Congress will declare the practice of ethics consultation to be America's other pastime and exempt it too from the reach of the anti-trust laws.

NOTES

1. E. Fox, S. Myers, and R.A. Pearlman, "Ethics Consultation in United States Hospitals: A National Survey," *American Journal of Bioethics* 7, no. 2 (2007): 13-25; N. Dubler, M. Webber, and D. Swiderski, "Charting the Future: Credentialing, Privileging, Quality, and Evaluation in Clinical Ethics Consultation," *Hastings Center Report* 39, no. 6 (2009): 23-33.

2. Ibid.

3. See, G.J. Agich, "Defense Mechanisms in Ethics Consultation," *HEC Forum* 23 (2011): 269-79; see also, R. Baker, "In Defense of Bioethics," *Journal of Law, Medicine & Ethics* 37 (2009): 83-92, which might be better called "In Defensiveness of Bioethics."

4. *Core Competencies for Health Care Ethics Consultation,* 1st ed. (Glenview, Ill.: American Society for Bioethics and Humanities, 1998); *Core Competencies for Healthcare Ethics Consultation,* 2nd

ed. (Glenview, Ill.: American Society for Bioethics and Humanities, 2011).

5. "Report and Recommendations of the ASBH Advisory Committee on Ethics Standards (ACES)," September 2006, *http://www.asbh.org/uploads/files/membership/protected/pdfs/acesrprt.pdf,* accessed 3 May 2012.

6. J.C. Fletcher and D.E. Hoffman, "Ethics Committees: Time to Experiment with Standards," *Annals of Internal Medicine* 120 (1994): 335-8. According to Nancy Dubler, "if 29,000 largely unsupervised, unexamined persons are mucking around with the lives of families and patients, that demands action now[.]" N.N. Dubler, "Author's Reply," *Hastings Center Report* 40, no. 3 (2010): 8. It's a matter of survival, after all. "[W]e have no time to wait . . . if 29,000 persons are engaging in this intervention now. *** [I]n the bunker, you don't try to understand the motivation for the bullet or the grenade; you try to survive." Ibid.

7. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., et al.,* 429 U.S. 477, 488 (1977), citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

8. According to the report submitted by the Clinical Ethics Consultation Affairs Committee to the Board of Directors of the American Society for Bioethics and the Humanities, part of this activity will consist of "encouraging" groups such as the Joint Commission and the American Hospital Association to "motivate hospitals to require a credentialing process for persons involved in CEC." Clinical Ethics Consultation Affairs Committee (CECA), "CECA Report to the Board of Directors, American Society for Bioethics and Humanities: Certification, Accreditation, and Credentialing (C/A/C) of Clinical Ethics Consultants," October 2010, *http://www.asbh.org/uploads/files/ceca%20c-a%20report%20101210.pdf,* accessed 3 May 2012, p. 6

9. C.C. Havighurst and N.M.P. King, "Private Credentialing of Health Care Personnel: An Antitrust Perspective. Part One," *American Journal of Law & Medicine* 9 (1983): 131-201; C.C. Havighurst and N.M.P. King, "Private Credentialing of Health Care Personnel: An Antitrust Perspective. Part Two," *American Journal of Law & Medicine* 9 (1983): 263-334; *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988).

10. L.M. Rasmussen, "Introduction: In Search of Ethics Expertise," in *Ethics Expertise: History, Contemporary Perspectives, Applications*, ed. L.M. Rasmussen (Dordrecht, The Netherlands: Springer, 2005), 1.

11. D. Callahan, "Professional Morality: Can an Examined Life Be Lived?" in *Philosophical Perspectives on Bioethics,* ed. L.W. Sumner and J. Boyle (Toronto, Ont.: University of Toronto Press, 1996), 9.

12. Ibid.

13. D. Callahan, "Doing Good and Doing Well," *Hastings Center Report* 31, no. 2 (2001): 19.

14. See, for example, G.J. Agich, "Clinical Ethics: A Role Theoretic Look," *Social Science & Medicine* 30 (1990): 389-99, pp. 394-5.

15. S.G. Finder, "Is Consent Necessary for Ethics Consultation?" *Cambridge Quarterly of Healthcare Ethics* 18 (2009): 384-96.