Seeking a Seat at the Table: Has Law Left Environmental Ethics Behind As It Embraces Bioethics?

Heidi Gorovitz Robertson
SEEKING A SEAT AT THE TABLE: HAS LAW LEFT ENVIRONMENTAL ETHICS BEHIND AS IT EMBRACES BIOETHICS?

HEIDI GOROVITZ ROBERTSON*

ABSTRACT

Long before its crystallization as an academic discipline in the 1960s and '70s, bioethics was evolving from isolated ideas and theories into a coherent and practical field. Today, people train in academic bioethics programs and seek careers as bioethicists. Hospitals, universities, government organizations, and corporations hire bioethicists, where they use their training to help make decisions regarding life or death issues in science and medicine. Although there is controversy over the extent and content of the influence they exert there, bioethicists have achieved a seat at the decision-making table.

Environmental ethics also emerged in the 1960s and '70s, beginning most notably when Rachel Carson opened America's eyes to the environmental ills of the times. There are now many major environmental laws and countless volumes of regulations implementing them. However, while people study environmental ethics, mainly in philosophy programs, they do not train for careers as practicing environmental ethicists. It is difficult even to find people who hold themselves out as "environmental ethicists" rather than "environmentalists" or "environmental activists," with the exception of those who are really academic philosophers. Unlike bioethicists, environmental ethicists have not achieved a place at the decision-making table. They have, at best, a stool outside the door.

In this article, I explore the development of bioethics and environmental ethics. Although I consider various definitions of the fields and what their practitioners seek to achieve in practice, primarily I consider the role of law in the development and practice of bioethics and of environmental

*Associate Professor of Law, Cleveland-Marshall College of Law, and Associate Professor of Environmental Studies, Levin College of Urban Affairs, Cleveland State University. The author gratefully acknowledges the support of past summer research grants from the Cleveland-Marshall Fund, the exemplary research assistance of Laurent Gloerfelt, J.D. 2007, and the comments on earlier drafts of Professors Dena Davis, Patricia Falk, Samuel Gorovitz, and of Lucia Wocial, nurse ethicist at Clarian Hospitals, Indianapolis.
ethics. I ask whether the existence of laws and legal opinions encouraging
the use of bioethicists in decision making was pivotal in promoting the
development of that field, and correspondingly, whether the absence of
similar laws and opinions promoting the use of environmental ethicists
has retarded the development of an influential field of applied environ-
mental ethics. Finally, I suggest that environmental ethicists propose a
statement of ethical principles for environmental decision making, similar
to the work done by bioethicists in the Belmont Report, in the hope that
those principles begin to be considered in law making, leading law to
courage the use of environmental ethicists in environmental decisions.

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INTRODUCTION

Long before its crystallization as an academic discipline in the 1960s and '70s, bioethics was evolving from isolated ideas and theories into a coherent and practical field. It began with philosophers and theologians who spoke and wrote of morality as applied to health care decisions. Today, people train in academic bioethics programs and seek careers as bioethicists. Hospitals, universities, government organizations, and corporations, hire bioethicists, though sometimes reluctantly, where they use their training to help make decisions regarding life or death issues in science and medicine. Professional associations of bioethicists exist and thrive, and many journals and other types of publications seek out and publish their work. Many state and federal laws and regulations require or encourage their existence. In other words, although there is controversy over the extent and content of the influence they exert there, bioethicists have achieved a seat at the decision-making table.

Environmental ethics also emerged in the 1960s and '70s, beginning most notably when Rachel Carson opened America's eyes to the environmental ills of the times. Following her pivotal work toward fostering public awareness and change in pesticide policy, Americans pushed the government to enact environmental laws. There are now many such laws and countless volumes of regulations implementing them. Universities offer academic courses in environmental ethics, but not in the same abundance as courses and programs in bioethics. While people study environmental ethics, mainly in philosophy programs, they do not routinely train

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1 RACHEL CARSON, SILENT SPRING (Houghton Mifflin Co. 1963).
2 See, e.g., CLARE PALMER, ENVIRONMENTAL ETHICS 115 (1997) (arguing that the National Environmental Policy Act of 1970 "came about in response to the rise of environmental concern during the 1960s, following the publication of Rachel Carson's Silent Spring."); ROBERT E. TAYLOR, AHEAD OF THE CURVE: SHAPING NEW SOLUTIONS TO ENVIRONMENTAL PROBLEMS 11-22 (1990) (listing such laws as the National Environmental Policy Act, the Clean Air Act, and the Clean Water Act, in addition to the establishment of the Environmental Defense Fund in 1967, Earth Day in 1970, and the Environmental Protection Agency the same year, in reaction to Carson's book Silent Spring).
3 See infra Appendix 1 for a listing of bioethics programs around the country. For a listing of environmental ethics programs, see Center for Environmental Philosophy, Environmental Ethics Graduate Programs, http://www.cep.unt.edu/other.html (last visited Jan. 10, 2008).
for careers as environmental ethicists. Although there is a well-respected journal dedicated to the topic, there is no professional association of environmental ethicists. It is even difficult to find people who hold themselves out as “environmental ethicists” rather than “environmentalists” or “environmental activists,” with the exception of those who are really academics in philosophy. To the extent applied environmental ethicists even exist, lawmakers and agencies do not seek their advice, and other environmental decision makers do not hire them. Corporations do not bring them in to help make decisions that affect the environment. No laws require or encourage their existence. Studies regarding environmental decision making routinely dismiss environmental ethicists, or lump them into the broader category of “environmental advocates.” As a result, their opinions are marginalized or dismissed. Unlike bioethicists, environmental ethicists, such as they are, have not achieved a place at the decision-making table. They have, at best, a stool outside the door.

Why is this so? What makes these two substantive tracks of ethics, born and developed around the same time, diverge so dramatically when it comes to their practical application? Of course, many potential explanations exist and likely several contribute to the divergence. For example, is one reason for the divergence the idea that bioethics, like business ethics, often deals with issues concerning a profession, medicine, whereas environmental ethics deals with the environment, which is not a profession? How about economics? Economics must be an important factor in the relative positions of influence of the two fields of ethics. For example,

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5 These, of course, include J. Baird Callicott, Ralston Holmes, and some other prominent environmental philosophers. See The Online Gadfly, Environmental Ethics: A Directory, http://gadfly.igc.org/ee-list.htm (last visited Jan. 10, 2008) (listing 222 professors as specializing in environmental ethics).

6 See David Schmidtz & Elizabeth Willott, Why Environmental Ethics?, in Environmental Ethics: What Really Matters, What Really Works xi, xii (David Schmidtz & Elizabeth Willott eds., 2002). This article will not address the relative professionalism of the two disciplines to determine whether one explanation for environmental ethics’ practical lag behind bioethics is that, unlike medicine and business, the environment is not generally viewed as a profession.

7 This article will consider only briefly the certainty that economics is a major obstacle
businesses might well be reticent to hire environmental ethicists who will tell them not to site buildings where they would like, not to sell products that will make them money, or not to buy supplies from the cheapest sources because of the adverse effect those actions would have on the environment. Also, the difference may lie partly in the nature of the problems each field addresses. Whereas bioethicists handle problems affecting individual people, environmental ethicists would handle problems that tend to affect populations rather than individuals. They are likely to be longer term issues, rather than urgent life or death concerns. Finally, has law, or the fields' uses of law, affected their divergent trajectories? Related to the role of law is governments' role in policy making.

Although there are many reasons why bioethics and environmental ethics have followed different paths, this article will focus on the role of law. Numerous laws at the state and federal levels exist requiring or encouraging the involvement of ethicists in medical decision making, such as those requiring hospitals to have ethics committees. Perhaps such laws have bolstered bioethics' influence. Or perhaps the laws exist because bioethicists were already influential at the time of their enactment. If so, they reinforced the field's growing influence. No such laws exist to support or reinforce a field of applied environmental ethics. In fact, few laws exist that even mention environmental ethics. Although committees in the legislative and executive branches helped develop the field of bioethics, the government has played no such role in developing environmental ethics. I suggest that the lack of laws, regulations, and government involvement, has helped marginalize the practical influence of environmental ethics.

to environmental ethics-informed decision making, leaving in-depth study of this issue for the economists. See Eugene Hargrove, Taking Environmental Ethics Seriously: The Challenge before Us, in ENVIRONMENTAL ETHICS AND THE GLOBAL MARKETPLACE 16, 18-20 (Dorinda G. Dallmeyer & Albert F. Ike eds., 1998). In fact, Hargrove goes on to say that economics is the “major obstacle to environmental policy and decision making based on environmental ethics.” Id. For example, he points out that environmental economist, Allen Kneese, testified before a congressional committee in 1970 that “environmental economics eliminated the need for the development of an environmental ethic,” that is, a claim that nature ought to have rights. Id. at 20. Hargrove also states that “people are being taught that values in general are irrelevant and that environmental policy can be formulated in a value-free manner, despite the fact that this training is counterintuitive.” Id. at 29 (emphasis added). Hargrove calls this kind of training “inoculation against value training.” Id.

Infra Part II.B.
Indeed, the development of the discipline of environmental ethics may have been retarded in part by environmental advocates' use of environmental laws in ways that obfuscate the ethicists' true purposes. By this I mean that environmental advocates often use environmental laws to stop a development project, and claim that, for example, an environmental impact statement is inadequate or a species is endangered. Although these violations of law may well be true, what environmentalists really want is to stop the project on the grounds that it violates some often unstated principles of environmental ethics. Environmental lawyers and advocates do not often speak of the ethical issues. The laws provide no basis for challenging projects on the ground that they violate principles of environmental ethics, perhaps because no clear principles exist. Instead, the law allows advocates to challenge actions on other grounds; grounds that are enumerated in the laws, so, that is what environmental advocates do. Advocates are using the laws to their best advantage, which is to be expected. However, such uses of law that overlook principles of ethics may undermine any potential influence of environmental ethicists because advocates appear to be using the law with unstated ulterior motives, however positive those motives might be for the environment.¹⁰

Christopher Stone, a law professor and early contributor on issues of environmental ethics and law,¹¹ published a study in 2003 indicating that government, meaning courts and legislatures, has not considered the work of environmental ethicists to any significant degree when making law and policy concerning the environment.¹² Here, I look at the laws they made in that void, and whether those laws encourage the use of ethicists in decision making. Stone concludes that courts and legislatures pay greater heed to ethicists in areas other than the environment, for example, using bioethicists to help make medical or scientific policy.¹³ This article supports Stone's conclusion, finding that courts and legislatures encourage the involvement of ethicists in fields other than the environment. They support the use of ethicists in medically-related decisions, but not in environmentally-related decisions.

¹⁰ See infra note 201 and accompanying text (stating that legislative, administrative and judicial decisions must be objective and ethics are subjective).
¹³ Id. at 50-51.
In Part II, I explore the respective paths of development of bioethics and environmental ethics. I consider various definitions of the fields and what their practitioners seek to achieve in practice, briefly including the role of training and standards of practice. In my Conclusion, I consider the role of law in the development and practice of bioethics and of environmental ethics. Here, I ask whether the existence of laws encouraging the use of bioethicists in decision making was pivotal in promoting the development of bioethics as an applied discipline, and correspondingly, whether the absence of similar laws promoting the use of environmental ethicists has retarded the development of an applied field of environmental ethics. Finally, I suggest that environmental ethicists propose a statement of ethical principles for environmental decision making, similar to the work done by bioethicists in the Belmont Report. My hope is that those principles will begin to be considered in law making, leading law to encourage and support the use of environmental ethics and ethicists in environmental decisions.

I. ORIGINS AND DEFINITIONS

A. Bioethics

1. Bioethics Defined

Although thinking about medical and health-related ethics predates the days of Hippocrates, medical ethics began its brisk movement

14 Although likely relevant to the problem overall, this article also will not examine the locus of decisional impact of the two fields. That is, the fact that bioethics decisions usually concern individuals' lives directly, whereas environmental ethics only indirectly concern individuals' lives. It also will not explore in-depth what the applicable professionals expect from their ethicists. That is, what those making medical decisions hope to learn from bioethicists, and what those making decisions affecting the environment might learn from environmental ethicists, although this may well play a role in the divergent development of the fields.

15 See infra Part I.A.2.d.

16 A modern version of the Hippocratic Oath was written by Dr. Louis Lasagna, former Dean of Tufts University Medical School. See NOVA Online, Hippocratic Oath—Modern Version, http://www.pbs.org/wgbh/nova/doctors/oath_modern.html (last visited Jan. 10, 2008). Please note that although many medical school graduates still take the Hippocratic Oath upon graduation, the American Medical Association (“AMA”) no longer fully incorporates it into the organization’s Principles of Medical Ethics: “The AMA does not have formal policy related to the Oath. Some of the tenets of the Oath represent long-standing ethical traditions that the AMA supports, while others are somewhat outdated.” See
towards its own field in the 1960s. It did so as those involved in the medical and related scientific fields began to voice concerns over some of the advances they were making, and the human and moral effects of that progress. During that time, "self-proclaimed bioethicists and their medical collaborators" began building the discipline by holding symposia, meetings, and conferences on death and dying, organ transplantation, and fertility. Thereafter, a period ensued that Albert Jonsen, well-known chronicler of the development of bioethics, has called one of "institution building." The 1960s and 70s saw funding of The Hastings Center for Bioethics, the Kennedy Institute for Ethics, and the Society for Health and Human Values, all instrumental in developing the field.

A number of important conferences on the subject occurred during this period. The Hastings Center drew quick and early involvement by leaders in the fields of philosophy, theology, medicine, and science, lending it immediate credibility. The Hastings Center Report, first issued in 1971, quickly became respected and influential in the developing field. In addition to the Hastings Center, André Hellegers was busy at Georgetown University, working with the Kennedy Foundation to develop what would become the Kennedy Institute of Ethics. Although Hellegers was a physician, the Kennedy Institute was founded and housed in a Jesuit university and began with staff grounded in religion—LeRoy Walters, a Mennonite theologian, and Warren Reich, a moral theologian from Catholic University. The Kennedy Institute, primarily through the


The Institute of Society, Ethics, and the Life Sciences, later called The Hastings Center, was launched by Daniel Callahan, a philosopher, and Willard Gaylin, a psychiatrist, with original funding from John D. Rockefeller III, Elizabeth Dollard, the National Endowment for the Humanities, and the Rockefeller Foundation. ALBERT R. JONSEN, THE BIRTH OF BIOETHICS 20-24 (Oxford University Press 1998).

Id. at 13-19.

Id. at 21-22; see also THE HASTINGS CENTER REPORT, http://www.thehastingscenter.org/publications/hcr/hcr.asp (last visited Jan. 10, 2008).

Id., supra note 18, at 22-24. The Kennedy Institute, originally called the Joseph and Rose Kennedy Center for the Study of Human Reproduction and Bioethics, became known for its research library in ethics. Id. at 23.

Id.
work of Warren Reich, developed *The Encyclopedia of Bioethics*, which was first published in 1978.23

Also at this time, questions were arising concerning medical care, which had become highly technical and expensive, and the use of human subjects in medical research, which was becoming controversial. Doctors’ work had become complicated by moral and technical issues, in part due to advances in technology.24 Advances in technology that lead to increased moral and technical issues included, for example, human cloning,25 reproductive cloning,26 in vitro fertilization,27 genetic and stem cell research,28 the patenting of human organisms,29 transplantation,30 physician-assisted suicide, and the ability to save lives without restoring health. A related issue that was, and remains, at the crossroads of morality and technology is the appropriate withdrawal of life-sustaining support systems. Abortion,

23 *Id.*


New procedures and technologies are rapidly expanding the range of conditions health care professionals are asked to address and the nature of health care intervention. Abortion, physician-assisted suicide, artificial insemination, and many emerging genetic treatments go beyond the act of simply providing care, intervening on natural processes in profound ways.


27 See GEOFFREY SHER ET AL., *IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES* 168-81 (1998) (addressing the “ethical implications of fertility technology,” including the issue of semen, egg, or embryo cryopreservation); *id.* at 180-81 (questioning the “absence of clear ethical and legal guidelines to direct the use of IVF and related procedures”).


30 See, e.g., MURPHY, *supra* note 25, at 81 (discussing the suitability of organs, particularly hearts, for transplantation after donors died); *id.* at 141 (discussing the risks of heart transplantation); *id.* at 257 (discussing tissue transplantation from animal to humans).
although not so much an advance in technology as it was an advance in safety for pregnant women, presented persistent moral issues that drew increasing public and political attention.

Public interest and concern also built around medical ethics issues, for example, the Tuskegee syphilis study, the Karen Ann Quinlan case, and others. Questions arose concerning the allocation of various duties that arise in health care decisions, such as who should provide healthcare for those who cannot pay for it, and who should make decisions for those who cannot speak on their own behalf.

Were these questions for doctors, philosophers, or theologians? Regardless, they led to a public focus on these issues, and the concurrent development of the practical field of bioethics. These moral questions prompted health care professionals, institutions, legislatures, patients, and families to turn to bioethicists. Difficult situations involving “patient autonomy, informed consent, competence, rights of conscience, medical futility, resource allocation, confidentiality, and surrogate decision making” were pivotal. These issues arose and still arise, both in clinical settings

31 The Tuskegee Syphilis Study (1932-1972) was a clinical study conducted around Tuskegee, Alabama, during which 400 poor, mostly illiterate, African American sharecroppers became part of a study on the treatment and natural history of syphilis. This study is infamous for the substandard manner in which researchers treated human subjects and spurred change in the laws and regulations protecting patients in the clinical studies. The patients in this case were merely told they had “bad blood” and could receive free treatment. Researchers did not inform the subjects that they had been diagnosed with syphilis, and were not treated for syphilis. TUSKEGEE SYPHILIS STUDY LEGACY TEAM, BAD BLOOD: FINAL REPORT OF THE TUSKEGEE SYPHILIS LEGACY COMMITTEE (1996) available at http://www.healthsystem.virginia.edu/internet/library/historical/medical_history/bad_blood/report.cfm.

32 In re Karen Quinlan, 355 A.2d 647 (N.J. 1976); see also Karen Ann Quinlan Hospice, History, http://www.karenannquinlanhospice.org/history.htm (last visited Jan. 10, 2008). Karen Ann Quinlan was in a persistent vegetative state for ten years while her parents and doctors argued about whether her ventilator could be removed. Her parents wanted her taken off the respirator, but hospital officials refused. The New Jersey Supreme Court sided with the parents and Ms. Quinlan was taken off the respirator. Quinlan continued to breathe unaided and was fed by artificial nutrition for nine more years until she died of pneumonia.

33 Rosen & Satel, supra note 17. See generally ELISABETH A. CAWTHON, MEDICINE ON TRIAL (2d ed. 2004).

34 JONSEN, supra note 18, at 11. This book presents the best, and perhaps the only, comprehensive study of the development of the field of bioethics. For further and detailed information on that topic, please refer to it.

35 See id.

and in research. The emerging field of bioethics helped professionals in the medical and related fields address these problems in clinical, research, and policy making settings.

Fundamentally, bioethicists help answer questions concerning medicine and biotechnologies, as they affect human life. To do so, they primarily do three things. First, they "provide ethical input for the development and implementation of patient care guidelines and policies for various healthcare institutions." For example, they might serve on, or make recommendations to, committees that determine hospital policies or procedures for handling ethical issues that arise in the hospital. Second, they "educate health care professionals (e.g., physicians, nurses, etc.) within an institution about ethical concerns associated with the care of patients." For example, ethicists often hold seminars or participate in grand rounds to help keep health care professionals aware of ethical issues concerning patient care and provide framework and opportunity for them to address the issues as they arise. Third, they "perform individual case consultation, in response to either a patient's or a physician's request."Ethicists may help decide whether life support systems should remain turned on for a particular patient under a specific set of facts. They can help determine whether conjoined twins should be separated, or whether a deaf child should get a cochlear implant against her parents' wishes. These examples all reflect the roles of bioethicists in clinical or hospital settings. In addition to these clinical applications of bioethicists' skills, bioethicists work in policy making and research, with government committees and in legislatures. For example, bioethicists worked at the funded behest of Congress on the Human Genome Project, for which Congress earmarked funds for Ethical, Legal, and Social Issues.

38 Id. at 671 (citing Fletcher & Hoffmann, supra note 37, at 336; Slowther & Hope, supra note 37, at 649).
39 Id. (citing Fletcher & Hoffmann, supra note 37, at 336; Slowther & Hope, supra note 37, at 649). Although this quote refers specifically to requests by patients and physicians, those requests could as likely come from other health care providers, or family members of patients.
40 "The U.S. Department of Energy (DOE) and the National Institutes of Health (NIH) devoted 3% to 5% of their annual Human Genome Program budgets toward studying the
One commentator on this subject includes among ethicists' responsibilities reducing liability for medical ethical decision making, specifically, "helping to protect healthcare professionals legally by making them aware of any applicable law, and providing a forum for discussion of legal issues." The rationale for including a liability reduction role amongst bioethicists' responsibilities is that ethics consultants would thereby help reduce physicians' fear of liability for their decisions and allow physicians to focus on making good medical decisions, thus reducing the number of malpractice law suits. That said, most ethicists are not trained for the purpose of liability reduction, and although their presence and involvement in decision making may reduce litigation in fact, this is not generally viewed as their intended function.

Some bioethicists serve on a bioethics or institutional ethics committee. This is a "multidisciplinary group of health care professionals within a health care institution that has been specifically established to address the ethical dilemmas that occur within the institution." Institutional ethics committees have been hailed as good resources for physicians confronting complex ethical issues in patient care. Physicians may seek ethics committee consultations to receive impartial assistance in decision making, to resolve conflicts, and to avoid cumbersome court proceedings and unwieldy litigation. They address, as a group, the tasks and issues set forth above as applying to the role of individual bioethicists. The general goal of ethics committees is not to make decisions for physicians, but to facilitate decision making by clarifying the ethical issues, providing information


41 Sontag, supra note 37, at 671 (citing Judith Hendrick, Legal Aspects of Clinical Ethics Committees, 27 J. MED. ETHICS i50, i51 (2001)).

42 Id. (citing John C. Fletcher, The Bioethics Movement and Hospital Ethics Committees, 50 MD. L. REV. 859, 860 n.4 (1991)).

43 Id.


45 Fleetwood & Unger, supra note 44, at 320. In addition to physicians, other health care providers also seek consultations with ethics committees. Advice seeking is certainly not limited to physicians.
on hospital policies and state laws, or fostering communication among physician, patient, and family.\textsuperscript{46}

Bioethics committees are used or endorsed by many of the associations and institutions that make up the health care system.\textsuperscript{47} For example, the American Hospital Association,\textsuperscript{48} the Department of Health and Human Services,\textsuperscript{49} the President’s Commission for the Study of Ethical Problems in Medical and Biomedical and Behavioral Research,\textsuperscript{50} and the American Medical Association,\textsuperscript{51} have endorsed the use of ethics committees. The Joint Commission on the Accreditation of Healthcare Organizations requires that hospitals have a method for considering ethical issues.\textsuperscript{52}

\textsuperscript{46} Id.

\textsuperscript{47} See Glenn McGee et al., Successes and Failures of Hospital Ethics Committees: A National Survey of Ethics Committee Chairs, 11 CAM. QUAT. HEALTHCARE ETHICS 87, 87 (2002) (citing Glenn McGee et al., A National Study of Ethics Committees, 1 AM. J. BIOETHICS 74 (2002)) (stating that “over 90% of U.S. hospitals had ethics committees, compared to just 1% in 1983.”); see also Ellen L. Csikai, The Status of Hospital Ethics Committees in Pennsylvania, 7 CAM. QUAT. HEALTHCARE ETHICS 104, 104 (1998), cited in McGee et al., supra at 93 (finding that “[o]f 208 hospitals surveyed, 183 or 88% had ethics committees” in the state of Pennsylvania); id. at 106 (“The growth of hospital ethics committees has continued in the last decade, as seen in the rise from 60% of hospitals in 1989 to 88% [in 1998].”); PRESIDENT’S COMM’N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. & BIOMEDICAL & BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT: A REPORT ON THE ETHICAL, MEDICAL, AND LEGAL ISSUES IN TREATMENT DECISIONS 443-450 (1983) [hereinafter PRESIDENT’S COMM’N]. Massachusetts, New Jersey, Pennsylvania, and Maryland for the “Northeast/Atlantic” region, Illinois and Michigan for the “Industrial Midwest” region, California and Oregon for the “West Coast” region, and Kansas and Missouri for the “Midwest” region were the only states having hospitals with ethics committees in 1983. Note that even in these states, with the exception of New Jersey, the proportion of ethics committees was very low: one, at the most two, ethics committees for an average of over twenty hospitals surveyed per state. New Jersey, with seven hospitals with ethics committees out of a total of eighteen hospitals surveyed, led by far the pack.

\textsuperscript{48} Id.

\textsuperscript{49} Fleetwood & Unger, supra note 44, at 320 (citing AMERICAN HOSPITAL ASSOCIATION, GUIDELINE: HOSPITAL COMMITTEES ON BIOMEDICAL ETHICS, in HANDBOOK FOR HOSPITAL ETHICS COMMITTEES 57, 110-11 (Judith Wilson Ross et al. eds., 1986)).

\textsuperscript{50} Id. (citing Nondiscrimination on the Basis of Handicap: Procedures and Guidelines Relating to Healthcare for Handicapped Infants, 49 Fed. Reg. 1622 (Jan. 12, 1984)).

\textsuperscript{51} Id. (citing Judicial Council, Guidelines for Ethics Committees in Healthcare Institutions, 253 J. AMER. MED. ASS’N 2698, 2699 (1985)).

\textsuperscript{52} Id. (citing JOINT COMM’N ON THE ACCREDITATION OF HEALTHCARE ORGANIZATIONS, ACCREDITATION MANUAL FOR HOSPITALS (1993 ed.).
Every ethics committee creates its own policies or guidelines to address the ethical issues that arise within its hospital or other institution. However, when issues handled by an ethics committee end up in court, the court will analyze each policy and guideline and likely compare them with those from other hospital ethics committees. The court may find some legal error that could put the hospital at risk of liability. Partly in an attempt to reduce the likelihood of this occurring, ethics committees have begun to develop ethics consortiums in which hospital ethics committees within a region meet, present, and discuss the issues that have come before them and the actions taken. The idea is that the consortium attempts to reach a consensus on policies, procedures, and actions so that when it comes to court review there will be an agreed upon set of procedures and actions. So, perhaps ethics committees have had a seat at the decision-making table, in part, because they can help resolve complex ethical issues “while avoiding the costly, often adversarial, legal system.”

2. Evolution of the Discipline of Bioethics

The term “bioethics” may be a combination of “biology” and “ethics,” coined by Sargent Shriver at a meeting in 1970. The meeting concerned the possibility of using money from the Joseph P. Kennedy, Jr. Foundation to form an institute to study the religious and ethical aspects of advancements in science and medicine. William Reich defines “bioethics” as “the study of the ethical dimensions of medicine and the biological sciences.” Others, such as Andre Hellegers, also claim to have coined the term

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54 Fleetwood & Unger, supra note 44, at 320.
55 See JONSEN, supra note 18 for a complete discussion of the evolution of bioethics.
56 Id. at 26-27 (“Because of the need to bring biology and ethics together, I thought of ‘bioethics.’”) (citation omitted).
57 Id. at 27 (citing Introduction to 1 THE ENCYCLOPEDIA OF BIOETHICS xix-xx (Warren Reich ed., 1977)); see also Daniel Callahan, Bioethics as a Discipline, 1 HASTINGS CENTER STUD. 66 (1973) (discussing the requirements necessary to define environmental ethics as a discipline).
“bioethics.” The Library of Congress entered the word as a subject heading when it categorized Daniel Callahan’s “Bioethics as a discipline.” The evolution of bioethics is widely believed to derive from synergies among theologians, philosophers, and physicians.

a. Theologians

Theologians were concerned early about the advancements in science that were leading to manipulation and alterations of human beings. According to some, the “theological inaugural address for bioethics” was given by a Protestant theologian named Helmut Thielicke in 1968. In that lecture, entitled “Who Shall Live,” he pointed out that the field of medicine, in particular the progress of that field, constantly encounters questions of the nature and destiny of man. Because Western theology concerns not only the study of God, but the study of God’s relationship with mankind, theologians were acutely interested in the developments in the fields of medicine.

The Roman Catholic Church had been interested in questions concerning medicine since its inception. For example, in its interpretation of the “thou shalt not kill” commandment, Catholic theologians saw a link to the practices of doctors in their caring for the sick and dying. Catholic theologians were interested in thinking about the appropriate courses of action in caring for the sick, in particular, distinctions between ordinary and extraordinary medical interventions, which appeared in their writings in the 16th century. Also in the 16th century, Catholics wrote about whether people were morally obliged to preserve their own lives. In the 19th century they wrote about “pastoral medicine,” a guide for pastors in caring for their sick parishioners. In the 20th century, they began writing whole treatises on medical and nursing ethics, largely because there were many Catholic hospitals. Issues dealt with in these treatises include: the rights and duties of physicians, abortion, sexuality, eugenics, euthanasia, insanity, and hypnosis.

The general approach of the Catholic theologians was to explain moral principles as derived from natural law and divine revelation,

58 JONSEN, supra note 18, at 27.
59 Id.
60 Id. at 35.
61 Id.
62 Id. at 36.
63 Id.
followed by an analysis of any of a number of topics of medical ethical concern. Theologians applied this approach to analysis of many issues, including abortion, contraception, sterilization, and lobotomy. In each instance, they either interpreted natural law in terms of the apparent physical structure and purpose of human functions, or in the alternative, sought a final word on the issue from the church itself.64

b. Philosophers

Philosophers began, in the late 1960s and ‘70s, to expand beyond their theoretical work, eventually becoming professional practitioners of medical ethics. In addition, professionals from other disciplines began practicing medical ethics, for example, panels of doctors and other health care providers, theologians, and lawyers. Like the theologians before them, philosophers learned that they had to move beyond their intellectual training to speak to the bioethical issues. They needed to learn to speak in a language that could yield practical decisions and contribute to policy debates that were no longer merely theoretical.65

They began to do this, in particular with regard to medical ethics, when Hans Jonas began redirecting his thinking from the philosophy of antiquity to the connections between mind and organisms. He began writing about the Kantian categorical imperative to “act so that the effects of your action are compatible with the permanence of genuine human life.”66 Upon this idea, Jonas began searching for understanding of the range of problems that humans face in nature and technology.67

Based on his work in this area, Jonas was invited to participate in a meeting of the American Academy of Arts and Sciences regarding the ethics of experimentation, following which he created Philosophical Essays: From Ancient Creed to Technological Man, which included two chapters dealing with issues of bioethics. The first dealt with the definition of death, and the second concerned genetic engineering. These essays were pivotal in laying the philosophical foundation for bioethics.68

Next came efforts by Samuel Gorovitz69 to educate philosophers about the questions raised in science and medicine and thereby entice

64 Id.
65 Id. at 65.
66 Id. at 77.
67 Id.
68 Id. at 77-78.
69 Here, I must admit the familial bias at work. Samuel Gorovitz is my father.
them to contribute their philosophical acumen to the work in this field. Early on, he published *Ethics and the Allocation of Medical Resources* in *Medical Research Engineering*. This was important because it spoke to an audience not often privy to ideas and discussions of philosophical issues. He wrote to an audience who understood the need for practical decisions, and in it he set forth problems that could benefit from systematic philosophical analysis.

Gorovitz pushed for the creation of centers where physicians and philosophers, and academics and professionals from other disciplines, could discuss issues concerning advancements in science and medicine. To accomplish this goal, he obtained funding from several foundations and created the center he had described, the Project on Moral Problems in Medicine at Case Western Reserve University. Here, along with others who would become important in the field, Gorovitz led the group ultimately to produce the widely used medical ethics anthology "Moral Problems in Medicine."

To his great credit, Gorovitz realized that the emerging discipline needed thoughtful input from faculty in medicine, law, and other fields, in addition to that of the philosophers. In an effort to encourage people to teach issues in medical ethics from a philosophical point of view, he obtained funding and held a Council for Philosophical Studies Institute on Moral Problems in Medicine at Haverford College in Pennsylvania in 1974. He gathered many distinguished philosophers to serve as faculty for the institute. In addition to Gorovitz, were William Frankena, Robert Nozick, Judith Jarvis Thomson, Bernard Williams, Dan Callahan, Willard Gaylin, and Robert Veatch. Students at the Institute included many who became prominent in the field of bioethics including H. Tristram Engelhardt, Stuart Spicker, and Tom Beauchamp. The Haverford Institute led to significant growth in the field, as its faculty and students returned to their institutions and disciplines ready to contribute to the field of medical ethics.

According to Jonsen's account, the next ground breaker by a philosopher was when K. Danner Clouer joined the faculty of the medical

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70 *JONSEN, supra* note 18, at 78.
72 *MORAL PROBLEMS IN MEDICINE* (Samuel Gorovitz et al. eds., 1976).
73 *JONSEN, supra* note 18, at 79.
74 *Id.*
75 *Id.*
school at Pennsylvania State University at Hershey. In doing so, he was a model both for philosophers and medical schools and took it upon himself to clarify the meanings of terms relevant to both medicine and philosophy, such as "sanctity of life" and "bioethics."76

Dan Callahan, at the Hastings Center77 was also working hard at integrating philosophy with the other disciplines. He promoted work on traditional philosophical questions such as the meaning and value of life, and integrated these with the problems raised in modern medicine and technology.78 Similar efforts were being made elsewhere as well, as these questions infused academic programs, institutes, universities and medical schools.79

As the field developed from theoretical to applied philosophy, Callahan said he "'resisted with utter panic the idea of participating with the physicians in their actual decisions,' much preferring 'the safety of the profound questions [he] pushed on them.'"80 Later, bioethicist Albert Jonsen, who describes bioethicists as "doctor-watchers," admits to satisfaction at being on the "inside" of medical decision making and believes bioethicists have a right to be there.81

c. Government Role

In 1968, Senator Walter Mondale introduced a resolution in Congress seeking the establishment of a President’s Commission on Health, Science, and Society. In doing so, he raised important questions of societal concern, in particular, heart transplantation and genetic engineering.82 The hearings on Mondale’s resolution were held in March and April 1968 before the Subcommittee on Government Research of the Senate Committee on Government Operations. Many scientists testified at the hearings, including physicians. They were enthusiastic about the scientific advancements, and felt that the moral issues were being blown out of proportion, though most admitted that the advances in science and

76 Id. at 79-81.
77 See supra notes 18-20 and accompanying text for a discussion of the Hastings Center.
78 JONSEN, supra note 18, at 81.
79 Id. at 81-83.
80 Rosen & Satel, supra note 17.
81 Id.
82 JONSEN, supra note 18, at 90 (citing Hearing on S.J. Res.145: Hearing Before the U.S. S. Subcomm., 90th Cong. 1 (1968) [hereinafter Hearing on S.J. Res. 145]).
medicine had some "troubling aspects." Although most scientists supported the creation of a "President's Commission," some felt that such a commission should be dominated by physicians because the issues presented do not vary substantially from existing issues in medical practice. They argued that doctors essentially are already ethicists because they deal with ethical issues in their daily practice. In the later sessions of the hearings, the scientists and physicians were downright hostile to the idea of establishing a commission to study and discuss ethical issues arising in their areas of research.

Theologians also testified. In the first session of the hearings they were in favor of establishing commissions, sought breadth in their membership, and were primarily concerned that the moral issues concerning advancements in science and medicine be discussed honestly.

Although the legislation did not pass following the initial set of hearings in 1968, Senator Mondale tried again in 1971, ultimately succeeding in 1973. That success led to the creation of an Advisory Commission on Health Science and Society to perform "a comprehensive study of the ethical, social, and legal implications of advances in biomedical research and technology." The same language was later used in legislation creating the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.

Later that year, a bill was introduced in the House to authorize National Institute of Health ("NIH") funding of research in the United States and abroad, but contained a provision restricting funding for research that would violate NIH's ethical standards. Just a month before, the NIH had been embarrassed publicly by some high school girls (including Eunice Kennedy Shriver's and Sargent Shriver's daughter, Maria) who

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83 Id. at 91 (citing Hearing on S.J. Res. 145, supra note 82, at 36).
84 Id. (citing Hearing on S.J. Res. 145, supra note 82, at 36).
85 Id. at 92-93 (citing Hearing on S.J. Res. 145, supra note 82, at 370, 382). Dr. Owen Wangensteen of the University of Minnesota, in response to the question of whether he believed non-physicians could provide useful insight, stated, "If you are thinking of theologians, lawyers, philosophers and others to give some direction . . . I cannot see how they could help . . . the fellow who holds the apple can peel it best." Id. at 93 (citing Hearing on S.J. Res. 145, supra note 82, at 100).
86 Id. (citing Hearing on S.J. Res. 145, supra note 82).
87 Id. at 94.
88 Pub. L. No. 93-348, § 203, 88 Stat. 342, 350 (1973); see also JONSEN, supra note 18, at 94.
asked pointed questions about research using human fetal tissue. This incident concerning fetal research, as well as the Tuskegee events, helped push a debate in Congress over the medical research grant bill.\textsuperscript{90} After multiple sets of hearings, a different bill, the National Research Act, sponsored by Senator Kennedy, and supported by Senator Mondale, passed. Among other things, it created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.\textsuperscript{91}

This Commission primarily focused on the rights and welfare of human subjects in federally funded research. The Commission's early role was to implement a provision in the new law requiring the Secretary of the Department of Health, Education, and Welfare\textsuperscript{92} to issue regulations covering all biomedical researchers who receive federal funds.\textsuperscript{93} The initial Commission included representatives from the medical and biomedical research fields, lawyers, a member of the public, and a couple of ethicists. It was created for a two-year term and developed an extensive agenda.\textsuperscript{94}

In February 1976, the Commission convened a closed retreat at the Smithsonian Institution's Belmont Conference Center, during which it held a broad discussion of the "nature and role of ethical principles for human research."\textsuperscript{95} The Commission members read and discussed a number of requested essays on the topic and generated a set of three basic principles of bioethics: respect for persons, beneficence, and justice. The report espousing these principles later became known as the Belmont Report. It was published in the Federal Register\textsuperscript{96} and has had an enormous impact on the development of the field of bioethics overall,

\textsuperscript{90} 119 Cong. Rec. 12, 15332-33 (1973) (statement of Rep. Hogan); JONSEN, supra note 18, at 95.
\textsuperscript{91} National Research Act, Pub. L. No. 93-348, 88 Stat. 342 (1973); see also JONSEN, supra note 18, at 97-99.
\textsuperscript{93} Id. § 414, 93 Stat. at 685; see also JONSEN, supra note 18, at 97-99.
\textsuperscript{94} JONSEN, supra note 18, at 99.
\textsuperscript{95} Id. at 102.
specifically with respect to the development of standards and rules for the treatment of human research subjects. The Department of Health and Human Services used the Belmont Report as the basis of its regulations on the protection of human subjects. That rule, the Federal Policy for the Protection of Human Subjects, was later adopted by fourteen federal agencies and has become known as The Common Rule. The principles set forth in the Belmont Report have become the standard set of principles used by bioethicists when evaluating problems. They underlie much of what bioethicists do.

Soon thereafter, Senator Kennedy sponsored another bill that created the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. This Commission, generally called the President's Commission, created a number of reports the first of which, “Defining Death,” provided a model statute for states. It later addressed issues regarding, among others things, genetic engineering, access to health care, and the termination of life support (an issue brought to the fore by the Karen Anne Quinlan case). The report on this last topic, “Deciding to Forego Life-Sustaining Treatment,” has been the most influential of the reports issued by the President's Commission.

The President's Commission terminated in 1983, but has been followed over the years by other incarnations of similar groups.

Some feel that the issues raised and addressed by the Commissions and those that followed led to an increased need for public and practical

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101 See generally President's Comm'n, supra note 47.
102 Other advisory groups have included: DHEW's Ethics Advisory Board, which existed in 1978-79, the National Institutes of Health's Human Embryo Research Panel, which met in 1994, the Biomedical Ethical Advisory Committee, which met briefly in 1988-89, the National Bioethics Advisory Commission, which met from 1996-2001 and produced a substantial volume of advice and reports prior to its expiration and replacement by President Bush with the President's Council on Bioethics. See The President's Council on Bioethics, Former Bioethics Conventions, http://www.bioethics.gov/reports/past_commissions/index.html (last visited Jan. 10, 2008).
ethicists. People began to seek help addressing these issues and they sought help from the people who had already been discussing them in depth.\footnote{JONSEN, supra note 18, at 118.}

d. The Belmont Report

The President’s Commission’s Belmont Report established the three foundational principles of bioethics: respect for persons, beneficence, and justice. The Report acknowledged that these principles cannot always be applied so as to resolve, beyond dispute, ethical problems in medicine and science. The objective was to provide an analytical framework to guide the resolution of ethical problems arising from research involving human subjects.\footnote{Belmont Report, supra note 96.} That said, these ideas have formed a foundation for the development of the field of bioethics beyond their specific purpose in creating principles for the use of human subjects in medical research.

The Belmont Report addresses each of the three core principles respect for persons, beneficence, and justice under the heading, “Basic Ethical Principles.” When discussing respect for persons, it addresses the issues of personal autonomy, self-determination, and the ethical considerations involved in using imprisoned persons or persons otherwise impaired as subjects of research. Persons serving as subjects must be treated as autonomous individuals, which means that a person should be allowed and enabled to decide on their own whether they choose to participate as a subject in research. This requires informed consent, which in terms requires information, comprehension, and voluntariness, all of which the researchers must ensure.

With respect to beneficence, the Report includes the charge to “do no harm” and the requirement that physicians benefit their patients “according to their best judgment,” as well an assessment of risks and benefits to the research subject, which must be communicated under informed consent. It also discusses several variations of the term “justice,” considering whether burdens should be distributed to each person equally, to each according to his needs, to each according to his societal contribution, or to each according to merit.
The report states that "poor ward patients" suffered the burden, in the 19th and 20th centuries, of serving as often unwitting subjects of medical research, and noted that "the exploitation of unwilling prisoners as research subjects in Nazi concentration camps was condemned as a particularly flagrant injustice." The Belmont Report emphasized that "the selection of research subjects needs to be scrutinized in order to determine whether some classes (e.g., welfare patients, particular racial and ethnic minorities, or persons confined to institutions) are being systematically selected simply because of their easy availability, their compromised position, or their manipulability, rather than for reasons directly related to the problem being studied."

Today, the principles set forth above, and the Belmont Report's analysis of those principles, serve as fundamental references for institutional review boards ("IRBs") that review research proposals involving human subjects, whether conducted or approved by federal agencies, or in university or other research settings. The IRBs use the principles set forth in the Belmont Report to evaluate research according to ethical principles. The Belmont Report also provides the ethical principles and background for the many federal and state laws and regulations, and for courts making decisions on ethical issues, especially those concerning research and human subjects.


See, e.g., Conway v. A.I. DuPont Hosp. for Children, No. 04-4862, slip op. (E.D. Pa. Feb. 14, 2007) (in which Plaintiffs allege that defendants failed to comply with the standard of care as required in the Belmont Report); Washington Univ. v. Catalona, 437 F. Supp. 2d 985 (E.D. Mo, 2006) (holding that Plaintiffs failed to show university's refusal to transfer the subject samples constitutes a violation of contract with the Department of Health and Human services, and therefore, a violation of the Belmont Report); Abney v. Amgen, Inc., No. 5:05-CV-254-JMH, 2005 WL 1630154 (E.D. Ky. July 8, 2005) (in which plaintiffs argue that by withdrawing use of the drug GDNF, the defendants acted inconsistently with the Belmont Report and, thus, are breaching their fiduciary duties to the plaintiffs, and the Court holds that while federal regulations create certain duties on sponsors of drug trials, a fiduciary duty is not one of them); Ancheff v. Hartford Hosp., 799 A.2d 1067 (Conn. 2002) (including an in-depth discussion of the Belmont Report and its principles, but holding that a trial court properly excluded it from evidence due to potentially prejudicial content).
B. Environmental Ethics

1. Environmental Ethics Defined

Environmental ethics has long been described as a sub-discipline within the larger field of ethics, in philosophy. Some have even called it a synonym for “environmental philosophy.” As with other fields of ethics, it is the study of what is right and wrong, good and bad, and who bears responsibility for what. Environmental ethics pertains to these questions in an environmental context. It has been described as a “set of principles and justifications for distinguishing good from bad human conduct insofar as it affects the environment.”

According to philosopher Joseph DesJardins, environmental ethics presents a systematic and comprehensive account of the moral relations between human beings and their natural environment and assumes that human behavior toward the natural world can be governed by moral norms. Much of the writing in environmental ethics concerns what those principles should be and attempts to isolate a specific set of principles or ethical theories. That said, some philosophers believe no single or specific ethic needs to emerge for environmental ethics to have an important role in social development.

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107 David Schmidtz & Elizabeth Willott, Introduction to Schmidtz & Willott, supra note 6, at xii.
108 Alyson C. Flournoy, In Search of an Environmental Ethic, 28 COLUM. J. ENVT'L. L. 63, 71-83 (2003). See also Eugene Hargrove, Foundations of Environmental Ethics 2 (1989) (suggesting that the term “environmental philosophy” may more accurately describe the field often called environmental ethics, because the academic literature is not focused primarily on applied ethics, but on other traditional fields within philosophy, such as aesthetics, metaphysics, epistemology, philosophy of science, and social and political philosophy).
109 Schmidtz & Willott, supra note 107, at xii (defining ethics as “the study of goodness and rightness”).
111 DesJardins continues to suggest that “[a] theory of environmental ethics then must go on to explain what these norms are and to whom or to what humans have responsibilities and to show how these responsibilities are justified.” Joseph R. DesJardins, Environmental Ethics 9 (2d ed. 1989).
112 See Christopher D. Stone, Earth and Other Ethics: The Case for Moral Pluralism 201-58 (1987) (suggesting the possibility that moral pluralism is the future of environmental ethics).
Environmental ethics encompasses, or is related to, a number of other sub-disciplines within the broader field of ethics. For example, because aesthetics concerns perceptions of physical properties, like color, sound, and light, it is related to environmental ethics due to environmental ethics' concern with aesthetic experiences in nature. The fields of social and political philosophy can also apply to environmental ethics because of environmental ethics' concern with the uses of natural resources. Certainly philosophy of science is involved due to the scientific questions pertaining both to preservation and use of environmental resources. So, environmental ethics is rooted in various fields of philosophy.

In addition, growth of the discipline of ecology played a pivotal role in defining environmental ethics. Ecology has provided empirical information on the centuries of human exploitation of the natural environment. According to Richard Goldstein, who has written extensively on environmental ethics, "[t]he science of ecology has been the most significant factor in the development of environmental ethics over the course of the last century" because it helps "identify the core values comprising environmental ethics." Goldstein further states that, "[h]istory demonstrates a lack of regard for nature, some of which is attributable to the failure of 'civilized' cultures to understand the patterns and processes of nature." Understanding the patterns and processes of nature is precisely the task ecology has undertaken. Environmental ethics is then, to some, a body of moral principles that considers the natural environment and the role of humans within it. Thus, the term environmental

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114 Id. at 77-107.
115 Id. at 79-80 (discussing Gifford Pinchot's utilitarian theory of preservation).
116 Id. at 2.
118 Id. at 3. For a discussion of the importance of identifying values in order to define environmental ethics, see Ben A. Minteer & Robert A. Manning, Pragmatism in Environmental Ethics: Democracy, Pluralism, and the Management of Nature, 21 ENVTL. ETHICS 194 (1999).
119 Goldstein, supra note 117, at 2.
120 See id. at 3-4 (surveying several definitions of "ecology").
121 Id. at 1.
means “the morals that humans adopt in their interactions with the non-human world.” 122

Environmental ethics has also been described as the practical and theoretical manifestation of a difficult problem: “how to harmonize the sometimes dissonant claims of private interests and public goods.” 123 This is a tension that plays out every day in decision making by legislators and business people. The field of environmental ethics attempts to set a moral groundwork for these decisions and hopes that it will affect practical decision making.

Applied environmental ethicists, should they come to exist, would help evaluate moral questions related to human use of the natural environment. Questions environmental ethicists might help to answer vary from the theoretical to the quite practical. Such questions might concern human use of limited resources. For example, whether we should cut down old growth forests to provide additional farm land is a theoretical question with practical application in the specific instances of particular plots of land. Whether we should construct a specific building in a wetland is a practical question with theoretical underpinnings—specifically, the preservation of environmental resources versus the human benefits of development. This question has philosophical and legal roots grounded in our theories and beliefs about property rights—that, absent some limitations, we should be able to use our land as we please. Environmental ethicists, along with government policy makers, might help to determine some of those limitations, balancing the needs and rights of individual people with those of the environment, which generally affect larger groups of people or populations.

Another question, often considered the hallmark question in environmental ethics, is what are our obligations to future generations with respect to the environment we will leave behind? 124 This question is theoretical in nature but practical in respect to every facility siting and

122 Flournoy, supra note 108, at 74. The field of environmental ethics is sometimes referred to as environmental philosophy because the academic literature of the field focuses not on applied ethics, but on the more theoretical fields such as aesthetics, metaphysics, epistemology, philosophy of science, and social and political philosophy. Id. at 74 (citing EUGENE HARGROVE, FOUNDATIONS OF ENVIRONMENTAL ETHICS 2 (1989)).


development question that arises. So, environmental ethicists might help decide, with respect to the environment, which human behaviors are good, and which are bad, for us, and/or for the environment alone. They might also help consider who is responsible for making decisions with respect to the environment and who should bear responsibility for the results of those decisions. To make these decisions it would help to have a standard framework of environmental ethical principles, similar to bioethics' *Belmont Report*, which could serve as a basis for policy making and, according to which environmental ethicists, could begin to evaluate issues as they arise.

2. Evolution of the Discipline of Environmental Ethics

The modern conservation movement, and consequently the field of environmental ethics, grew out of the conservation movement that had begun in earnest in the late nineteenth and early twentieth centuries. In 1847, George Perkins Marsh, a U.S. Congressman from Vermont, delivered a "speech to the Agricultural Society of Rutland County, Vermont... [calling] attention to the destructive impact of human activity on the land, especially through deforestation... [and advocating]... a conservationist approach to the management of forested lands." Henry David Thoreau had moved to Walden Pond in 1845, and published *Walden* in 1854.

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125 *Belmont Report*, supra note 96.

126 Some environmental ethicists believe that "systematic environmental philosophy is premature." J. BAIRD CALLCOTT, ENVIRONMENTAL PHILOSOPHY IS ENVIRONMENTAL ACTIVISM 24 (1995) (citing Anthony Weston, *Before Environmental Ethics, in 14 EnvTL. ETHICS* 337-38 (1992)). Weston suggests that it is too early in the "sea change of values" to systematize a new environmental ethic. He would like to let "new environmental values ferment and bubble up organically." *Id.*

127 Goldstein, supra note 117, at 2-3.


129 Environmental Movement Timeline, supra note 128.

Congress created Yellowstone National Park in 1872\textsuperscript{131} and the Appalachian Mountain Club was founded in 1876.\textsuperscript{132}

Years thereafter, environmentalism developed a rich literary heritage. It included most prominently Aldo Leopold’s \textit{A Sand County Almanac}, in particular, his essay \textit{The Land Ethic}.\textsuperscript{133} In \textit{The Land Ethic}, Leopold’s statement, “[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community” refers to “an ecosystem and its capacity to withstand change.”\textsuperscript{134} This idea has formed the basis of an environmental ethic, and likely developed from his experiences as an ecological scientist. Leopold wrote that “a land ethic changes the role of \textit{homo sapiens} from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and respect for the community as such.”\textsuperscript{135}

The modern environmental movement also was propelled by Rachel Carson’s \textit{Silent Spring}, published in 1962. Carson’s work in particular helped politicize environmentalism and kick-start the modern movement, of which environmental ethics is a part. Her writing focused on the destruction of ecosystems through the use of pesticides and motivated the environmental movement of the 1960s.

Following Leopold’s and Carson’s work, and particularly in the early 1970s, when bioethics was developing as well, academics in philosophy began to take note of the ideas they presented.\textsuperscript{136} In particular, historian Lynn White and philosopher John Passmore were interested in Leopold’s ideas on ethics and published important works pushing forward the idea of environmental philosophy—or moral issues concerning man and nature.\textsuperscript{137}

\begin{itemize}
\item \textsuperscript{131} See Environmental Movement Timeline, supra note 128.
\item \textsuperscript{132} See Evolution of the Conservation Movement, supra note 130.
\item \textsuperscript{133} Aldo Leopold, \textit{The Land Ethic, in A SAND COUNTY ALMANAC} 201 (1949).
\item \textsuperscript{134} \textit{Id.} at 224-25.
\item \textsuperscript{135} \textit{Id.} at 240.
\item \textsuperscript{136} See Flournoy, supra note 108, at 77 (discussing formative writings in environmental ethics).
\item \textsuperscript{137} \textit{Id.} (discussing Lynn White, \textit{The Historical Roots of Our Ecologic Crisis}, 155 SCI. 1203 (1967), and John Passmore, \textit{MAN’S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS} (1974)). According to Alyson Flournoy,

Both of these works focused on how elements of the religious and cultural traditions of the West, specifically Judeo-Christian beliefs and morality, shaped human relations with the rest of the natural world. Their writings contributed to the early debate over whether industrial western society was in some measure programmed by its existing ethics to degrade and destroy the natural world, or whether some alternative
\end{itemize}
White argued that "Christian thinking had encouraged the overexploitation of nature by maintaining the superiority of humans over other forms of life, and by depicting all of nature as created for the use of humans." Passmore, like White, wrote that the traditional Judeo-Christian thought about nature, despite being focused on the superior role of humans, also supported the idea of humans as stewards of God's creation.

In the 1960s, following the publication of *Silent Spring* and the ensuing public outcry, Congress passed many laws designed to protect the environment. By 1970, a movement was building to bring the environment to the forefront of law, policy, and social action. Although Senator Gaylord Nelson had been thinking about Earth Day for years, he saw it celebrated on a national scale on April 22, 1970. His idea was to use the idea of Earth Day to help bring the environment into the political

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Id. at 77 n.47.

138 *Environmental Ethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/ethics-environmental (last visited Jan. 10, 2008); White, *supra* note 137, at 135. White also argued that "some minority traditions within Christianity (e.g., the views of St. Francis) might provide an antidote to the 'arrogance' of a mainstream tradition steeped in anthropocentrism." Id.

139 *See* PASSMORE, *supra* note 137.


141 *See* GAYLORD NELSON, BEYOND EARTH DAY: FULFILLING THE PROMISE 14 (2002) ("[O]n April 22, 1970, Earth Day was held, one of the most remarkable happenings in the history of democracy... twenty million people demonstrated their support..." quoting John Steele Gordon, *The American Environment*, 44 AMERICAN HERITAGE (Oct. 1993)). President Bill Clinton awarded Senator Gaylord Nelson the Medal of Honor on September 29, 1995, in recognition of his work on Earth Day. In doing so, President Clinton remarked that Nelson "inspired us to remember that the stewardship of our natural resources is the stewardship of the American Dream." President Bill Clinton, Remarks by the President in Presentation of the Presidential Medal of Freedom (Sept. 29, 1995), available at http://earthday.wilderness.org/history/remarks.pdf; *see also* Frank A. Aukofer, Former Governor, Others Honored for Contributions, MILWAUKEE J. SENTINEL, Sept. 30, 1995, at 3.
Although it did not occur again for another twenty years, beginning on its twentieth anniversary, Earth Day would become a tradition that has continued from 1990 to the present.\textsuperscript{143} Later in 1970, President Nixon created the Environmental Protection Agency\textsuperscript{144} ("EPA") to enforce the new and anticipated environmental laws. Congress also passed the Clean Air Act in 1970,\textsuperscript{145} regulating air emissions and providing the EPA with the authority to set air quality standards.\textsuperscript{146} In 1972 Congress passed the Clean Water Act, which prohibited unpermitted discharges of pollutants into waters of the United States, and limited the flow of raw sewage into rivers, lakes, and streams.\textsuperscript{147} Congress passed the Safe Drinking Water Act in 1974\textsuperscript{148} and further air pollution control legislation that set the standards for automobile tailpipe emissions that resulted in the addition of catalytic converters to cars.\textsuperscript{149}

\textsuperscript{142} NELSON, supra note 141, at 3. See also EnviroLink, How the First Earth Day Came About, http://earthday.envirolink.org/history.html (last visited Jan. 10, 2008). In response, there was an enormous proliferation of environmental activity, Nelson believed, because people finally had a forum in which to discuss their concerns about the condition of the rivers, lakes, land, and air around them. On that first Earth Day in 1970, more than 20 million people marched, demonstrated, and attended teach-ins on environmental topics. See Holly Hartman, Milestones in Environmental Protection, Infoplease.com, http://www.infoplease.com/spot/earthdaytimeline.html (last visited Jan. 10, 2008).


Congress also passed the Toxic Substances Control Act in 1976, which empowered the EPA to track the use of industrial chemicals, and to ban those that pose a threat to the environment or human health. At this time, the League of Conservation Voters began its operations as a bipartisan political action committee which maintains and publishes the conservation-related votes of every member of Congress. By 1980, Congress had also created the Superfund, setting aside large amounts of money to clean up hazardous waste sites across the United States.

In 1975, American environmental philosopher Holmes Rolston III argued that species protection was a moral duty. He argued that species have intrinsic value and that the loss of a species is a loss of genetic possibilities. Rolston further argued that the deliberate destruction of a species (he gives the example of someone destroying the last of a species of butterfly for the purpose of raising the value of specimens in collections) would show disrespect for the biological processes which make possible the emergence of individual living things.

Environmental philosophers have tried, in some ways, to do what the bioethicists did to steer their field towards practical significance. In 1990, a group of faculty members at the University of Georgia banded together and called themselves the “faculty of environmental ethics.” They strived to include academics from various disciplines, including the sciences and humanities. They created an Environmental Ethics Certificate Program and put together an important conference—The Second

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155 ROLSTON, supra note 123, at 126-58.
156 Id. at 144.
157 Id. at 123.
158 Id. at 144.
International Conference on Ethics and Environmental Policy. Although these conferences have pulled together experts in many areas critical to environmental ethics, they have not yet led to a standard set of principles, like the Belmont Report.

So environmental ethics, or environmental philosophy, was emerging as a discipline within the broader field of ethics in philosophy. As an applied field of its own, however, it has yet to emerge. In the premier anthologies on environmental ethics, one finds articles on many of the ideas and questions that seem to make up the field. These include concerns about the land ethic and animal liberation, about the rights of and responsibilities for trees, animals and islands, about ecofeminism and environmental holism, species equality and respect for nature. There are articles about population, preservation of the wilderness, sustainability, poverty, and cost-benefit analysis, but nothing setting forth or suggesting a set of unified principles of environmental ethics. Instead, the anthologies include chapters on effective environmentalism, as a form of advocacy—J. Baird Callicott’s article puts it even more bluntly, *Environmental Philosophy is Environmental Activism: The Most Radical and Effective Kind.* These chapters include reflections on what an environmental philosopher should do. In one such essay, in a thoughtful discussion between Bryan Norton and Eugene Hargrove, Norton urges the philosophers in environmental ethics to become more practical. He criticizes what he calls “[t]he prevailing tendency of environmental ethicists to see problems . . . as interesting cases with which to test philosophical principles

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160 *Id.* This conference was held April 5-7, 1992 and was preceded by the First International Conference on Ethics and Environmental Policy held in 1990 in Borca di Cadore, Italy. The first conference was sponsored by the Fondazione Lanza. *Id.; General Announcements, INT’L SOC’Y FOR ENVTL. ETHICS NEWSL.,* Spring 1992, http://www.cep.unt.edu/ISEE/nS3-1-92.htm. Other universities have sponsored conferences on environmental ethics as well. For example, the University of Miami and Florida Atlantic University have been sponsoring annual Environmental Ethics conferences for many years. These have focused on environmental issues in Florida. *See University of Miami Ethics Programs, Environmental Ethics in South Florida, http://www.fau.edu/environmentl/index.html* (last visited Jan. 10, 2008).

161 *See Schmidtz & Willott, supra note 6, at v-vii; see also ETHICS AND ENVIRONMENTAL POLICY—THEORY MEETS PRACTICE* (Frederick Ferré & Peter Hartel eds., 1994).

162 *See Schmidtz & Willott, supra note 6, at vii-viii.

163 *See J. Baird Callicott, Environmental Philosophy is Environmental Activism: The Most Radical and Effective Kind,* in Schmidtz & Willott, *supra* note 6, at 546-56.

164 *See Ferré & Hartel, supra note 161, at viii.

165 *See Bryan Norton & Eugene Hargrove, Where Do We Go from Here?, in ETHICS AND ENVIRONMENTAL POLICY,* *supra* note 161, at 235-52.
rather than as real problems requiring rational resolution . . . "\(^{166}\) Norton suggests that this approach has "isolated environmental ethics from policy discourse and debate."\(^{167}\) Although he has been called an environmental antiphilosopher\(^ {168}\) for his position, it makes sense if environmental ethics hopes to influence policy.

Norton further suggests that the theory in environmental philosophy should be to create rules based on values that a practical philosopher could use to "reduce the distance between the two sides in . . . [a] controversy by finding a general policy direction that can achieve consensus and define a range of actions that are morally acceptable to a wide range of worldviews."\(^ {169}\) This is not so far from what the early bioethicists were trying to achieve at Haverford, teaching philosophy to the scientists and lawyers, and science and law to the philosophers.\(^ {170}\) With few exceptions, though, environmental philosophers seem focused on environmentalism, or activist environmental philosophy in practice, rather than on developing a set of ethical principles for a new breed of environmental ethicists to apply in practical and policy making settings.

The motivating factors that fueled the environmental movement and the emergence and growth of environmental ethics in philosophy, including the environmental activism they both pursue, also led to the creation and enactment of new environmental legislation since the 1970s.\(^ {171}\) For purposes of this article, the important question is whether those laws, or any others, would help create circumstances where environmental ethicists could play a practical role in decision making on issues concerning the environment.

C. Training and Standards of Practice

1. Bioethicists

At least fifty universities have academic programs focused on medical ethics or bioethics. Many more have courses devoted to the field.\(^ {172}\)

\(^{166}\) Id. at 241.

\(^{167}\) Id.

\(^{168}\) Callicott, supra note 163, at 548.

\(^{169}\) Norton & Hargrove, supra note 165, at 239.

\(^{170}\) See supra notes 73-74 and accompanying text.

\(^{171}\) See Hartman, supra note 142 (chronicling environmental legislation and events); see also supra notes 145-154 and accompanying text.

\(^{172}\) See Kennedy Institute of Ethics, Georgetown University, National Reference Center
Some offer certificate programs in bioethics, many others offer majors or minors within philosophy programs. Bioethics programs may be housed in departments of philosophy, religion, sociology, law, or elsewhere, such as in medical schools or at university-related hospitals. Although numerous programs exist at every academic level in bioethics, there is neither a standard course of study, nor a set of professional standards for practitioners in the field. Despite the abundance of programs, practitioners' level of preparation varies from many years of specialized doctoral work, to a ten-day intensive course of study at the Kennedy Institute for Ethics at Georgetown. So, practicing bioethicists may be Ph.D.-prepared academics in philosophy or another discipline. There may also be lawyers, sociologists, or social workers, with varying levels and content of training.

Although no set standard of practice has solidified for bioethicists, standards of practice in medicine began with the Hippocratic Oath, thought to be created in the 4th century B.C.E., and still administered in a modified form to new medical doctors today. Through it, new physicians pledge, among other things, to work for the good of the patient. In the past, people also believed the oath to include the promise to do no harm. Although it has been modified over time, this oath sets forth basic, original standards of practice for physicians. Any standards for ethicists of medicine for Bioethics Literature, http://www.bioethics.georgetown.edu/edures/edopps.htm (last visited Jan. 10, 2008) (listing more than twenty centers or institutes of bioethics). The table at Appendix 1 lists programs in bioethics by type of programs.

173 Id.

174 See infra Appendix 1.

175 Rosen & Satel, supra note 17.


must certainly derive, in part, from the standards applied to the field they oversee.

Thomas Percival, an English physician, wrote the first known book on medical ethics, published in 1803. The principles from his book formed the foundation for the American Medical Association's first Code of Medical Ethics. This Code repudiated "sectarian" medicine, like homeopathy, naturopathy, and hydropathy, in favor of the emerging scientific medicine. The AMA revised this Code on numerous occasions, ultimately narrowing it to nine basic principles that encourage physicians to respect the rights of their patients, maintain their skills, accept the discipline of the profession, consult when necessary, keep confidences, and be good citizens.

See JONSEN, supra note 18, at 7; see also AMERICAN MEDICAL ASSOCIATION, ORIGINAL CODE OF MEDICAL ETHICS (1847), available at http://www.ama-assn.org/ama/upload/mm/369/1847code.pdf.


For the text of each of the revisions, in 1903, 1957, 1980, and 2001, see History of AMA Ethics, supra note 180.

See JONSEN, supra note 18, at 8. For the text of the 2001 version of the AMA Principles of Medical Ethics, see History of AMA Ethics, supra note 180. The current Principles of Medical Ethics state:

I. A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights.

II. A physician shall uphold the standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities.

III. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.

IV. A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.

V. A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.

VI. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with...
In 1998, the American Society for Bioethics and Humanities ("ASBH") codified "core knowledge areas" and "core competencies" that describe a trained bioethicist in terms of his or her preparedness to engage in bioethics consultation.\textsuperscript{183} These included an understanding of moral reasoning, health law, and the organization of the healthcare system. It required the ethicist to be able to engage in creative problem solving, to "listen well" and communicate interest and respect, and to distinguish ethical dimensions of a problem from that problem's other dimensions.\textsuperscript{184} No mechanism exists, however, to ensure that a person working as an applied bioethicist meets these knowledge areas and competencies.

Some argue that the core responsibilities set forth by the ASBH are not specific to bioethicists because they are not outside the scope of the responsibilities of medical doctors.\textsuperscript{185} Doctors are bound by their own codes of ethics, beginning with the Hippocratic Oath and the American Medical Association's Code of Ethics, to approach medical cases with the same level of care for ethical issues as would apply for a bioethicist.\textsuperscript{186} Some bioethicists take on broader, political goals, such as making the medical system more fair to underprivileged persons, and addressing the needs of minorities and women. Contrawise, Rosen and Satel argue that broader, political principles of bioethics are not a worthy supplement to the requirements of the Hippocratic Oath because they lend themselves to outcomes that are far from "ethical."\textsuperscript{187} Rosen and Satel call the applied philosophy that emerged as bioethics, "a euphemism for political agitation."\textsuperscript{188}

whom to associate, and the environment in which to provide medical care.

VII. A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health.

VIII. A physician shall, while caring for a patient, regard responsibility to the patient as paramount.

IX. A physician shall support access to medical care for all people.


\textsuperscript{183} See Core Competencies for Health Care Ethics Consultation, \textit{supra} note 176.

\textsuperscript{184} Rosen & Satel, \textit{supra} note 17.

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} See \textit{supra} note 178.

\textsuperscript{187} Rosen & Satel, \textit{supra} note 17.

\textsuperscript{188} \textit{Id.}
2. Environmental Ethicists

Some universities offer courses in environmental ethics. The University of North Texas, in particular, has one of the most comprehensive and respected programs, and the University of Georgia has an established and well-respected Environmental Ethics Certificate Program. The University of Montana has an active Environmental Ethics Institute.

Environmental Ethics is usually a certificate or study area within another academic program, rather than a stand-alone degree. It is usually interdisciplinary in nature, seeking to unify a diversity of viewpoints about environmental issues that involve competing values. An important aspect of your studies would be devoted to defining and defending these values. Students also learn to create solutions that are agreeable to people with different values.

Graduates of Ethics programs should be able to identify and succinctly argue topics in Environmental Ethics; to interpret and criticize the arguments of others; and to analyze problems in the environmental field and be able to propose solutions. Programs in Environmental Ethics usually involve a good deal of writing, editing and reading. Good communications skills are important, as are mediation skills.

Id. The site also includes courses often included in environmental ethics programs:
- Introduction to Environmental Philosophy
- Ecofeminism: Women's Studies and Environmental Ethics
- Comparative Environmental Ethics
- Western Religion and the Environment
- Ecological Values
- Environmental Economics
- Environmental and Public Health Law
- Cultural Ecology
- Ecological Basis of Environmental Issues
- Environmental Policy
- Environmental Dispute Resolution
- Conservation Ecology and Resource Management
- American Environmental History

Id.


190 The Center for Environmental Philosophy at the University of North Texas, http://www.cep.unt.edu/ (last visited Jan. 10, 2008).


New York University has a program that specifically focuses on the interconnectedness of medical ethics and environmental ethics.\(^{193}\) That said, environmental ethics courses and programs are far fewer than those in bioethics. Most are housed in philosophy departments, but some are in departments of religion, ecology, or environmental studies.\(^{194}\)

As far as I can find, no standards of practice exist or have been proposed for environmental ethicists. There is a code of environmental ethics for environmental engineers,\(^ {195}\) but nothing apparent for environmental ethicists.

### D. Resulting Roles for Ethicists

The roles played today by medical ethicists, or bioethicists, vary by institution, and generally fall into the categories of clinical, research, and policy making. In the clinical arena, they are often “on-call” consultants at healthcare facilities. Here, they help doctors and families with decisions regarding the mental capacity of patients and accompanying issues concerning the potential withdrawal of extraordinary treatments. “Medical ethicists are generally asked to participate in the resolution of tough decisions which members of the medical community do not want to resolve themselves.”\(^ {196}\) An example of this is determining what defines the moment of death.\(^ {197}\) “Ethics committees for patient care issues have become a fixture in hospitals in the United States.”\(^ {198}\)

In research oriented institutions, bioethicists serve on institutional review boards and help make sure research conforms to ethical standards. For policy making, medical

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\(^{197}\) \textit{Id}.

\(^{198}\) Fletcher & Hoffman, \textit{supra} note 37.
ethicists are on staff at the National Institutes of Health, the U.S. Public Health Service, the health committees of the U.S. Congress and state legislatures, biotechnology and managed care companies, and hospitals and clinics.\footnote{Rosen & Satel, supra note 17.}

By contrast, "[e]nvironmental professionals have little interest in having philosophers make tough decisions for them. . . . The interest of environmental professionals is not in tough cases but in justification."\footnote{Hargrove, supra note 113, at 17.}

According to Eugene Hargrove, who has written extensively in this area, environmental professionals, ethicists and otherwise, must pretend that their decisions are not value-driven because values are subjective, and therefore not sufficient grounds for decisions. In essence, to be good policy, a policy must be value-free. Because environmental ethics reintroduces the concept of value, the role of environmental ethicists can only be minimal.\footnote{Id. at 24.}

Whereas with bioethics, some doctors sought assistance from philosophers and theologians in understanding and making their difficult decisions,\footnote{Rosen & Satel, supra note 17; see also Jonson, supra note 18, at 1-79. Certainly some doctors have believed bioethicists to be intrusive, unhelpful, uninformed about the issues they are delving into, distracting to the doctors' work, and worse. Some believe that only bioethicists who are also medical doctors have credibility. Rosen & Satel, supra note 17.} few have sought such advice regarding decisions concerning the environment, although this is certainly changing with growing concern for climate change and the increasing demand for "green" buildings. That said, no real analog exists in the environmental area for the role of the doctor or hospital. Certainly, real estate developers, utilities, and manufacturers are not usually asking the relevant questions. Although, as with bioethics, philosophers and theologians have long been at work on environmental ethics, the discipline seems not to have broken loose from its philosophical moorings enough to become a practical discipline of its own.

\footnote{Rosen & Satel, supra note 17.}
\footnote{Hargrove, supra note 113, at 17.}
\footnote{Id. at 24.}
\footnote{Id.}
\footnote{Rosen & Satel, supra note 17; see also Jonson, supra note 18, at 1-79. Certainly some doctors have believed bioethicists to be intrusive, unhelpful, uninformed about the issues they are delving into, distracting to the doctors' work, and worse. Some believe that only bioethicists who are also medical doctors have credibility. Rosen & Satel, supra note 17.}
II. THE ROLE OF LAW IN PROMOTING THE INFLUENCE OF BIOETHICS AND ENVIRONMENTAL ETHICS

A. Law in the Development of Bioethics

Historically, doctors played the sole role in ethical decisions concerning medicine. As discussed above, however, medical professionals sought assistance with their developing moral problems from theologians and philosophers. Courts and legislatures stepped in and provided roles for others in decision-making processes. Although the “others” did not have to be ethicists, hospitals began involving ethicists in decisions and on decision-making committees. To some extent this was driven by the hospitals themselves, but it was also driven by law.

Bioethics’ professional recognition increased when hospitals were forced, in part by law, to establish procedures for dealing with ethical issues, such as determining who should live, die, pay, or decide. State lawmakers have encouraged ethics consultants to advise patients and families as well as medical and legal actors. This is because some state statutes and regulations either require or allow ethics committees to have the power to provide advice and recommendations to healthcare professionals. Now, hospital bioethics committees often have a say in decisions, and the extent to which courts defer to the authority of those committees underlines the emergence of bioethics as a profession. The role of courts and legislatures helps explain the development of bioethics as a profession and a self-sustaining discipline. Administrative agency rules have also supported the forward momentum of bioethics.

1. Legislation

a. Federal Legislation

Much of the legislation related to the forward momentum of bioethics has come at the state level. That said, federal law was an early
leader and clearly affected and encouraged the use of bioethicists in decision making, most notably since Congress's passage of the National Research Act in 1974. The National Research Act required institutional review boards for institutions applying for a grant or contract to conduct research involving human subjects. Although this federal law encouraged ethical review of research involving human subjects by requiring it in circumstances involving federal grants and contracts, the law did not require that the review boards include persons trained in bioethics. Still, this new requirement to consider ethical issues in the use of human subjects in research guided the development of the field of bioethics.

Importantly, the National Research Act also created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. It charged the Commission to identify the basic ethical principles that should underlie the conduct of biomedical and behavioral research involving human subjects and to develop guidelines that should be followed to assure that such research is conducted in accordance with those principles. The resulting report, *Ethical Principles and...*
Guidelines for the Protection of Human Subjects of Research, commonly known as the Belmont Report, summarizes the basic ethical principles identified by the Commission and formed the foundational basis of the field of bioethics. The Department of Health, Education, and Welfare published the Belmont Report in the Federal Register, intending that it be readily available to scientists, members of Institutional Review Boards, and Federal employees. The Belmont Report did not make specific recommendations for administrative action. Instead, the Commission recommended that it be adopted as a statement of policy. It was so adopted and has become the document that ethicists and others return to when seeking guidance or applicable principles concerning the use of human subjects in research.

Although enacted before the creation and publication of the Belmont Report, the Food, Drug, and Cosmetic Act was also born when ethical issues concerning the use of human subjects in research were a focus of public concern. This act required informed consent in the use of human subjects in research, an issue central in the development of bioethics.

Other federal laws presented ethical issues, although they did not address the role of ethicists. For example, the National Organ Transplant Act, passed in 1984, created the Organ Procurement and Transplantation Network, but also set guidelines that states must follow in creating their own organ transplant laws. The act prohibits the buying and selling of body parts for transplantation and establishes certain requirements regarding informed consent—another core issue for bioethicists.

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211 Id.
212 See Belmont Report, supra note 96.
213 Id.
219 Id. § 274e.
220 Section 401 of the National Organ Transplant Act required that donors of bone marrow listed in the registry have given an informed consent to the donator of the bone marrow. Pub. L. 98-507(b)(1), §401, 98 Stat. 2339 (2006).
The Public Health Service Act\textsuperscript{221} presented several bioethical issues, such as questions surrounding the proper use and distribution of vaccines\textsuperscript{222} and the quarantining of persons with communicable diseases.\textsuperscript{223} In the Animal Welfare Act, Congress declared animals traded and used in agriculture as either in or affecting interstate commerce and thereby required humane treatment of such animals.\textsuperscript{224} Although not concerning humans directly, ethical treatment of creatures in research is closely related to that of humans, and thus close to the core of bioethics. In the Assisted Suicide Funding Restriction Act of 1997, Congress stated that despite recent court decisions, it would not fund any program engaging in or encouraging assisted suicide.\textsuperscript{225} This pertains to another issue close to bioethics' core—potential interference with natural life.

The Baby Doe law, really a 1984 amendment to the Child Abuse Prevention and Treatment Act of 1974,\textsuperscript{226} also brought issues of medical ethics to the forefront of law making, without specifically including a role for ethicists. It required that to be eligible for certain grants, states must, in a plan related to child protective services, ensure that they have procedures for responding to notifications of medical neglect.\textsuperscript{227} The law specified that medical neglect includes the withholding of medically indicated treatments from disabled infants. The amendment also requires states to have in place authority to pursue legal action to prevent the withholding of medical treatment from children.\textsuperscript{228} This law, and the Health and Human Services ("HHS") regulations that preceded it,\textsuperscript{229} arose in response to some specific cases in 1982 and 1983 in which disabled infants were denied medical treatment. In one case, an infant with Down Syndrome


\textsuperscript{222} 42 U.S.C. § 300aa.

\textsuperscript{223} Id. § 243(a).


\textsuperscript{225} Assisted Suicide Funding Restriction Act, 42 U.S.C. § 14401(a)(4) (2000).


\textsuperscript{228} Id.

was denied surgery to correct an internal blockage. In another, an infant with spina bifida and hydrocephaly was denied treatment because of the severity of the baseline condition and the limited positive outcomes that could result. The Surgeon General at the time, C. Everett Koop, persuaded Congress to enact major legislation to help prevent similar cases from occurring. This was a major step in legislating ethics in medicine. Although it did not provide a role for ethics committees or ethicists, it was a government response to a moral issue in medical care, indicating the willingness of the government to create laws concerning ethical issues in medicine.

Supplementing the many federal statutes presenting and calling for action on ethical issues, administrative implementation of the National Research Act led to the creation of the Common Rule, the Federal Policy for the Protection of Human Subjects. The Common Rule requires that the federal agency or department adopting the rule have institutional review boards, select research participants equitably, minimize risks to human subjects, comply with informed consent requirements, and ensure that risks are reasonable as compared with anticipated benefits of participation in the study. It was accepted by twenty federal agencies

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234 See 45 C.F.R. § 46.103(b) (2006).
235 Id. § 46.111(a)(3).
236 Id. § 46.111(a)(1).
237 Id. § 46.116.
238 Id. § 46.111(a)(2).
and departments in 1991, including the EPA, and currently has been adopted by many more.\textsuperscript{239} The Common Rule applies to all research involving human subjects that is conducted, supported, or otherwise subject to regulation by any federal department or agency.\textsuperscript{240} It also applies to such research conducted, supported, or otherwise subject to regulation by the federal government outside the United States.\textsuperscript{241} Again, the rules do not require the Institutional Review Boards to include persons trained in bioethics.\textsuperscript{242} Although this rule is fairly specific and compartmentalized, requiring certain federal departments to conduct an ethical review when human subjects are used in research, it does provide support for more widespread involvement of ethics and ethicists in research and medicine.

These and other federal laws presented issues calling, even distantly or impliedly, for the involvement of bioethicists largely by validating the issues that concern bioethicists and leaving the ethicists as the experts

\textsuperscript{239} Protection of Human Subjects, 40 C.F.R. pt. 26 (2006) (setting forth the requirements for all human subjects research conducted or supported by the EPA); see also Federal Policy on the Protection of Human Subjects, 56 Fed. Reg. 28,003 (June 18, 1991) (listing the agencies adopting the Common Rule).


\textsuperscript{241} See id.

\textsuperscript{242} IRB membership. (a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members, . . . to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific research activities, the IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a vulnerable category of subjects, such as children, prisoners, pregnant women, or handicapped or mentally disabled persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these subjects. (b) . . . No IRB may consist entirely of members of one profession. (c) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas. . . . (f) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues which require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

to help resolve them. Notably, many of the issues addressed in the federal laws stem from those addressed in the Belmont Report, particularly the use of human subjects in research and informed consent. Therefore, the Belmont Report presented issues on which some of the major federal laws affecting bioethics were created.

b. State Legislation

State legislatures have given bioethics a boost in several ways, often more directly than is found in the federal laws. For example, in some states, laws require health care institutions to establish ethics committees. In others, they mandate a role for ethics committees in decision making or support the use of ethicists in decision making in other ways. These laws may be both defining events in the emergence of bioethics as a profession, and evidence of its arrival as a force in decision making.

Although most states do not have laws requiring the establishment of ethics committees in healthcare institutions, Maryland is an early example of one that does. In 1987, Maryland mandated that hospitals establish advisory committees. Maryland law requires that each hospital and related institution establish an advisory committee which may, at the discretion of the institution, include an ethics professional. Maryland


244 See also Spielman, supra note 204, at 169-70 (referencing laws in Maryland, Texas, Montana, and Arizona which authorize ethics committees to advise medical professionals).


- Membership of advisory committee
  - (a)(1) Each advisory committee shall consist of at least 4 members, including:
    - (i) A physician not directly involved with the care of the patient in question;
    - (ii) A registered nurse not directly involved with the care of the patient in question;
is one of the few states to regulate the composition of hospital ethics committees and to specifically offer the inclusion of an ethics professional.\textsuperscript{248} Most states' legislation says little or nothing about the composition of ethics committees. Often, no certification, licensure, or accreditation of training programs is set forth or required for the membership of ethics committees.

Like Maryland, New Jersey requires the establishment of ethics committees.\textsuperscript{249} New Jersey hospitals must have a multidisciplinary ethics committee and assure that individuals with medical, nursing, legal, social work, and clergy backgrounds participate in the committees.\textsuperscript{250} It does not require that the committee include a person with bioethics training, although it does specify that the function of the committee includes participation in the formulation of hospital policy related to bioethical matters.\textsuperscript{251}

\textsuperscript{248} \textit{Id.} (emphasis added).
\textsuperscript{249} MD. CODE ANN., HEALTH-GEN., § 19-372(a)(2)(ii); Spielman, \textit{supra} note 204, at 180.
\textsuperscript{250} Cummins, \textit{supra} note 206, at 33 (citing N.J. ADMIN. CODE § 486-5.1 (1992)).
\textsuperscript{251} \textit{Id.} In particular, the New Jersey regulation requires that
The hospital shall have a multidisciplinary bioethics committee, and/or prognosis committee(s), or equivalent(s). The hospital shall assure participation by individuals with medical, nursing, legal, social work, and clergy backgrounds. The committee or committees shall have at least the following functions:

1. Participation in the formulation of hospital policy related to bio-ethical issues;
2. Participation in the formulation of hospital policy related to advance directives. Advance directive shall mean a written statement of the patient's instructions and directions for health care in the event of future decision making incapacity in accordance with the New Jersey Advance Directives for Health Care Act (P.L. 1991, c.201). An "advance directive" may include a proxy directive or an instruction directive, or both.
3. Participation in the resolution of patient-specific bioethical issues, and responsibility for conflict resolution concerning the patient's decision-making capacity and in the interpretation and application of advance directives. The committee may partially delegate responsibility for this function to any individual or
In Hawaii, the legislature placed the decision to establish an ethics committee at the discretion of the hospital. Hawaii law indicates that the function of an ethics committee is to consult, educate, review, and make decisions regarding ethical questions, including those on life-sustaining therapy. Its definition of “ethics committee” indicates that the committee may be multidisciplinary, but does not provide the requisite qualifications of its members, thereby not explicitly including trained bioethicists.

Interestingly, Iowa statutes give legislative support for the idea that a county board of supervisors can establish and fund a medical decision board to act as substitute decision makers in certain circumstances, and that the board may appoint and fund a hospital ethics committee to serve as local decision makers.

State legislatures have also addressed the use of medical ethicists or ethics committees in making decisions regarding the termination of life support, especially in circumstances where the patient is unable to make decisions on his/her own. In Colorado, for example, a statute requires that the assistance of a health care facility’s medical ethics committee be provided upon the request of a proxy decision maker or any other interested person. Here, significantly, the statute explicitly states that where

individuals who are qualified by their backgrounds and/or experience to make clinical and ethical judgments; and

4. Providing a forum for patients, families, and staff to discuss and reach decisions on ethical concerns relating to patients.

Id.

See Fleetwood & Unger, supra note 44, at 320 (citing HAW. REV. STAT. ANN. § 663-1.7 (1992)). The Hawaii statute also raises the issue of liability and the shield against liability that ethicists can provide. See Cummins, supra note 206, at 33.

HAW. REV. STAT. ANN. § 663-1.7 (LexisNexis 2007). “‘Ethics committee’ means a committee that may be an interdisciplinary committee appointed by the administrative staff of a licensed hospital, whose function is to consult, educate, review, and make decisions regarding ethical questions, including decisions on life-sustaining therapy.” Id.

IOWA ADMIN. CODE § 641-85.3 (LexisNexis 2007). Specifically, section 85.3(1) provides that “[t]he county board of supervisors may establish and fund a local substitute medical decision-making board” and section 85.3(1) further provides that “[t]he county board of supervisors may appoint and fund a hospital ethics committee to serve as the local decision-making board. . . .”

The assistance of a health care facility’s medical ethics committee shall be provided upon the request of a proxy decision-maker or any other interested person specified in subsection (3) of this section whenever the proxy decision-maker is considering or has made a decision to withhold or withdraw medical treatment. If there is no medical ethics committee for a health care facility, such facility may provide an outside referral for such assistance or consultation.

COLO. REV. STAT. § 15-18.5-103(6.5) (2007).
the medical facility does not have a medical ethics committee, it may refer the matter to outside consultants. The Colorado legislature is directly recommending the use of practicing ethicists, certainly a boost for the field.

Vermont requires that any decision to withhold medical treatment for an irreversible or terminal condition be reviewed by the department’s ethics committee. Florida also mandates that “[d]ecisions to withhold or withdraw life-prolonging procedures be reviewed by the facility’s bioethics committee.” Similarly, in West Virginia, where there is a conflict between the decisions of the surrogate decision maker, and those of the attending physician, the law requires that the attending physician involve an ethics committee in the resolution.

When a patient is not capable of making a decision regarding the continuation of life-sustaining processes, Maryland requires that the decision-making physician seek the advice of a patient care advisory board, although it does not mention the specific involvement of ethicists on that board. Similarly, New Jersey requires the involvement of a reviewing...

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256 Id.
257 The power to seek, obtain, and give consent to initiation and continuation of medical and dental treatment that best promotes the health, comfort, and well-being of the respondent, or to withhold consent for initiation or continuation of treatment which does not promote the health or well-being of the respondent. In exercising this power, the commissioner shall be guided by the wishes and preferences of the individual. Any decision to withhold or abate medical treatment for an irreversible or terminal condition shall be reviewed by the department’s ethics committee.


259 If there is a conflict between the decisions of the medical power of attorney representative or surrogate and the person’s best interests as determined by the attending physician when the person’s wishes are unknown, the attending physician shall attempt to resolve the conflict by consultation with a qualified physician, an ethics committee or by some other means. If the attending physician cannot resolve the conflict with the medical power of attorney representative, the attending physician may transfer the care of the person pursuant to subsection (b), section twelve [§ 16-30-12] of this article.


260 (a) Petition by health care provider
   (1) A health care provider for an individual incapable of making an informed decision who believes that an instruction to withhold or withdraw a life-sustaining procedure from the patient is inconsistent with generally accepted standards of patient care shall:
board in like circumstances, and also does not explicitly include ethicists on the board. Significantly, Texas requires the involvement of an ethics committee in like situations, and does explicitly include ethicists. Tennessee requires that an ethics committee be consulted when a physician is making a decision in the absence of the surrogate.

(I) Petition a patient care advisory committee for advice concerning the withholding or withdrawal of the life-sustaining procedure from the patient if the patient is in a hospital or related institution;


N.J. STAT. ANN. § 26:2H-67 (West 2006) ("Prior to implementing a decision to withhold or withdraw life-sustaining treatment, the attending physician may promptly seek consultation with an institutional or regional reviewing body in accordance with section 17 of this act, or may promptly seek approval of a public agency recognized by law for this purpose.") (emphasis added).

TEX. HEALTH & SAFETY CODE ANN. § 166.039 (Vernon 2005).

(e) If the patient does not have a legal guardian and a person listed in Subsection (b) is not available, a treatment decision made under Subsection (b) must be concurred in by another physician who is not involved in the treatment of the patient or who is a representative of an ethics or medical committee of the health care facility in which the person is a patient.

Id. § 166.039(e) (emphasis added).

(b) If the patient does not have a legal guardian or an agent under a medical power of attorney, the attending physician and one person, if available, from one of the following categories, in the following priority, may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment:

(1) the patient's spouse;
(2) the patient's reasonably available adult children;
(3) the patient's parents; or
(4) the patient's nearest living relative.

(c) A treatment decision made under Subsection (a) or (b) must be based on knowledge of what the patient would desire, if known.

Id. § 166.039(b)-(c). See also 25 TEX. ADMIN. CODE § 405.60(a) (LexisNexis 2006) ("An ethics committee must be established by each facility. The committee may be established multi-institutionally in cooperation with other health care providers, e.g., local hospitals, serving the same geographical area."); 40 TEX. ADMIN. CODE § 40:8.60 (2006).

If the resident lacks capacity and none of the individuals eligible to act as a surrogate under 1200-8-11-12(16)(c) thru 1200-8-11-12 (16)(g), is reasonably available, the designated physician may make health care decisions for the resident after the designated physician either: (1) consults with and obtains the recommendations of a facility's ethics mechanism or standing committee; or (2) obtains concurrence from a second physician who is not directly involved in the resident's health care, does not serve in a capacity of decision-making, influence, or responsibility
State laws have encouraged individual bioethicists and ethics committees to give advice to patients and families, and to medical and legal professionals by, in some cases, granting those committees specific powers.\textsuperscript{264} Several states have granted ethics committees the power to provide advice and recommendations to medical professionals.\textsuperscript{265} For example, in Texas, ethics committees are the sole decision makers when patients and physicians disagree about life-sustaining treatment.\textsuperscript{266} Georgia law allows an ethics committee to decide when a patient is a candidate for non-resuscitation, provided the attending physician and another physician agree.\textsuperscript{267} In New Jersey, state law gives ethics consultants the authority to resolve disagreements among patients, health care representatives and physicians "that would otherwise be resolved by judges."\textsuperscript{268} Hawaii law, under certain specific circumstances pertaining to life-sustaining therapies, grants actual decision-making authority to an ethics committee.\textsuperscript{269}

\textsuperscript{264} Spielman, \textit{supra} note 204, at 169.

\textsuperscript{265} \textit{Id.} For example, see \textsc{Tex. Admin. Code Ann.} § 405.53(4) (2007).

\textsuperscript{266} Spielman, \textit{supra} note 204, at 174.

\textsuperscript{267} Spielman, \textit{supra} note 204, at 174. New Jersey law states that

\textsuperscript{268} Spielman, \textit{supra} note 204, at 176. New Jersey law states that [i]n the event of disagreement among the patient, health care representative and attending physician concerning the patient's decision making capacity or the appropriate interpretation and application of the terms of an advance directive to the patient's course of treatment, the parties may seek to resolve the disagreement by means of procedures and practices established by the health care institution, including but not limited to, consultation with an institutional ethics committee, or with a person designated by the health care institution for this purpose or may seek resolution by a court of competent jurisdiction.

\textsuperscript{269} Spielman, \textit{supra} note 204, at 174. Hawaii law states that "'[e]thics committee' means a committee . . . whose function is to . . . make decisions regarding ethical questions, including decisions on life-sustaining therapy." \textsc{Hawaii Rev. Stat. Ann.} § 663-1.7(a) (LexisNexis 2006).
In Arizona, a statute encourages the use of ethics committees in decision making where no close family members are available to help make decisions for an adult patient who is unable to communicate. In the absence of a surrogate, Arizona allows a physician to make decisions with the concurrence of an ethics committee. The law also permits a heath care provider to obtain recommendations of an institutional ethics committee when a surrogate decision maker is not available. Alabama law permits the same. In such instances, the ethics committee is stepping

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270 If the health care provider cannot locate any of the people listed..., the patient's attending physician may make health care treatment decisions for the patient after the physician consults with and obtains the recommendations of an institutional ethics committee. For the purposes of this subsection, 'institutional ethics committee' means a standing committee of a licensed health care institution appointed or elected to render advice concerning ethical issues involving medical treatment. ARIZ. REV. STAT. § 36-3231 (LexisNexis 2007).

271 Spielman, supra note 204, at 174. Arizona law states: “If the health care provider cannot locate any of the people listed in subsection A of this section, the patient’s attending physician may make health care treatment decisions for the patient after the physician consults with and obtains the recommendations of an institutional ethics committee.” ARIZ. REV. STAT. § 36-3231(B) (LexisNexis 2007).

272 ARIZ. REV. STAT. § 36-3231(B) (LexisNexis 2006).

273 Alabama law provides the same permission for a physician to follow the advice of an ethics committee when a family member is not available. ALA. CODE § 22-8A-11(d)(7) (LexisNexis 2006).

If the patient has no relatives known to the attending physician or to an administrator of the facility where the patient is being treated, and none can be found after a reasonable inquiry, a committee composed of the patient’s primary treating physician and the ethics committee of the facility where the patient is undergoing treatment or receiving care, acting unanimously; or if there is no ethics committee, by unanimous consent of a committee appointed by the chief of medical staff or chief executive officer of the facility and consisting of at least the following: (i) the primary treating physician; (ii) the chief of medical staff or his or her designee; (iii) the patient’s clergyman, if known and available, or a member of the clergy who is associated with, but not employed by or an independent contractor of the facility, or a social worker associated with but neither employed by nor an independent contractor of the facility.

Id. § 22-8A-11(d)(7) also provides:

In the event a surrogate decision is being made by an ethics committee or appointed committee of the facility where the patient is undergoing treatment or receiving care, the facility shall notify the Alabama Department of Human Resources for the purpose of allowing the department to participate in the review of the matter pursuant to its responsibilities under the Adult Protective Services Act, Chapter 9 of Title 38.
up to make decisions when no spouse or family member is available to do so.

In neither Arizona nor Alabama, however, does the legislature indicate who should comprise the ethics committee. In fact, "[t]here is no state or federal prescription for the composition of an institutional ethics committee. The general guideline for the membership is that it be diverse in perspective." A diverse committee membership should comprise one-third physicians, one-third nurses, and one-third "other." The 'other' group may include social workers, clergy, patient representatives, lawyers, administrators, trustees, ethicists, philosophers, and lay people. A survey conducted in 1999 found that 71% of ethics committees have ten to twenty members—the larger the institution, the larger the ethics committee. The survey further found that medical staff had the highest average number of members on each committee while ethicists had the lowest. Nonetheless, a recent study found that only 41% of individuals performing ethics consultation had formal supervised training in ethics consultation.

Under the Adult Protective Act of 1976, the Alabama Department of Human Resources has a duty to seek out through investigation, complaints from citizens or otherwise, the adults in the state who are in need of care and protection because of danger to their health or safety. The Department also has a duty to "aid such adults to a fair opportunity in life" through existing agencies, public or private. Id. § 38-9-4(b).

Id.; see Janet L. Schaffner & Robert M. Nelson, What are Healthcare Ethics Committees in Wisconsin Doing? 11(3) HEC FORUM 247, 247 (1999) ("The necessity for healthcare institutions to have [a healthcare ethics committee] became clearer in 1992 when the Joint Commission on Accreditation of Health Care Organizations (JCAHO) mandated that an 'organization should have in place a mechanism for the consideration of ethical issues arising in the care of patients and to provide education to caregivers and patients on ethical issues in healthcare.'").

Hollerman, supra note 275.

Schaffner & Nelson, supra note 276, at 249.

Id.

Ellen Fox et al., Ethics Consultation in United States Hospitals: A National Survey, AM. J. BIOETHICS, Feb. 2007, at 13. The study also provides that most individuals performing ethics consultation were physicians (34%), nurses (31%), social workers (11%), or chaplains (10%). Id.
Despite the absence of provisions requiring the use of bioethicists on ethics committees, there are laws still developing in which the use of ethics committees is gaining support. Although the state laws discussed above give some authority to ethics committees, Florida takes this one step further. Like several other states, it allows life-sustaining technology to be removed for persons in certain circumstances, only upon consultation of the health care facilities' medical ethics committee. The statute further states, however, that if the health care facility does not have its own medical ethics committee, it "must have an arrangement with the medical ethics committee of another facility or with a community-based ethics committee approved by the Florida Bio-ethics Network." The statute also requires the ethics committee to review the case with the patient's guardian and physician, and shields medical ethics committee members from liability arising from carrying out this duty. All of these requirements support and encourage, even require the use of practicing medical ethicists.

In New York, the State Task Force on Life and the Law wrote and introduced model legislation regarding surrogate decision making in 1993, which included a role for an ethics committee in circumstances of disagreement. However, despite repeated attempts and the success of other

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281 FLA. STAT. ANN. § 765.404 (West 2006). Id. § 765.404 (2) (emphasis added):

The guardian and the person's attending physician, in consultation with the medical ethics committee of the facility where the patient is located, conclude that the condition is permanent and that there is no reasonable medical probability for recovery and that withholding or withdrawing life-prolonging procedures is in the best interest of the patient. If there is no medical ethics committee at the facility, the facility must have an arrangement with the medical ethics committee of another facility or with a community-based ethics committee approved by the Florida Bio-ethics Network. The ethics committee shall review the case with the guardian, in consultation with the person's attending physician, to determine whether the condition is permanent and there is no reasonable medical probability for recovery. The individual committee members and the facility associated with an ethics committee shall not be held liable in any civil action related to the performance of any duties required in this subsection.

282 Id.
283 Id.
Task Force model legislation, the Family Health Care Decisions Act has not yet become law.\textsuperscript{285}

In addition to requiring or facilitating the creation and use of ethics committees, and addressing their decision-making authority with respect to patient care, some legislatures have granted immunity from liability to ethics committee members and health care professionals who implement ethics committees' recommendations. Maryland's law, for example, provides statutory immunity from law suits for ethics committee members acting in good faith.\textsuperscript{286}

Arizona is another state which seems to grant decision makers immunity in such instances. In Arizona, a person who makes a good faith medical decision in reliance on a health care directive of a surrogate is immune from criminal and civil liability and not subject to professional discipline for that reliance.\textsuperscript{287} Although the statutory definition of "person" does not include "institutional ethics committees,"\textsuperscript{288} and it allows physicians to follow the advice of an institutional ethics committee when a surrogate is not available, it is possible, therefore, that this immunity extends to those decisions as well.

Hawaii, Maryland, and Montana statutes protect ethics committee members from liability.\textsuperscript{289} Idaho grants blanket immunity to surrogate

\textsuperscript{285} Family Healthcare Decisions Act, \textit{supra} note 284.
\textsuperscript{286} MD. CODE ANN., HEALTH-GEN., § 19-374(c) (West 2007).
\textsuperscript{287} ARIZ. REV. STAT. § 36-3231(c) (LexisNexis 2007).
\textsuperscript{288} ARIZ. REV. STAT. § 36-3201 (LexisNexis 2007).
\textsuperscript{289} Hawaii law states that:

There shall be no civil liability for any member of a peer review committee, ethics committee, or quality assurance committee, or for any person who files a complaint with or appears as a witness before such committee, for any acts done in the furtherance of the purpose for which the peer review committee, ethics committee, or quality assurance committee was established; provided that: (1) The member, witness, or complainant acted without malice; and (2) In the case of a member, the member was authorized to perform in the manner in which the member did.

HAW. REV. STAT. ANN. § 663-1.7(b) (West 2006) (emphasis added). In addition, section 663-1.7(d) further provides that the immunity of ethics committees does not relieve hospitals, clinics, or HMOs from liability although a hospital, clinic, or HMO shall not be liable for "communicating any conclusions reached by one of its ... ethics committees ...." The Maryland code states that "An advisory committee or a member of an advisory committee who gives advice in good faith may not be held liable in court for the advice given."

MD. CODE ANN., HEALTH-GEN. § 19-374(c) (LexisNexis 2006); Montana law states that

No member of a utilization review or medical ethics review committee of a hospital or long-term care facility or of a professional utilization
Massachusetts protects health care providers from liability regarding communications, in certain circumstances, when they have communicated with an ethics committee. By protecting these communications, the statute, in a sense, sanctions and encourages them. The legislature must find it valuable or meritorious for health professionals to communicate with ethics committees.

Some states, while not specifically granting immunity to ethics consultants or committees, allow them effectively to provide a legal liability shield to physicians and other health care providers. For example, in Minnesota, ethics consultants may certify to courts that health care providers have followed proper procedures in a “do-not-resuscitate” order. In a related context, Minnesota law also specifically defines “biomedical ethics committee” as “a multidisciplinary group established by a health care institution to address ethical dilemmas which arise within the institution.” New Jersey statutes allow bioethics consultants to interpret whether certain actions or inactions on the part of health professionals will conform to applicable law. Additionally, New Jersey defines “ethics

committee, peer review committee, medical ethics review committee, or professional standards review committee of a society composed of persons licensed to practice a health care profession is liable in damages to any person for any action taken or recommendation made within the scope of the functions of the committee if the committee member acts without malice and in the reasonable belief that the action or recommendation is warranted by the facts known to him after reasonable effort to obtain the facts of the matter for which the action is taken or a recommendation is made.

MONT. CODE. ANN. § 37-2-201(1) (2005). Section 37-2-201(2) further provides that “the proceedings and records of ... medical ethics review ... committees are not subject to discovery or introduction into evidence in any proceeding.” Id.


MASS. GEN. LAWS ANN. ch. 1, § 5G (West 2007).

See ARIZ. REV. STAT. § 36-3231 (LexisNexis 2007); HAW. REV. STAT. ANN. § 663-1.7(d) (LexisNexis 2006).


Spielman, supra note 204, at 178. In New Jersey, [a]n institutional or regional reviewing body which engages in prospective case consultation pursuant to paragraph (4) of subsection a of section 15 of this act may be consulted by the attending physician, patient or health care representative as to whether it believes that the withholding or withdrawal of the medical intervention under consideration would be in conformity with the requirements of this act, including without limitation: whether such action would be within the scope of the patient’s advance directive; whether it may reasonably be judged that
committee," here, as a "multi-disciplinary standing committee." Several other states encourage ethics consultants to provide advice to legal actors.

Some states encourage the use of medical ethicists in subtler ways. For example, Alabama requires that surrogate decision makers, including ethics committees, complete a form when making a recommendation. Although this law is not explicit in its support for medical ethicists, the inclusion of them in this procedural requirement places them squarely as a legitimate part of the medical decision-making world.

Despite the inclusion of bioethicists in decision making as discussed above, many states still do not encourage the use of ethics committees, or make no mention of them at all. However, for those that do, by enacting

the likely risks and burdens associated with the medical intervention to be withheld or withdrawn outweigh its likely benefits; and whether it may reasonably be judged that imposition of the medical intervention on an unwilling patient would be inhumane. The attending physician, patient and health care representative shall also be advised of any other course of diagnosis or treatment recommended for consideration.

N.J. STAT. ANN. § 26:2H-69(a) (West 2006).

N.J. ADMIN. CODE § 10:48B-2.1 (2006). Section 10:48B-3.1 goes further into describing ethics committees. See also id. § 8:43G-5.1(h) (mandating that a hospital have a bioethics committee).

(f) The facilities shall have an ethics committee consistent with this chapter, the New Jersey Advance Directives for Health Care Act (N.J. Stat. Ann. 26:2H-53 et seq.) and the Administrative Procedure Act (N.J. Stat. Ann. 52:14B-1 et seq.). The facilities shall ensure participation on the ethics committee by individuals with medical, nursing, legal, social work, and clergy backgrounds. The ethics committee shall provide a forum for patients, families, and staff to discuss and reach decisions on determinations to withhold or withdraw a patient's life-sustaining treatment.

(g) In the event of disagreement among the patient, health care representative, a health care professional involved in the patient's care, or the attending physician concerning the patient's decision making capacity or the appropriate interpretation and application of the terms of an advance directive to the patient's course of treatment, the parties may seek to resolve the disagreement by means of consultation with the ethics committee. If necessary, the parties may then seek resolution by a court of competent jurisdiction.

Id. § 10:8-2.1 (f-g).

Spielman, supra note 204, at 170 (mentioning Massachusetts, Minnesota, Delaware, and Wisconsin).


and implementing these laws, the federal and state legislatures have generally helped bolster the influence of bioethics.

2. Support for Bioethics in the Courts

In addition to the statutory enactments, federal and state courts have helped pave the way for bioethicists. They have done this largely by addressing how much deference to grant the decisions and recommendations of ethicists and ethics committees.300 Early on, the New Jersey Supreme Court delegated decision-making power to ethics consultants in the famous case of Karen Ann Quinlan.301 The case, In re Quinlan, arose out of a dispute between Karen Quinlan’s father and her doctor over what medical care was appropriate for Karen, who was in a chronic vegetative state.302 Karen’s father sought to be appointed her guardian for the purpose of removing artificial life support. Karen’s doctor opposed the removal of life support because he was concerned that removal of life support would violate standards of medical ethics and expose him to malpractice liability.303 The trial court appointed Karen’s father guardian of Karen’s estate, but not of her person, precluding him from authorizing the removal of life support.304 The New Jersey Supreme Court reversed the trial court and appointed Karen’s father guardian of her person, giving him the right to authorize removal of life support provided her family would agree and her doctor would confirm that she has no reasonable hope of ever emerging from her comatose state.305

Notable in the development of bioethics as a practical field, the Quinlan court also required that the doctor’s opinion be corroborated by the hospital ethics committee.306 This decision placed judicial value on the opinions of bioethicists, thus bolstering the field within courts and in general. Because the court found the corroboration by a panel of ethicists

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300 See Cummins, supra note 206, at 32.
302 In re Quinlan, 355 A.2d at 651.
303 Id. at 667-68.
304 Id. at 670.
305 Id. at 671.
306 Id.
to be critical to their decision, separate and independent of the doctor's opinion, bioethicists' opinions became validated by the courts.

A decade after Quinlan, in *In re Jobes*, the New Jersey Supreme Court encouraged hospitals to make the services of their ethics committees available to assist family members and healthcare providers in making end-of-life decisions for incapacitated patients.\(^3\) Justice Pollock stated in a concurring opinion on this topic that "[a]s an aid to physicians and families, hospitals and other health-care facilities, such as nursing homes, should give serious consideration to making available the services of ethicists and institutional ethics committees."\(^3\) He goes on to say,

[re]course to an ethics committee need not be mandatory and the decision to seek ethical guidance is best left to the judgment of the patient or someone who can speak on his or her behalf, such as a family member or physician. While leaving the decision to him or her, an ethics committee could provide guidance and support to the ultimate decision maker.\(^3\)

By the 1990s, the New Jersey Superior Court backed away from its early promotion of bioethics by requiring court review of ethicists' decisions, though still giving ethics consultants substantial power.\(^3\) In *In re Moorhouse*, the patient, an adult with Down syndrome, was found "breathless and pulseless in her residential unit." Doctors resuscitated her and connected her to a respirator.\(^3\) For more than twenty years, her guardian was the Bureau of Guardianship Services ("Bureau") because no relative had expressed interest in taking on the role.\(^3\) Three months after she was found breathless in her apartment, the Chief of the Bureau

\(^{307}\) *In re Jobes*, 529 A.2d 434, 463-64 (N.J. 1987); see also Wilson, *supra* note 243, at 359 n.31.

\(^{308}\) Justice Pollock further contends that "[h]ospitals that cannot afford or attract a bio-ethicist could, nonetheless, authorize the establishment of an ethics committee. Such a committee can not only perform an educational and policy-making role, but also act as an advisor to the patient's family and physician." *In re Jobes*, 529 A.2d at 463 (Pollock, J. concurring).

\(^{309}\) *Id.* at 464.


\(^{311}\) *In re Moorhouse*, 593 A.2d at 1257.

\(^{312}\) *Id.*

\(^{313}\) *Id.* at 1256-57.
declared her "brain dead." At that point, her sister expressed an interest in becoming the guardian and asked that the respirator be disconnected. The Deputy Attorney General "stated that the hospital's prognosis committee [a committee including ethicists] would ... decide whether to concur with ... [the Chief of the Bureau's] decision."

In similar circumstances, the Quinlan court had not found additional review necessary for bioethicists' opinions, thus placing substantial value on the ethics committee's corroboration of the doctor's opinion. In Moorhouse, the New Jersey Court of Appeals determined that judicial review was necessary when a Public Advocate disagreed with an ethics committee's decision to terminate life support. In other words, the Moorhouse court required an additional layer of review. Specifically, it required review of the ethics committee's decision by a Public Advocate, then a return to the court if the Public Advocate, upon further review of the ethics committee's opinion, disagreed with the decision to terminate life support. The court explained that this was because mentally-retarded patients, notwithstanding their current condition, are entitled to an "enhanced degree of protection." The Public Advocate provided the kind of protection the court believed was needed. The opinion of the hospital's prognosis or ethics committee was not sufficient for the court. It wanted additional review of that opinion.

Just after Quinlan was decided in New Jersey, the Massachusetts Supreme Judicial Court addressed the question of foregoing life-sustaining treatment, and held that courts could consider the findings of ethics

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314 See id. at 1257.
315 Id.
316 Id.
317 Id. at 1258.
318 The Court stated that
[u]pon the determination of family member(s) or friend(s) of an institutionalized mentally retarded patient to withdraw life support from the patient, with the concurrence of the attending physician, the hospital's prognosis committee and at least two independent physicians knowledgeable in neurology that the patient is in a persistent vegetative state with no reasonable possibility of recovering to a cognitive, sapient state, notice of that determination shall be sent to the Public Advocate for further review.
319 See id. at 1262-63.
320 Id. at 1262.
321 Id.
committees.\textsuperscript{322} Mr. Saikewicz, who was mentally retarded and unable to communicate verbally, was diagnosed with "acute myeloblastic monocytic leukemia," a disease "invariably fatal."\textsuperscript{323} The probate court appointed a guardian \textit{ad litem} with authority to make decisions concerning the care and treatment of Saikewicz.\textsuperscript{324} The guardian \textit{ad litem} "recommended 'that not treating Mr. Saikewicz would be in his best interests.'"\textsuperscript{325} The court considered whether a potentially life-prolonging treatment, here chemotherapy, should be withheld from a person incapable of making his own decision and determined that it is "advisable to consider the framework of medical ethics which influences a doctor's decision as to how to deal with the terminally ill patient."\textsuperscript{326} The court also stated that "[w]hile these considerations are not controlling, they ought to be considered for the insights they give us."\textsuperscript{327}

While still deferring to the authority of the probate judge, the court emphasized that ethics committees would be of great assistance to the probate judge in making a difficult decision such as approving or invalidating the guardian \textit{ad litem's} recommendation.\textsuperscript{328} Despite its strong endorsement of the value of ethics committees, the Massachusetts court did not allow decision-making authority to shift from the judge to ethics committees. In fact, it said just the opposite. In so doing, it rejected the approach of the New Jersey Supreme Court in \textit{Quinlan}, while expressing its support for the value of ethicists' decisions.\textsuperscript{329}

\textsuperscript{322} Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 434-35 (Mass. 1977). \textit{See also} Spielman, supra note 204, at 163; Wilson, supra note 243, at 360 n.33.

\textsuperscript{323} Saikewicz, 370 N.E.2d at 420.

\textsuperscript{324} Id. at 419.

\textsuperscript{325} Id.

\textsuperscript{326} Id. at 423.

\textsuperscript{327} Id.

\textsuperscript{328} [T]he probate judge may, at any step in these proceedings, avail himself or herself of the additional advice or knowledge of any person or group. We note here that many health care institutions have developed medical ethics committees or panels to consider many of the issues touched on here. Consideration of the findings and advice of such groups as well as the testimony of the attending physicians and other medical experts ordinarily would be of great assistance to a probate judge faced with such a difficult decision.

\textsuperscript{329} Id. at 434.

\textsuperscript{329} Id. at 434-35. "We take a dim view of any attempt to shift the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction to any committee, panel or group, ad hoc or permanent. Thus, we reject the approach adopted by the New Jersey Supreme Court in the Quinlan case." \textit{Id.}
Three years after it decided Saikewicz, the Massachusetts Supreme Judicial Court held, in In re Spring, that the opinions of ethics committees may be persuasive evidence of good faith and good medical practice. Specifically, it “disapproved the delegation of the ultimate decision-making responsibility to any committee, panel or group, ad hoc or permanent” but “approved the consideration of findings of medical ethics committees or panels, as well as the testimony of attending physicians and other medical experts.”

Nevertheless, the court later relied on an ethics committee’s decision regarding the foregoing of nutrition and hydration. In In re Guardianship of Jane Doe, the judge had determined at trial that the patient was incompetent, with agreement of the guardian ad litem and counsel for Doe. To reach his decision, the judge relied on neurological consultations, reports of the guardian ad litem, and a review of the case by the ethics committee at the patient’s health care institution. None of these evaluations contested the recommendation that feeding and hydration be discontinued. The Massachusetts Supreme Court affirmed the judge’s decision that had relied, in part, on the recommendation of ethicists.

In 1980, a lower New York court criticized the decision-making process that Quinlan allowed, stating that “the ethics committee, as an institution, is an ill-defined, amorphous body, which in some hospitals may not even exist. Hence, uniformity of the decision-making process could never be guaranteed under the Quinlan model.” The case, In re Eichner, considered the opinions in Quinlan and Saikewicz and preferred the

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330 In re Spring, 405 N.E.2d 115, 120, 122 (Mass. 1980). See also Spielman, supra note 204, at 163 n.12; Wilson, supra note 243, at 360 n.33.
331 In re Spring, 405 N.E.2d at 120.
332 In re Guardianship of Jane Doe, 583 N.E.2d 1263 (Mass. 1992). See also Spielman, supra note 204, at 171 n.51.
333 In re Guardianship of Jane Doe, 583 N.E.2d at 1265.
334 Id. at 1270.
335 Id. at 1272.
337 In re Eichner, 426 N.Y.S.2d at 548-49.
approach in *Saikewicz*, stating that "judicial intervention is required before any life-support system can be withdrawn."³³⁸ Here, the religious colleague of an elderly Catholic priest in a permanent vegetative coma sought to have a respirator removed. After a lengthy consideration of constitutional, medical, and moral issues, the court allowed the respirator to be removed, insisting that a court order was necessary to validate the opinion of the committee representing the comatose patient in substituted judgment.³³⁹

In Delaware, the Supreme Court stated that "the advice of ethics committees might be useful in court proceedings."³⁴⁰ However, the medical center where the patient in this case was hospitalized did not have an ethics committee "or like body which has as a part of its functions the approval or disapproval of the discontinuance of life support systems."³⁴¹ Even so, the court followed the Massachusetts Supreme Court and the New York lower court, rather than other courts that had been more supportive of ethicists, holding that "judicial intervention is required before any life-support system can be withdrawn."³⁴²

The Minnesota Supreme Court further bolstered the influence of bioethics, in *In re Torres*, by stating that ethics committees "are uniquely suited to provide guidance to physicians, families, and guardians when ethical dilemmas arise."³⁴³ To determine the appropriate level of medical care for the patient who had suffered massive and irreversible brain damage and was dependent on a life support system, the court referred to ethicists' reports. The reports of three area biomedical ethics committees outlined the procedures they would use to determine the appropriate treatment for someone in the patient's condition. In this case, the bioethicists' reports supported the doctors' recommendation that the respirator be

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³³⁸ Eichner, 426 N.Y.S.2d at 550.
³³⁹ Id.
³⁴¹ Id. at 1338.
³⁴² Id. at 1343 (citing Eichner, 426 N.Y.S.2d at 523).
³⁴³ In re Conservatorship of Torres, 357 N.W.2d 332, 336 n.2 (Minn. 1984). *See also* Spielman, *supra* note 204, at 170, 177; Wilson, *supra* note 243, at 360 n.34.
removed.\textsuperscript{344} Because their opinions agreed with the doctors', however, we do not know whether the court would have preferred the ethicists' judgments.

The Wisconsin Supreme Court suggested a role for ethics consultation in determining the best interests of an incompetent patient.\textsuperscript{345} In \textit{In re Guardianship of L.W.}, the court appointed a guardian for L.W., a 79-year-old man left in a persistent vegetative state following a cardiac arrest. The court declared L.W. incompetent and asked the guardian to consent to the withdrawal of all life-sustaining treatment.\textsuperscript{346} Because L.W. had not expressed his own wishes regarding life-sustaining treatment,\textsuperscript{347} the Supreme Court of Wisconsin held that the guardian had authority to make the decision, with the caveat that the decision could be reviewed by the court at the request of an interested party.\textsuperscript{348} In attempting to determine the patient's best interest, the Court determined that "[a]nother possible factor is the opinion of a 'bioethics' or 'institutional ethics' committee."\textsuperscript{349}

\textsuperscript{344} \textit{In re Conservatorship of Torres}, 357 N.W.2d at 335-36. Also, at oral argument it was disclosed that on an average about 10 life support systems are disconnected weekly in Minnesota. This follows consultation between the attending doctor and the family with the approval of the hospital ethics committee. It is not intended by this opinion that a court order is required in such situations.

\textsuperscript{345} \textit{In re Guardianship of L.W.}, 482 N.W.2d 60, 65-66 (Wis. 1992).

\textsuperscript{346} Id. at 63.

\textsuperscript{347} Id. at 64.

\textsuperscript{348} Id. at 75. \textit{See also} id. at 64 n.4 (affirming the trial court's decision to give the guardian ad litem authority to withdraw all life-sustaining treatment but disagreeing with some of the criteria set forth by the trial court. One of the criteria includes "the recommendation, if any, of a bioethics committee.").

\textsuperscript{349} Id. at 73-74.

Increasingly, health care facilities such as hospitals and nursing homes are creating bioethics committees. In 1990, the American Hospital Association estimated that over 60 percent of United States hospitals had formed bioethics committees. Generally, these committees help establish hospital policies on medical-ethical issues, and advise, discuss, or consult with health care professionals, patients, and their families and representatives about medical and ethical decisions. The record in this case indicates that the Bioethics Committee of the Franciscan Health System unanimously concluded that it was appropriate to forego life support on a patient such as L.W. who is in a persistent vegetative state. Certainly if such a committee is available, the guardian should request it to review the decision, and should consider its opinion in determining whether it is in the patient's best interests to forego treatment.

\textit{Id.} (citing Gregory P. Gramelspacher, \textit{Institutional Ethics Committees and Case}
In Kentucky, the Supreme Court essentially "gave ethics committees veto power in nursing home residents' treatment decisions." Martha Sue DeGrella sustained severe brain damage as a result of a "tragic beating." Since then, she was in a persistent vegetative state and connected to breathing and feeding tubes "with no significant possibility of improvement in her condition." Her mother, who was her legal guardian, filed a petition asking the court to declare that she "is permitted by Kentucky law to substitute judgment for that of her daughter." The trial court held that Martha Sue's mother could act in lieu of her daughter, and the Supreme Court of Kentucky affirmed. On the issue of withholding further treatment, however, the Court indicated that the ethics committee must agree. It stated that:

[i]f the attending physician, the hospital or nursing home ethics committee where the patient resides, and the legal guardian or next of kin, all agree . . . no court order is required to proceed to carry out the patient's wishes.

A Florida appellate court, breaking with the judicial trend towards increased deference to ethics committees and ethicists, rejected the expert testimony of a professor who had presented himself to the court as an expert in bioethics. Here the court affirmed a lower court decision on the inadmissibility of testimony by a medical ethicist on the medical standard of care. The ethicist, a Catholic priest and professor of bioethics, had no medical training and was testifying as an expert on whether a doctor's negligent resuscitation of a newborn was "appropriate" and "within the standard of care." Recognizing "that some medical standards of care


Spielman, supra note 204, at 173; DeGrella v. Elston, 858 S.W.2d 698, 710 (Ky. 1993).

DeGrella, 858 S.W.2d at 700.

Id. at 701.

Id. at 703.

Id. at 704.

Id. at 710.


Id. at 41.

Id. at 43.
are influenced by medical ethics," and that "[a] decision concerning the termination of resuscitation efforts is probably an example of an area in which the standard of care includes an ethical component," the court found that the applicable standard of care concerns the level of care owed by a health professional, not an ethicist. The court therefore held it not appropriate to "allow an ethicist to testify about the medical standard of care." It did not, however, rule out the appropriateness of testimony by a medical ethicist regarding "ethical aspects underlying the professional standard of care."

In Washington, in 1990, a court encouraged the "establishment of another tribunal to make decisions" in life-and-death cases. The case, In re A.C., is the primary example of a court struggling with the boundaries between bioethics and the courts regarding how much authority courts should grant to decisions made by ethics committees or ethics consultants. The legal issue was mainly procedural. The trial court failed to follow the procedure known as "substituted judgment" by directly authorizing the hospital to perform a caesarian section on the dying woman in an effort to save the life of her baby, without inquiring of the woman’s family. The baby lived only a few hours, and the woman died a few days later. The District of Columbia Court of Appeals indicated, in a footnote, that "it would be far better if judges were not called to patients’ bedsides and required to make quick decisions on issues of life and death." The court suggested "the establishment—through legislation or otherwise—of another tribunal to make these decisions, with limited opportunity for judicial review." Although the court did not explicitly specify that this other tribunal include bioethicists, it clearly intended that someone better prepared than a court to handle life and death questions be available to do so. This implies a place for ethicists or an ethics committee.

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360 Id.
361 Id.
362 Id.
364 Cummins, supra note 206, at 33 (citing In re A.C., 573 A.2d 1235, 1237 n.2 (D.C. Cir. 1990)).
365 In re A.C., 573 A.2d at 1237.
366 Id. at 1241.
367 Id. at 1237 n.2.
368 Id.
Although courts in many states hear and follow the opinions of ethicists, they also hear and reject them. The Michigan Supreme Court considered a bioethics committee’s recommendation, but disagreed with it, finding it insufficient, along with other evidence, to meet the applicable standard of proof. In *In re Martin*, the Michigan Supreme Court reversed the court of appeals decision that the patient had, when competent, indicated an intention to forego life-sustaining treatment in the applicable circumstances. Despite a report of the hospital ethics committee supporting the guardian’s request to terminate life support, the Michigan Supreme Court concluded that there was not clear and convincing proof that the patient made a firm and deliberative decision, while competent, to decline medical treatment in the circumstances at hand. After consulting with the patient’s wife, a family friend, a social worker, the treating physician, and nurses at hospital, the hospital bioethics committee “issued [the] report stating that withdrawal of . . . nutritive support was both medically and ethically appropriate, but that court authorization would be required before the hospital would assist in the procedure.” Although the status of the ethics committee was not central to this case, it shows that the courts do not always value them above other evidence offered, and are willing to investigate ethical matters independently, even in the presence of an ethics committee opinion.

In summary, courts have not handed over their decision-making powers to bioethicists or ethics committees, even in situations where the ethicists’ expertise might be appropriate. Instead, courts have issued decisions that lend respect and validity to bioethicists’ opinions. In doing so, courts have helped encourage the use of bioethicists in decision making. After all, if ethicists’ opinions are valuable to judicial decision makers, they must be of some ultimate value.

B. Law in the Development of Environmental Ethics

As compared with law’s encouragement of bioethics, there has been precious little law supporting either environmental ethics *per se* or

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370 *In re Martin*, 538 N.W.2d at 413.
371 *Id.* at 402.
372 *Id.* at 411-12.
373 *Id.* at 402.
374 See *supra* Part II.A.
the use of environmental ethicists. Perhaps, if one included the preambles to several of the major federal laws, one would find loose promotions of an environmental ethic in the laws, or at least environmentally related ideals and goals, but certainly not the use of environmental ethicists to help with decision making.

To date, other than the preambles, there are no federal laws that encourage the use of environmental ethicists in decision making where ethical questions concern human actions and the preservation, conservation, or pollution of the environment. There are, however, numerous environmental laws presumably grounded in some fundamental environmental ethic. The laws, in their preambles, make statements about environmental values, but not environmental ethics in particular. For the laws to be grounded in an environmental ethic assumes that these laws rest on values widely held by the American people, although this idea has been challenged, and that government has created laws to enforce or support those values. In fact, according to Alyson Flournoy, a law professor who has written extensively on environmental ethics, “it is not clear that environmental laws [even] do reflect any clearly articulated ethic that should be called environmental.”

Nonhuman living things, such as plants and animals, and natural areas, such as ecosystems, have no legal rights of their own. They depend on protection by humans, due to their independent value to humans as property or resources. But even the environmental laws, with their possible underlying environmental ethic, ultimately are concerned less with environment itself, and more with human use of, or interest in, the environment. Many commentators have noted that our environmental laws seem grounded in a concern for protection of the environment while allowing, and not unduly stifling, production. So, the laws protect the environment largely because it matters to humans, not for its own sake, which tends to be the position espoused by environmental ethicists.

Professor Flournoy suggests that our environmental laws are merely “extensions of the ethical structure of our tort, property and criminal law, designed to protect person and property from certain insults not

375 See Flournoy, supra note 108, at 66.
376 Id. at 66.
377 CLAIRE PALMER, ENVIRONMENTAL ETHICS 113 (1997).
378 Id.
adequately addressed under pre-existing common law.\textsuperscript{380} If we look at the origins of environmental laws, this is exactly what they were—extensions of our common law of property and tort law, mainly through nuisance and the use of injunctions that amounted and led to the development of emissions limitations.\textsuperscript{381} Flournoy has examined the relationships between our environmental laws and ethics and concluded that the field is ripe for a "systematic inquiry into the ethics of our [environmental] law[s]."\textsuperscript{382} That is, that we currently do not really understand the ethics underlying our laws, and that to do so, there must be a systematic review both of their enactment and implementation.\textsuperscript{383} To date, this has not occurred.

One researcher, upon examination of the major federal environmental laws, concluded that the conflict between environmental ethics and environmental politics exists because politicians, not ethicists, make decisions regarding the environment.\textsuperscript{384} Although this is also true with respect to bioethics, the distinction is perhaps less pronounced there because of the bioethicists' involvement in policy-advisory governmental committees from the onset of the discipline.

Flournoy even states that "environmental law will not endure or have lasting effect unless environmental philosophy does indeed come down to earth successfully to affect how people view the world."\textsuperscript{385} Flournoy posits that we are not sure what values our laws advance—and that environmental laws do not necessarily espouse our environmental values.\textsuperscript{386} One reason is that we generally do not know a law's environmental values in advance because although a law might look comprehensive in language, the values it advances only emerge through its implementation. She suggests that although practicing lawyers do carry out some legal analysis, for us to understand the values the laws advance, the analysis needs an ethical component as well.\textsuperscript{387}

\textsuperscript{380} Flournoy, supra note 108, at 67.
\textsuperscript{381} See Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907) (defendant corporation discharged sulphur fumes and attempted to claim laches as a defense); Madison v. Ducktown Sulphur, Copper, & Iron, 83 S.W. 658 (Tenn. 1904) (finding a copper smelting plant to be a nuisance).
\textsuperscript{382} Flournoy, supra note 108, at 69.
\textsuperscript{383} Id. at 69-70.
\textsuperscript{384} See ROLSTON, supra note 123, at 246-89.
\textsuperscript{385} Alyson C. Flournoy, Building an Environmental Ethic from the Ground Up, 37 U.C. DAVIS L. REV. 53, 54 (2003).
\textsuperscript{386} Id. at 55-58.
\textsuperscript{387} Id. at 55, 60.
1. Legislation

a. The Environmental Ethic Underlying the Environmental Laws

Silent Spring led to the passage of numerous federal environmental laws. One in particular, the National Environmental Policy Act ("NEPA"), purports to have an environmental ethic supporting it. NEPA, the stated purpose of which is to ensure that federal agencies consider the environmental effects of their major decisions and actions, comes closest to supporting an environmental ethic. NEPA requires that federal agencies study the potential adverse environmental effects of their actions and produce an environmental impact statement. 388

Courts later required the agencies to consider the content of these reports in making their decisions, and placed additional requirements on agencies' use of the environmental impact statement ("EIS"), in an effort to prevent them from minimizing the effect of EISs' contents on decisions. 389 That said, the language of the statute makes it clear that its purpose does not support any clearly articulated environmental ethic. The statute states that "man and nature can exist in productive harmony" and that it seeks to ensure "... healthful, productive ... surroundings for all Americans while attaining the wide range of beneficial uses of the environment without degradation, ... or other undesirable or unintended consequences." 390 This language expresses the values of the legislature enacting the statute. Those values support the coexistence of man and nature, not nature or environment in their own right. The words "productive" and "beneficial use" suggest that the environment's job is to produce for and provide benefit to man. 391 So, although people may presume that an environmental ethic underlies the federal environmental laws, and to some extent it does, that ethic is usually not one that supports the environment for its own sake, but for the sake and pleasure of man.

389 The intent of 42 U.S.C. § 4332(c) is to require agencies to consider and give effect to environmental goals set forth in this chapter, not just to file detailed impact studies which will fill governmental archives. See Envtl. Def. Fund Inc. v. Corps of Engrs. of U.S. Army, 470 F.2d 289 (Ark. 1972); Conservation Council of N.C. v. Froehlke, 435 F. Supp. 775 (N.C. 1977).
390 PALMER, supra note 377, at 115 (citing National Environmental Policy Act, 42 U.S.C. § 4331(a), (b)(2), (b)(3) (2000)).
391 Id.
b. Federal Law

No federal law specifically addresses environmental ethics. Federal laws do not encourage or require the use of environmental ethicists to help with decisions affecting the environment. However, there are numerous federal environmental laws that codify what may be an unstated environmental ethic of sorts. Many of our federal environmental laws include preambles stating the goals or purposes of the laws. Those goals purport to espouse environmental values that Congress seeks to fulfill in the enactment. They usually set forth some form of balance between protection of the environment and support for industry and development. For example, NEPA sets forth this tension in its preamble, in which it promises to "encourage productive and enjoyable harmony between man and his environment."

These laws, and their state counterparts, have spawned volumes of regulations and caused the employment of government officials at every level of government. Federal and state environmental protection agencies employ inspectors and policy makers. The regulated community employs lawyers and lobbyists. All of these people, and many more, are engaged in the enforcement and interpretation of environmental laws. Non-governmental environmental groups have also worked to encourage, and sometimes force, government agencies to enforce environmental laws. They push for stronger laws and better enforcement. Perhaps collectively, these laws and people have obviated the need for environmental ethicists. But perhaps not. If we, as a nation, are not sure what our environmental ethical principles are, we can not be sure we have any mechanism for pursuing them.


\[393\] See id. § 4321; see also id. § 4331 (b)(5), which states a goal of NEPA is to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities." Also, in NEPA's preamble Congress seeks [t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Id. § 4321.
c. State Laws

Unlike the circumstances in which bioethics began its rise to a role of influence, where states and the federal government were enacting laws that encouraged or even required ethicist involvement in medical decision making, sometimes even mandating the involvement of trained bioethicists, no state requires the use of an environmental ethicist in any form of decision making. Only a handful of states have laws even mentioning environmental ethics in any context. Those that do have laws including the term environmental ethics do not use it in any way that is meaningful for either environmental policy or environmental ethicists.

For example, the Louisiana Revised Statutes, in a section on sewage disposal, require that "[a]ll members of the district shall be subject to the Code of Environmental Ethics as adopted by the state." That said, there appears to be no Louisiana Code of Environmental Ethics with which one could comply.

The Washington Revised Code includes a section dealing with enhancement of regional fisheries that requires the regional fisheries enhancement group advisory board to "[p]romote environmental ethics and watershed stewardship." Although the advisory board is certainly active releasing fish and restoring streams, it is difficult to see in any concrete way the implementation of their statutorily mandated mission to promote environmental ethics.

In Arizona, the statutory section that requires applicants for a trapping license to complete a trapping education course also requires that the applicable department conduct or arrange for a course on responsible trapping and environmental ethics. The statute sets forth what must

395 I have been unable to locate any such code in the Louisiana Code.
398 ARIZ. REV. STAT. ANN. § 17-333.02(A) (2006). This statute states that [a] person applying for a trapping license must successfully complete a trapping education course conducted or approved by the department before being issued a trapping license. The department shall conduct or approve an educational course of instruction in responsible trapping and environmental ethics. The course shall include instruction on the history of trapping, trapping ethics, trapping laws, techniques in safely releasing
be included in the course, and the topics closest to environmental ethics, which is not on the list, are wildlife management and trapping ethics.\textsuperscript{399} Arizona also requires, in its Transportation and Licensing section, that the applicable department offer a course on off-highway vehicle safety and environmental ethics.\textsuperscript{400} This statute is one of the few actually to mention anything specific about the environmental ethic it espouses. It requires the course on environmental ethics to include discussion of off-highway vehicle uses that limit air pollution and harm to natural terrain, vegetation, and animals.\textsuperscript{401} It is not much, but at least it is an example of a specific action taken to implement some sort of stated goal in environmental ethics.

The state of Florida, in its statutes regarding the placement of signs for an anti-litter campaign, included language that sought to build environmental awareness and an environmental ethic in the state.\textsuperscript{402} The statute included no further information, however, about what that environmental ethic might be, or how it should be achieved.

No other state includes environmental ethics within its statutes, at least not in any explicit way that is reasonably identifiable. As set forth above, those that use the words “environmental ethics” often do not follow

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non-target animals, trapping equipment, wildlife management, proper catch handling, trapper health and safety and considerations and ethics intended to avoid conflicts with other public land users.
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\textsuperscript{399} \textit{Id.}

\textsuperscript{400} The department shall conduct or approve an educational course of instruction in off-highway vehicle safety and environmental ethics. The course shall include instruction on off-highway vehicle uses that limit air pollution and harm to natural terrain, vegetation and animals. Successful completion of the course requires successful passage of a written examination.


\textsuperscript{401} \textit{Id.}

\textsuperscript{402} \textbf{FLA. STAT. ANN.} § 403-4131(2)(c) (2000). This section, entitled “Keeping Florida Beautiful, Incorporated, Placement of Signs,” provides

(2) As a partner working with government, business, civic, environmental, and other organizations, Keep Florida Beautiful, Incorporated, shall strive to assist the state and its local communities by contracting for the development of a highly visible antilitter campaign that, at a minimum, includes . . . (c) Fostering public awareness and striving to build an environmental ethic in this state through the development of educational programs that result in an understanding and in action on the part of individuals and organizations about the role they must play in preventing litter and protecting Florida’s environment.

\textit{Id.}
through on implementation, and the statutes rarely explain what might or should be done regarding the mentioned environmental ethics requirement. Most importantly for purposes of this article, no state legislation promotes the use of environmental ethicists, or even acknowledges environmental ethics as a discipline, for inclusion in decisions that affect the environment.

2. Courts

Environmental ethics also has rarely appeared in the courts as compared with bioethics. It is impossible to say that those appearances have helped bolster the role of environmental ethicists in terms of use by the courts or their involvement in decision making. They have not.

In reference to the effect of dams on river courses, Justice Douglas maintained in a dissenting opinion that “[t]his reshaping of the face of the Nation may be disastrous, no matter who casts the ballots.” Douglas further wrote that “[t]he enormity of the violation of our environmental ethics, represented by state and federal laws, is only increased when the ballot is restricted to or heavily weighted on behalf of the few who are important only because they are wealthy.” Douglas is making a point about values, and is concerned that those values are not well represented by the over-representation of wealthy, influential voters. The point is well-made, but is not an effort to promote the use of environmental ethicists in decision making concerning the environment.

A United States District Court in New Hampshire noted in a 1974 opinion that “[t]he National Environmental Policy Act now clearly requires that these prior decisions be re-evaluated utilizing the environmental ethics and environmental tools of the 1970’s.” The court’s reference is to the values espoused in the new laws, not to the use of ethicists in the re-evaluation process for prior decisions.

This is not to say that courts have not considered environmental ethics in their decisions. They have, but they do not generally refer to the values imparted as “ethics” and certainly not as “environmental ethics.” Robert Goldstein includes an analysis of several such cases in his article Green Wood in the Bundle of Sticks. In particular, he calls them, rather

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404 Id.
405 Id.
than ethics, "environmentally based societal policies." Goldstein notes that the Supreme Court of Minnesota cited Aldo Leopold's land ethic in *In re Christenson* and others cases, as support for deciding in favor of an environmentally-based societal policy. He mentions a Florida case in which the court relied on the concept of environmental stewardship to uphold a zoning restriction that would protect an endangered species of deer. Courts do consider environmental issues, and they sometimes use standards of ethics when deciding them. Although courts have chosen to consider, and place some value on, concepts of environmental stewardship and societal policies, they have not encouraged the use of environmental ethicists in decision making.

3. Administrative Agencies

Environmental ethics is rarely mentioned in the rules of administrative agencies. The term "environmental ethics" appears in a public comment regarding the scope of the U.S. Department of Agriculture’s rule prohibiting motor vehicle use in forest land. The comment says: "[s]ome respondents suggested replacing the prohibition in § 261.13 with a provision restricting motor vehicle use in certain areas to people with specific training and endorsement from organizations promoting environmental ethics, such as Tread Lightly! or the National Off-Highway Vehicle Conservation Council." The Department declined to adopt this approach, however, on the grounds that it would give nongovernmental organizations gatekeeper control of public lands, and it did not appear to

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408 Id. at 395-96 (citing *In re Christenson*, 417 N.W. 2d 607, 607 (Minn. 1987)).
409 Id.
410 Id. at 396 (citing Dept. of Community Affairs v. Moorman, 654 So. 2d 930, 934 (Fla. 1995)).
411 Travel Management; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005).
412 Id. § 261.13 refers to 36 C.F.R. § 261.13.
believe that training programs and pre-approval would eliminate unacceptable impacts on the land. Like the few mentions of environmental ethics in state legislation, this use of the term in an administrative rule neither promotes the field of environmental ethics, nor the use of environmental ethicists for decision making.

A vague U.S. Department of Commerce notice attempts to "encourage an environmental ethic" through education and outreach efforts. The notice provides that "[e]ducation, interpretation and outreach efforts will focus on enhancing public understanding of the function of estuaries and promoting the wise use of estuarine resources to encourage an environmental ethic." It is not clear, however, what outreach efforts have encouraged an environmental ethic, although the term is sometimes used in the National Oceanic and Atmospheric Administration ("NOAA") presentations.

The Federal Highway Administration has worked with the Federal Land Management Agencies on developing a "jointly held environmental ethic that pervades transportation project decision making through the use of context sensitive design, best management practices, and a heightened sensitivity to environmental impacts" as part of an environmental management system. But aside from issuing grants and awards for

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414 The Department appreciates the long-standing work of nongovernmental organizations, including user groups, to promote environmental ethics and responsible behavior on the part of motor vehicle users... Nevertheless, the Department declines to adopt this suggestion, which would make these nongovernmental organizations gatekeepers for Federal lands and resources. Moreover, the prohibition in § 261.13 is needed because in many situations cross-country motor vehicle use, and in some situations motor vehicle use on routes, can cause unacceptable impacts, regardless of driver training and endorsement of the driver by organizations promoting environmental ethics.

70 Fed. Reg. at 68,284.


programs for the public, for students, teachers, and coastal decision-makers will be offered and exhibits at the visitor center will be maintained and updated as needed. The reserve education program will continue to improve the use of Web based tools and public events to promote increased estuarine awareness among target audiences and the general public.

Id.

environmental practices, the development of a jointly held environmental ethic has not led to any discernable written policy.

The U.S. Department of Agriculture ("USDA") submitted to the Office of Management and Budget for review a “proposal for the collection of information under the Paperwork Reduction Act. . . .” and under the “Forest Service” section, the notice mentions an “environmental ethics study.” A search of USDA’s website reveals no such study.

The Department of Transportation ("DOT"), in an attempt to update and revise NEPA as it relates to federally funded or approved transportation projects, stated that “in administering their responsibilities under numerous transportation and environmental laws, the U.S. DOT agencies will manage the NEPA process to maximize attainment of a number of specific goals,” including “environmental ethic.” In terms of an environmental ethic, the agency wrote that federal action should “reflect concern for, and responsible choices that preserve, communities and the natural environment, in accordance with the purpose and policy direction of NEPA . . .”

In a later related Federal Register notice, DOT responded to comments regarding its review of the “goals of the NEPA process.” The notice established that because NEPA does not set forth its policy in terms of numbered goals, “[s]ome commenters were critical of the agencies’ attempt to restate the philosophy and the basic intent of the policy underlying the NEPA by specifying seven distinct goals of the NEPA process,” one of which was “environmental ethic.”

In 1996, the EPA even announced the issuance of a Code of Environmental Management Principles, in which it mentioned the need

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419 23 C.F.R. 1420.107, cited in 65 Fed. Reg. 33,960, 33,978 (May 25, 2000) (notice of proposed rulemaking issued by DOT to update and revise NEPA as it relates to transportation projects involving federal funds or requiring federal approval).
for an appropriate code of environmental ethics or conduct. Specifically, the EPA stated that

the public has also demanded that the Federal Government and its agencies and departments also demonstrate a commitment to a common environmental ethic. EPA believes that if the Federal Government is willing to make a public commitment to voluntarily adopt an appropriate code of environmental ethics or conduct, which is at least equivalent to the commitment demonstrated by environmental leaders in the private sector, and hold itself accountable for implementing these principles, then significant progress can be made toward improving public trust and confidence toward Federal facility environmental performance.

To date, although there exists a Code of Environmental Management Principles, there is no code of environmental ethics. Nor, apparently, has the existence of the Code of Environmental Management Principles done anything to encourage proposals for what such a code of environmental ethics might include. If the federal government decided to support the inclusion of environmental ethicists in decision making, this might be a place to start. In a sense, it could be similar to the work done by bioethicists in the development of the Belmont Report.

Even the EPA’s Federal Register notices do not promote the use of applied environmental ethics. In one such notice issued by the EPA, however, the agency sought candidates to assist it in setting policy regarding the recapture of economic benefit. In this notice, the agency described the desired qualifications of individuals who may be nominated to the panel as those including expertise in one of a number of areas, including environmental ethics. This is a rare event for EPA, and nonexistent for the other federal agencies. In fact, it is the only such instance I could locate, in which the EPA specifically included environmental ethicists as a possible qualification in its request for nominees to a Science Advisory Board Panel. The result, however, when EPA ultimately selected this Science Advisory Board Panel, was that it selected a group composed

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423 Id.
entirely of economists, and one person from the non-profit group Resources for the Future, who was trained in economics. In the end, the EPA did not include anyone on the panel with training, experience, or any documented interest in environmental ethics.

Although the EPA and other agencies often include ethicists on committees created to advise the agency on policy making, they tend not to be trained in environmental ethics. For example, when working to form its policy on the use of human subjects in pesticide toxicity studies, the EPA sought advice from a joint subcommittee of its Science Advisory Board and FIFRA Scientific Advisory Panel ("SAB/SAP"). Here, EPA included trained ethicists on the panel. The issues of concern were human and medical, however, not so much environmental, save the fact that the agency involved was the EPA. The ethicists the agency used, therefore, were not environmental ethicists, but bioethicists. In fact, they are more often than not bioethicists, or even more general ethicists, rather than ethicists trained with an environmental focus.

Although the words "environmental ethics" appear in laws of various kinds, their use pales in comparison to that of bioethics. Unlike the circumstances of bioethics, the words "environmental ethics," as they appear in law, are not used to encourage a role for environmental ethicists. They are used in passing, or in circumstances unrelated to any real decision making or moral issues. They almost seem to be an afterthought, or words included to appease an interested party, without independent meaning or significance. Whereas courts and legislatures have given great thought, and many years of legislative debate, law making, and judicial decision making to issues of medical and bioethics, they have given none to environmental ethics. For bioethicists, courts have debated their value and importance by issuing decisions that explain and discuss the roles of bioethicists and ethics committees. In legislatures, elected officials have debated questions like the role of ethics committees in decisions concerning patients unable to decide medical questions for themselves, and without families to decide for them, or when those groups or parties

427 Science Advisory Board/Scientific Advisory Panel; Notification of Public Advisory Committee Meeting; Open Meeting, 63 Fed. Reg. 64,714 (Nov. 23, 1998).
428 Id.
disagree on courses of action. Legislatures have struggled with no such moral decisions regarding the environment. It seems that law's consideration of the value of environmental ethics and the use of environmental ethicists in decision making has been non-existent. This finding comports with that of Christopher Stone, who states that "[the] direct impact of environmental ethics ("EE") on policy makers is veiled, but, as best we can glimpse, it has not been substantial." As environmental ethicists have not influenced lawmakers, lawmakers have not encouraged others to seek or value the opinions of environmental ethicists.

CONCLUSION: IF ENVIRONMENTAL ETHICISTS HAD A SEAT AT THE TABLE

If environmental ethicists had a seat at the decision-making table, rather than a stool outside the door, they would be available, like bioethicists, to help make decisions affecting their area of concern. Whereas bioethicists help with moral decisions in science and medicine, environmental ethicists would help make decisions when moral questions arise concerning the environment. To date, while we search for an environmental ethic within our laws, our legislators and judges are not yet requesting or suggesting environmental ethicists' input in decision making. By failing to make that request or suggestion, law is leaving environmental ethicists on the stool, rather than inviting them to the table.

But what if law did not? If law suggested or encouraged the involvement of environmental ethicists, where might we see them assisting in decision making? There could be environmental ethicists involved in decisions at EPA, the Department of Interior, and other federal and state government agencies. They could testify before legislative committees responsible for drafting legislation that would affect the environment, and they could serve as consultants to builders, manufacturers, corporations, utilities, and others who regularly make decisions regarding environmental issues. But they do not.

Just as hospitals and pharmaceuticals companies employ bioethicists, corporations, such as those manufacturing pesticides, the decisions of which impact the environment, could have environmental ethicists on staff. Barring that, they could bring in environmental ethicists to assist with decisions that might affect the environment, such as those concerning facility siting, manufacturing processes, product content, or waste.

\footnote{Stone, \textit{supra} note 12, at 15.}
But they do not. In fact, environmental ethics has little or no influence on what environmental decision makers do on a daily basis.431

One reason for the difference may be that in hospitals medical decisions are the core of what medical professionals do there. Everything hospitals do concerns the medical treatment of individual patients. Even the financial health of the institution is related to the ultimate well-being of the patients. Courts and legislatures have reflected the central role of these decisions in the medical area by encouraging the use of ethicists in making them.

Corporations, on the other hand, exist primarily to produce goods—whether widgets, electric power, or real estate developments. The environmental effect of a decision, especially as seen from a moral perspective, is tangential, rather than central to what they do. Courts and law have, again, reflected the tangential nature of ethics in environmental decision making by failing to mention, discuss, or encourage it.

Whereas bioethicists may play a role directly on the daily life of a medical professional, environmental ethicists have not developed the kind of relationships with decision makers in environmental areas that medical ethicists have with doctors, legislators, and other policy makers.432 One reason for this may be that the medical community wants something very different from medical ethics than environmental professionals want, if they want anything at all, from environmental ethics. Medical ethicists help resolve tough questions that doctors and hospitals may not want to tackle alone, and significantly, courts and legislatures also do not want them tackling alone. Environmental professionals, however, have little interest in involving philosophers in their decisions, and the courts and legislatures have not asked for them to be included.

Fundamentally, there is a significant disconnect between the environmental philosophy that is environmental ethics and the influence of environmental ethicists in environmental policy-making. Currently, the field of environmental ethics is mainly includes environmental philosopher activists rather than applied ethicists. Perhaps it is partly for this

430 Of course, corporations view these decisions as economic rather than moral, so the decision makers tend not to see a need for assistance with the decisions, other than from those offering economic or business advice. That said, corporations are beginning to see the value of making environmentally friendly decisions that also make economic sense. See, e.g., Hillary Mizia, Green Business Practices Make Good Business Sense, http://www.prizmsustainability.com/files/EPA_article2.pdf.
432 See id. at 17.
reason—that they have an agenda to move forward rather than a set of ethical principles to apply—that environmental ethics has not been supported by the public and therefore in the law. Environmental ethics is sometimes described as the “movement of society toward the understanding that preservation and protection of our natural environment is a positive value, and a widespread one.” Should that movement become embraced politically, law will likely follow. Because society’s concerns influence legislation, it follows that environmental ethicists have neither influenced legislation, as Stone observed, or been encouraged by it, as I conclude here.

To earn a seat at the table, environmental ethicists must make themselves relevant to the daily work of environmental professionals and others involved in decisions affecting the environment. They must convince the public, and thereby legislatures, that moral issues matter as applied to decisions affecting the environment, and that they can help make better, more principled decisions on difficult questions. To do this, environmental ethicists should start by proposing a statement of ethical principles for environmental decision making, similar to the work bioethicists did in the Belmont Report. From there, the principles may begin to be included in the formation of policy, and the creation and application of law. The Belmont principles are by no means all of bioethics, but they formed a generally accepted platform in one area of bioethics, that concerning the use of human subjects in research. Bioethics policy built upon those principles and was not limited by them. Environmental ethicists could do the same—that is, form a basic platform of principles from which other principles might emerge and branch out. If so, legislatures and courts may push to allow them to apply the principles they created, and include them in decision making. Then law would begin to reflect the environmental ethic some believe it is missing.

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433 Goldstein, supra note 407, at 395.
## APPENDIX 1

<table>
<thead>
<tr>
<th>Programs</th>
<th># of Programs</th>
<th>List of Universities and Institutions</th>
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</thead>
<tbody>
<tr>
<td>Master's Degree in Bioethics (and PhD when indicated)</td>
<td>11</td>
<td>Midwestern University (Ariz.); Loyola Marymount University (Cal.); Loyola University Medical Center (Ill.) (online); Albany Medical College/Union College (N.Y.) (online); Case (Oh.); Duquesne University (Pa.) (Master and PhD); University of Pennsylvania (Pa.); University of Pittsburgh (Pa.); University of Virginia (Va.) (undergraduate programs as well); University of Washington (Wa.); University of Wisconsin (Wis.)</td>
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<tr>
<td>Master's Degree in Health Care Ethics (Philosophy Dep't)</td>
<td>1</td>
<td>Loyola University of Chicago (Ill.)</td>
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<td>Master's Degree in Biomedical and Clinical Ethics (within Division of Religion)</td>
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<td>Loma Linda University (Cal.)</td>
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<td>Master's Degree in Religion/Religious Studies with concentration in Bioethics or Medical Ethics</td>
<td>3</td>
<td>Grace Theological Seminary (Cal.); Indiana University at Bloomington (In.); Syracuse University (N.Y.)</td>
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<tr>
<td>Master of Divinity with emphasis in Bioethics</td>
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<td>Trinity International University (Ill.)</td>
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<tr>
<td>Master's Degree and PhD in Philosophy with concentration in Bioethics</td>
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<td>Georgetown University (DC); Loyola University of Chicago (Ill.); Michigan State University (Mi.); New York University (N.Y.); Bowling Green University (Oh.); University of Tennessee (Tn.) (concentration in medical ethics); Baylor College of Medicine &amp; Rice University (Texas)</td>
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<td>Master's Degree in Medical Humanities</td>
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<td>Drew University (N.J.); University of Texas Medical Branch (Texas)</td>
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<tr>
<td>Master's Degree in Patient Rights</td>
<td>1</td>
<td>Sarah Lawrence College (N.Y.)</td>
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<tr>
<td>Master's Degree in Applied Ethics with Specialization in Medical Ethics</td>
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<td>University of Utah (Utah)</td>
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<tr>
<td>Dual Degree Programs (MA stands for Master's Degree in Bioethics)</td>
<td>5</td>
<td>Georgetown University Medical Center and Georgetown University (DC) (MD/MA or MD/PhD); Indiana University (In.) (JD/MPH); John Hopkins University (Md.) (JD/MPH); University of Pittsburgh (Pa.) (JD/MA; MD/MA; MPH/MA); University of Washington (MD/MA or JD/MA)</td>
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<tr>
<td>Minor in Bioethics</td>
<td>3</td>
<td>University of Minnesota (Minn.); University of Virginia (Va.); University of Washington (Wa.) (undergraduate level)</td>
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<tr>
<td>Concentration in Bioethics</td>
<td>2</td>
<td>John Hopkins University (Md.) (doctoral programs); Brown University (R.I.) (undergrad, master, and doctoral programs)</td>
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<td>Postdoctoral Research or Fellowship</td>
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<td>John Hopkins University (Md.); National Institute of Health (Md.)</td>
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<td>Certificate Programs</td>
<td>8</td>
<td>Midwestern University (Ariz.); St. Louis University (Mo.); Drew University (N.J.); Montefiore Medical Center (N.Y.); CSU (Oh.); YSU (Oh.); Duquesne University (Pa.); University of Pittsburgh (Pa.)</td>
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<tr>
<td>Fellowships/Research</td>
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<td>American Medical Association (Ill.); Hastings Center (N.Y.); Cleveland Clinic Foundation (Oh.)</td>
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<tr>
<td>Courses in Bioethics</td>
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<td>Midwestern University (Ariz.); Georgetown University—Kennedy Institute of Ethics (DC); University of Iowa (Iowa); Boston University (Ma.); CSU (Oh.)</td>
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<td>Seminars and Training in Bioethics</td>
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<td>Loma Linda University (Cal.); Stanford University Medical Center (Cal.); The Pope John Paul II Bioethics Center (Ct.); Ethics Resource Center (DC); Center for Bioethics and Human Dignity (Ill.); Iowa State University (Iowa); University of Iowa (Iowa); Institute of Global Ethics (Me.); National Institute of Health (Md.); National Catholic Bioethics Center (Ma.)</td>
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<tr>
<td>Continuing Education/Distance Learning Courses</td>
<td>10</td>
<td>Loyola Marymount University (Cal.); Georgetown University—Kennedy Institute of Ethics (DC); Georgetown University Medical Center (DC); Center for Bioethics and Human Dignity (Ill.); University of Louisville (Ky.); Nursing Ethics Continuing Education (Ma.); University of Minnesota (Minn.); Duke University (N.C.); Cincinnati Children’s Hospital Medical Center (Oh.); University of Wisconsin (Wis.) (certificate)</td>
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Source: Kennedy Institute of Ethics, Georgetown University