CIVIL LIBERTIES *By Harvey A. Silverglate*

Tipping evidence scales

DR. JACK Kevorkian's fifth trial resulted in his late-March conviction in Michigan for second-degree murder. The doctor was on trial for putting to death 52-year-old Thomas Youk, who suffered from Lou Gehrig's disease.

Lawyers and pundits argued over what enabled prosecutors to end the retired pathologist's winning streak, after four failed attempts (three acquittals and one mistrial) to win convictions on assisted-suicide charges. Some noted that Dr. Kevorkian actually killed this patient (or victim) rather than merely assisted the patient's suicide. Others cited the fact that Dr. Kevorkian turned the videotape of the process over to "60 Minutes" for national broadcast, providing irrefutable evidence of the crime. Still others blamed Dr. Kevorkian's 11th-hour decision to represent himself.

It is unlikely these were the critical factors. In the earlier cases, Dr. Kevorkian's assisted suicides were equally illegal. He has never denied what he has done. Arguably, his clumsy lawyering was offset by his ability, acting as his own counsel, to speak directly to the jury.

More likely, Dr. Kevorkian was finally convicted because prosecutors engineered a legal ruling that kept from the jury evidence of the patient's suffering and the views of close relatives that they and the patient wanted Dr. Kevorkian to end Mr. Youk's misery. The crucial evidentiary ruling emerged from a pretrial skirmish when Dr. Kevorkian was represented. Judge Jessica Cooper, of Oakland County Circuit Court, ruled that the defense could present testimony about Mr. Youk's suffering in defense of the assisted-suicide charge that prosecutors had initially added, but not the murder charge. Lead prosecutor John Skrzynski then decided to drop the assisted-suicide charge, so Mr. Youk's wife and brother never testified. The prosecutor told The New York Times, "We tried to put it on a legal playing field, not an emotional playing field."

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Not the only incident

A few days earlier, it was reported that the FBI was investigating whether former federal Department of Transportation Inspector General Mary Schiavo violated federal law when she checked a suspicious-looking bag at an Ohio airport to test airport security. Her experiment was part of a story a local television station was doing. Hence, while Ms. Schiavo may have technically broken the law, she was certainly doing so not to endanger lives, but to test safety measures she believed to be inadequate.

Both cases, and others like them reported with increasing frequency, demonstrate a trend whereby lawmakers, rule-drafters and trial judges allow prosecutors to limit trial evidence so as to deprive jurors of a rounded view of a defendant's decision to commit the act charged. On the theory that the defendant's motives and the victim's pain and intentions are technically irrelevant to the elements of the crime, courts dramatically truncate the jury's knowledge. It is assumed that neither defendant nor society are entitled to have jurors know enough about the circumstances to be able to exercise their undoubted power to return a lesser charge than the evidence supports, or even to acquit as an act of the community's conscience ("jury nullification"). Indeed, in Ms. Schiavo's case, grand and petit jurors should be provided with enough knowledge to enable them to determine whether the defendant was doing society a favor by testing airport security, rather than committing a crime in any truly meaningful sense.

The debate over jury discretion and even nullification will doubtless rage for a long time. The immediate question we face, however, is whether the profound issue in the Kevorkian case should be decided not by frank and full citizen debate, but by low-visibility evidentiary rulings that limit the jury's access to all of the facts.

Two days before the Kevorkian verdict, in *Jones v. U.S.*, No. 97-6203, the U.S. Supreme Court had occasion to review the central importance of trial by jury in our legal system. Writing for the majority, Justice David H. Souter noted that the drafters of the jury clause of the Sixth Amendment were looking back on the efforts of English kings to deny trial by jury and "well understood the lesson that the jury right could be lost not only by gross denial, but by erosion."

It should be more obvious to all our trial and appellate courts that there may be something profoundly wrong with depriving a jury of a rounded view under the rubric of eliminating technically irrelevant, but vitally important, background and motive evidence. NLJ