

**The London School of Economics and Political
Science**

**The Politics of Euthanasia and Assisted Suicide: A
Comparative Case Study of Emerging Criminal Law
and the Criminal Trials of Jack 'Dr. Death' Kevorkian**

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**A thesis submitted to the Departments of Law and
Sociology of the London School of Economics for
the degree of Doctor of Philosophy, London,
November 2009.**

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Declaration

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Abstract

During the 1990's, medical euthanasia and "physician assisted suicide" became controversial. The latter was variously criminalized, decriminalized and legalized. This dissertation analyses some of the factors leading to changes in *de jure* and *de facto* criminal law. With special reference to the 1990s criminal trials of Dr. Jack Kevorkian (a retired pathologist who became a self-styled "Dr. Death"), it considers the creation and implementation of criminal law regarding medically hastened death in Michigan. I examine the social roles of chief prosecutors, judges, juries, family members of the decedents, and the media. This method of analysis presents a unique opportunity to study key players and how they may have influenced (or been influenced by) the court processes during the emergence of an important issue in a specific jurisdiction. The longitudinal study focuses upon one defendant in one locale, but also examines different statutes and cases. Thus, it becomes possible to scrutinize alternative legal theories of the prosecutions of the cases, along with the development of law in the books and law in action.

Anchoring this study is Kevorkian's 1999 trial culminating in a conviction for euthanasia murder and related drug delivery charges. A landmark was a tape-recording of the consensual euthanasia, which Kevorkian made for broadcast on national television, and whose use by the media, the prosecution, and by Kevorkian, proved highly revealing. In short, the thesis supplies a detailed empirical and analytic examination of critical legal, social and political issues in the public response to physician assisted suicide and medical euthanasia. One principal conclusion is that in those Kevorkian cases in which the politics of death and the emerging assisted suicide debate were factors, the result was acquittal by juries. In sharp contrast, when the trial was limited to the elements of the crime, and eliminated questions of patient suffering and the families, the prosecution obtained a conviction.

Acknowledgements

Researching and writing about the social and legal constructions of euthanasia and physician assisted suicide was once a private enterprise for me. That this work found its way into an academic series of projects was the result of very encouraging support of my teachers and mentors in the M.Sc. in Criminal Justice Policy at the London School of Economics and Political Science. Professor Paul Rock (Sociology) and Professor Robert Reiner (Law) planted a seed that took root over the course of the year in which I earned my M.Sc. in Criminal Justice Policy at the LSE, and continuously nourished the project in the years to follow, with everything from economic support to moral support, from amazingly thorough editorial efforts to excellent questions, from suggestions as to practical advice for fieldwork to readings over a wide and fascinating array. Professor Leonard Leigh (Criminal Law), who ran an LL.M. course in Theoretical and Comparative Criminal Law, encouraged me to make a jump from the practicing lawyer I had been to the academic lawyer I could become. Professor David Downes (Department of Social Administration), in a brief, but highly influential conversation we had at the end of my masters' year, told me that "anything historical is inherently comparative," which offered me a new, comparative approach to work that had previously been constricted in my professional life to a single case before the court at any one time.

When I became a doctoral candidate, I knew both everything and nothing. I knew how I felt about a topic that I swiftly (and perhaps permanently) became ambivalent about. I did not know how to conduct an academic inquisitorial interview, having been trained to be a lawyer in an adversarial setting. Every person I interviewed, whether quoted or not in this thesis, has my profound gratitude for their time and their patience, as well as their information. I knew how to read a transcript, but not a roadmap to the courthouses that I suddenly had to drive to (for this, I thank a law school friend, Ann McCloskey, for a non-financial night on Wall Street, giving me driving lessons before my first trip to Detroit; I also thank the people of Michigan for their defensive driving skills and explaining to an apologetic woman what road skill she needed at any given moment for months on end). In a similar vein, my wonderful physical therapist, Avis Toochnin, taught me how to walk, encouraged me to run, and inspired me to fly after Dr. Stuart Springer performed the first of five miraculous operations to repeatedly rebuild both knees between 1990 and 2007. Without these two, I would never have been able to move to London or to drive or to do fieldwork (though I note that Dr. Springer cautioned me, without success, against doing so for the two 1996 Kevorkian trials which successfully provided much of what will be reported on in the field chapters). Mrs. Hermine Silver, Office Manager to Dr. Springer's very busy practice, repeatedly ensured that all manner of administrative matters were attended to, so that I could use the time and mental energy to focus my energies upon my academic work, as well as my knee rehabilitation. In the later period of post-millennium surgeries, I literally had "A-TEAM," in New Jersey, with Dr. Robert Ruffalo and his very able physical therapy staff, including Jan Steele, Walter "the other Rob," and Joanna.

The people (small case deliberate) of Michigan became the focus of this study, which went far beyond the original contemplation of the *People v. Jack Kevorkian*. I was fortunate to meet individually with many of those involved in the Kevorkian cases, as

well as the Michigan Commission on Death and Dying. These included doctors, nurses, patients, family and friends of Kevorkian decedents, lawyers, legislators, legislative task force members, judges, parties, jurors, witnesses, “named plaintiffs” (parties bringing civil actions against the state), “named prosecutors” (heads of offices), “line” (courtroom and appellate) prosecutors, professors and professionals, secretaries and clerks, ordinary people in extraordinary circumstances, who were all extraordinarily generous with time and information in varying forms.

This project reflects my emerging awareness that the time was right for developing research and writing methods of an interdisciplinary nature. My original training in law came out in particular ways of looking for lacunae, asking questions, seeking information. My subsequent academic training in criminal justice, sociology and law at the LSE is expressed in this work by an expanded vocabulary, none of which will frighten the American lawyer more than that I learned to ask “why?” Lawyers became concerned by my questioning of doctors, which prompted me to question nurses, and to focus upon medical personnel in a number of ways, later and most unusually in regard to the *voir dire* of Kevorkian’s 1999 trial.

It is my hope that the resulting dissertation will be of interest to a general readership composed of members of all of these groups, and others who are interested. For a number of years, I was adrift in a sea of shifting vocabularies amongst professions and disciplines, and Paul Rock quite rightly commented that I was concerned that I was neither fish nor fowl. Years of concern that I would be able to neither swim nor fly led to the conclusion that this may last the rest of my life. Phil Kayal at Seton Hall University paid me the high compliment that I was both a lawyer and a sociologist at a time I was worried that nobody would see me as either. Robert Reiner, a sociologist who later trained in law, kept me afloat in the idea that I could be both interdisciplinary and multi-disciplined. That said, any ambiguity in any discipline is something I offer an apology for, in the same way that I offer apologies for English (US) /English (UK) shifts in spellings and usages, which changed depending upon what I was quoting or whom.

I am grateful to countless friends, colleagues, collaborators and advisors for their generous help in many ways and at many times. Similarly, a number of institutions must be thanked.

Formative conversations were golden opportunities over the years. Lunches with friends in New York (sometimes during fly-by visits and layovers) with clerks and judges at the Appellate Division in New York were as spirited as the appellate arguments of my early days of practice, and certainly influenced me in questions I asked during fieldwork or focused upon during writing up the analysis. The Hon. Ernst H. Rosenberger paid me the compliment of listening to my access questions (and offering insightful answers) and the ultimate compliment of discussing his own work in a Masters of Judicial Administration and his late father’s doctoral work prior to the Holocaust. The Hon. Betty Weinberg Ellerin tirelessly cheered me on to do academics, when few supported the decision. The late Hon. Theodore Roosevelt Kupferman encouraged me to make presentations to the Legal History Committee of the Association of the Bar of the City of

New York and the New York Society of Medical Jurisprudence. As I began to make the transition from legal practitioner to socio-legal researcher, Professor Glennys Howarth (University of Sydney Faculty of Health Sciences and University of Bath Centre for Death and Society) and the Rev. Dr. Peter Jupp introduced me to the Sociology of Death, which became a particularly lively field in the 1990s, and graciously provided a neophyte with first conference, publication, and book review opportunities.

Dr. Linda Wasserman and Dr. Lewis Wasserman issued medical challenges and challenges about medicine. Dr. Bill Gasarch (an academic at the University of Maryland) and Ms. Carolyn Gasarch (a trained pharmacist), Dr. Pearl Gasarch (whose Ph.D. was in technical writing) and Mr. Ralph Gasarch (with an M.A. in drama) routinely offered questions outside the law, and answers about the academy. Hilly Wiese, Esq. provided a number of crucial insights. The Hon. Margaret Marrinan of Minnesota cheerfully kept telling me to “push” at critical stages. Rob Weinberg offered critiques as to my perspectives and weekly columns to educate and entertain me, along with e-conversations that were almost as good as being there. Professor Mike Lewyn was always a tireless cheerleader. Miss Ellen Fuhr turned me loose on her unsuspecting (but very curious) students to workshop ideas and suggested teaching in this illuminating regard; this was a gift I was privileged to pass on to Ms. Lisa Haddock (who taught several semesters of my students about the death penalty in a special team evening event). My flatmates over the years were never ending sounding boards at all hours of the day and night and I thank The Women of Flat 6 (and Vasili), The Men of Flat 30 (especially Dr. Elias Mossialos, who encouraged me to apply for a fellowship at the University of Minnesota, and Jonathan Springer, who helped me formulate thoughts into a proposal), The Boys at Roy’s (especially Ian and Peter), Dr. Julie Allen Whitehouse and “Professor” Pat Whitehouse (who were not formal roommates, but whose hearts were always open during the Clapham years, when I felt embraced as a member of the family) and Adam Heilman, Esq. (who was their Brooklyn equivalent). Olga Sekulic, Esq. and Brian Derdowski, Esq. peppered me with questions every time we spoke or saw each other. Dr. Williamjames Hull Hoffer was generous with praise, gentle with encouraging guidance, and asked a lawyer’s questions about my doctoral process, informed no doubt by his own doctoral experiences. In early stages, Jacquie Gauntlett, Margaret Savage (who in a different time, would have been a professor herself), and Amor Vieira gave me pointed assistance, article clippings, and support beyond their administrative titles at the LSE. On several occasions throughout, Ed Guardaro, Jr. treated me to friendly lunches and lectures, and more than once called me both for, and to give, advice relating to this project. Dr. Molly Easo Smith, President of Manhattanville College, supported several of my initiatives during her tenure as Dean of the Faculty of Arts and Sciences at Seton Hall University, and always encouraged me to finish my dissertation, ultimately ensuring I had the time and money to do so. One of these initiatives, a Faulty Innovation Grant under the Teaching, Learning and Technology Center, directly led to much of the analytical process and development of Chapter 6 (Media), with technological and moral support from Drew Tatuskso, then-Senior Instructional Designer at Seton Hall University, and currently Program III Director at Mount Aloysius College.

Two weeks before the viva of the original draft of this dissertation, I invited an interdisciplinary group to a pre-viva event to “sock it to me.” Each member of The Sock It To Me Brain Trust read a field chapter and questioned me from the left, the right and the centre for the better part of four hours. This esteemed group included Olga Sekulic and Brian Derdowski (Chapters 3 and 4), Dana Richardson (Chapter 5), Lisa Haddock and Nancy Palmstrom (Chapter 6, with additional thanks for lessons in track changes and untrack changes during the revision process) and Adam Heilman (Chapter 6). Honorary members Bob McGreevy (Chapter 3) and Rob Weinberg (Chapter 4) could not make the event, but graciously gave time and energy to lengthy phone “question times” from across a river and a country, respectively. All of these people presented difficult questions, complicated challenges, artful insights and surely made me more adept at speaking extemporaneously about what I had researched and analysed. This unofficial group served as the link between my Thanksgiving Kitchen Committee (the Gasarches) and my official pre-viva meeting with my Actual Committee, composed of my supervisors, Professors Paul Rock and Robert Reiner. To all, I owe the mental agility that I brought into the viva and any courage that I displayed in defending the work.

In addition to the obvious readers who supervised me (Paul Rock, Robert Reiner and Leonard Leigh) at the LSE, there were others who kindly read and commented. I particularly thank Robert P. McGreevy, Esq. (judges and prosecutors), Appellate Division Deputy Chief Clerk David Spokony (juries), Dr. Linda Wasserman (juries) and Barry T. Bassis, Esq. (who read every word at least twice, and most more). Although not readers of the dissertation, Professor Arthur Caplan and Dr. Steve Miles read a number of my early essays in the mid-1990’s, as I started to delve into medically hastened death from a bio-ethics perspective and Steve Miles kindly read a formative essay that ultimately was a cornerstone of my methodology discussion. Similarly, Sandy Towers and Sarah Colwell at Greenwood Publishing made insightful comments relating to my chapter reconstructing historical debates.

The Tuesday meetings of the Mannheim Centre for the Study of Criminology and Criminal Justice, the Friday meetings of the Law Department Methodology (chaired by Peter Muchlinski), the Tuesday night meetings of the Sociology Department (chaired variously by Professor Leslie Sklair and Professor Anthony Smith) were jointly and severally responsible for expanding my horizons, inviting me to give presentations as I struggled through the various aspects of working on evolving cases and legislation, and moving from adversarial to inquisitorial questions and interview styles. Dr. Lynne Jurgielwicz took me under her wing in the Friday meetings, and I am so grateful to her for encouraging me to do the undoable. Miss Angela White, the former Departmental Administrator of the Law Department at the LSE, and Mrs. Rachel Yarham, the Doctoral Programme Administrator at the LSE, assisted me with administrative information and assistance on occasions too numerous to count. In the Graduate School, Mr. Richard Leppington provided answers to questions at crucial moments, Ms. Sarah Johnson provided good news and excellent guidance, and Ms. Alexandra Williams communicated vitally important information. Miss Hannah Cocking in the Scholarships Office was an information resource who directly led to funding sources.

Students who provided cheerful technical assistance in photocopying and downloading, included Jeff DeCruz, Diana Giampiccolo, Megan Natale. These individuals were enormously entertained by my status as a techno-moron, and were kind enough to take my searches and produce reams of articles for me to review, saving me time and energy.

Without certain grants of money, with which I purchased equipment, travel tickets and accommodation, conference presentation opportunities and that most precious asset of time, this work could never have been attempted. Thanks are due double or triple the amount of pounds and dollars I received from the United Kingdom Overseas Research Scheme, the LSE Morris Finer Memorial Fellowship, the LSE W.G. Hart Bursary in Law, the Seton Hall University Faculty Innovation Grant of the Teaching, Learning and Technology Center. Particular field opportunities were funded by the University of London Irwin Trust, the National Long Term Resource Center of the University of Minnesota, the Center for Biomedical Ethics of the University of Minnesota, the Sociology Department of the LSE and the Law Department of the LSE.

Libraries that kindly extended me privileges included that London School of Economics (which also provided my flatmate, Brendan), the Institute for Advanced Legal Studies, NYU (Bobst and Law Libraries), Hamline University School of Law, Seton Hall University. Richard Tuske, Director of the Library at the New York City Bar Association, gave excellent information regarding my research efforts, on several occasions. In addition, I thank my friend Robert Gelber, the former law librarian at the Appellate Division in New York, although his role was social (bringing me on historical and art walks and group outings, which he now does professionally as a retired historian and librarian), rather than professional (I also thank him for providing me with a used car that our former colleagues and I knew would be as gently treated as that of “a little old lady from Pasadena,” to quote my reader Bob McGreevy).

In his own category, Barry T. Bassis variously questioned, harangued, read, fed me. On a number of occasions, he suggested that I dedicate this work to him. This I shall not do, as I am too superstitious to so dedicate a book about death. Rather, this project was dedicated from the get-go to grandfather Neocles “Pappou” Pappas (who would have encouraged the questions) and to father William “Bill” Vasilis Pappas (who would have encouraged the project and doctoral study, had he not been felled by Huntington’s Disease, or perhaps because he was).

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Introduction

This doctoral study in law and sociology began as an interest in the relationship between the criminal law and terminal illness. More specifically my interest was in the application of the criminal law to those in the medical profession who hastened the deaths of consenting adults who were terminally ill. First, as an initial matter, I offer a set of personal factors that drew me to the research I am about to present, emulating one of my chosen examiners (Howarth 1996, pp. 1-9). I note that this also had roots in questions asked by Leonard Leigh and Paul Rock, which I pretended not to hear for nearly two years, and which they politely pretended not to notice that I was not answering. I do, however, need to acknowledge a formative conversation with Glennys Howarth at the LSE in 1993, in which she told me about an experience of her own viva -- in which she had to face some personally sensitive questions from her external examiner. This prompted me to start to “answer” personal questions related to the germination of my academic research (to pre-empt surprise questions). The first open question, in a surprise setting, came in the form of a third party question at my first conference paper, given at a 1993 conference on the “Social Contexts of Death, Dying and Disposal,” organized by Glennys Howarth and Peter Jupp, and at which Glennys Howarth chaired my talk. The third party question was “what are your personal experiences and views?” and my answer was that I had had personal experiences tending to support both in favour, and in opposition, of euthanasia. Before I could (as I feared) cease breathing, Dr. Howarth intervened, and said “well spoken, indeed.”

This gave me courage to write a short introduction to a volume she and Peter Jupp edited in 1996 (which I honestly expected to be redlined out in the galleys), and *that* gave me courage to begin to speak about sensitive topics. As I shall develop in

this dissertation, many involved with, and interviewed for, this dissertation told their stories, and those of their families, and those who *became* their families (such as jurors). In their honour, it is only fair that I commence with sharing my own story.

As a young girl, I had experienced the death trajectory of a parent who had a long-term and incurable fatal illness, which was genetically transmitted by a dominant gene. This meant that I had a 50 per cent chance of inheriting the disease and decline, which in turn had a 100 per cent chance of manifesting itself, assuming no intervening cause of death, such as accident. Likewise, unless there was a successful suicide, either altruistic or otherwise, the illness would inexorably rob physical ability and intellectual lucidity. In this regard, I was mindful of my father's own experience. After he became ill, he attempted an unsuccessful suicide which had disastrous consequences for him, as I have discussed (Pappas 1996, 167). I shall amplify further, since I subsequently learned during the Kevorkian cases and my interviews, that was neither unique on the part of the would-be suicidant or its effects on the people around him.

I was deeply concerned and intellectually perplexed by the lack of *de jure* law and *de facto* criminal justice in response to these underlying illnesses and their terrible death trajectories. By this, I mean that there was a total lack of effective and decisive law, as I shall amplify upon in Chapters 3 and 4. Likewise, since I was at-risk for this particular form of death, I felt a compelling need to learn as much as I could about possibilities of voluntarily-induced death – how to choose the time and manner of death, if there was no choice in potentially contracting a fatal genetic illness in mid-life with a 10-20 year trajectory.

Like others, I was born into a family which shrouded the illness and death of my father's mother in myth and secrecy, and which engaged in patterns of denial so

unreal as to approach psychosis when my father began to manifest symptoms of the same illness that claimed four of the eight siblings of his mother's family, I developed an obsessive need to learn about the illness (Huntington's Disease) that spent two decades claiming his life and placed my own at risk of inexorable and uncontrollable decline. When family members became ill and died, there was little or no discussion – unless the deaths were accidental or immediately explainable (such as by heart attack). Those who *did* try to discuss it were dismissed as “senile” (my grandfather) or “liar” (as with me, once I was told about my father's defined illness in my 20's) or “crazy” (as with both of us) and systematically denounced and/or exiled from the family, only to be summoned back to do “the dirty work” of caring for the infirm that the “deniers” refused to accept once there was a possibility (Cohen 2001) of being publicly polluted by the disease, a living embodiment of an homage phrase – purity and danger (Douglass, 2002). Illness went unacknowledged, as though to acknowledge it was to contract it; thus, there was a silent practice of social death associated with the family illness (or long term illness, as with my maternal grandfather, who was institutionalized after a debilitating stroke). I offer a rhetorical question here – while it is beyond the scope of this research project, are not the nursing homes of today simply a sanitized and medicalised version of what former generations used to house the infirm and the insane?

Having accepted (although not embraced) my family's behaviour as the norm during my childhood and adolescence, it was not until early adulthood that I had my first experiences of discussing and explaining my father's illness, which had been evident for the preceding decade as a totally unexplained intellectual and physical decline (not altogether unlike full-blown AIDS). My grandfather had been assisting in the care of my father, and my father's estranged sister's husband was beginning the

task of assisting in the care of my aunt. In hindsight, the shocking news I received at age 22, of the naming of my father's illness, and the recitals of what had been happening and what would happen in due course, had been clearly collaborated on. The revelations from the grandfather I revered and from the distant uncle came within weeks of one another, despite the seemingly opportunistic nature of the kitchen table conversations.

Thus, in short order, the categories into which my father belonged, and the identifying labels of both him and his condition were thrust into rapid and kaleidoscopic shifts. Simultaneously, I became aware of his illness and what would be his certain mortality, and that of his sister, and a 50-50 chance my own. This was accompanied by an awareness that death was a part of (his) living, and potentially my own, and those of others in my life (as well as my potential offspring). Pain and bewilderment of grief, illness and unexplained illness are often met with avoidance and embarrassed silences. Furthermore, and particularly where the illness or death is marked by personality changes and movement disorders, embarrassed silences are almost as often met by embarrassingly pointed questions, exclusions from society, or even aggression that are horrifying to someone who has been deliberately left in the dark of lack of information concomitant with *misinformation*.

So I had been trained (by negative reinforcement) to be silent (ironically by my *mother* and her family, *not* my father and his family) about the problem, which left me voiceless, even as I battled the ignorance and the exile foisted upon me. I found the solution and solace to be in unfettered reading and writing about those who were similarly afflicted or isolated, and expanded into other areas of reading and writing (and later, teaching) about those who were marginalized by families and societies. (One such example of the latter was the gay and same-sex marriage

debate.). For example, Clausen and Yarrow (1955) detailed the differences in the so called “meaning” of mental illness to various people in a 33 family study. Clausen and Yarrow observed that various persons, including the patient, had effects of these “semantic” positions in shaping their paths to, through and from the mental hospital. Davies (1961) considered deviance disavowal, where there was a refusal on the part of the patient to accept the characterization of deviant – for the physically handicapped, this reflected an interest in minimizing the stigma of the deviance so as to appear normal (or to normalize interactions with others in a world of the able-bodied and sound minded). I would argue that decedents for whose deaths Kevorkian was tried were not only in a “sick role,” but were also at the end of life – with the exception of Marjorie Wantz, as I shall amplify in Chapters 3 and 4. This was in a world of medicine, rather than one of religion.

Further, I been raised without religion and socialized to avoid social interaction that would bring anyone into a home of chaos and unpredictable violence (which was named only after the fact in medical terms of illness), there was no adolescent issue of embarrassing social situations with neighbors, friends or colleagues. In short, I was trained to be self-marginalising due to the social consequences of my father’s physically and psychologically-disabling biological condition, which went untreated for years.

These personal experiences of a long-term and largely unexplained process of trajectory and of my father’s lack of control over his destiny (he unsuccessfully tried to starve himself to death when I was 15, at which time my grandfather and elder sister intervened by having him institutionalized and force fed until he “recovered” enough to be controlled by pharmaceutical intervention) suggested to me that there were deficiencies in patient information and meaningful medical participation in

treatment, and I began to question whether there was a need for informed medical choices in dying.

The same year that I was informed of the name and the nature of my father's illness, I started a post-graduate law degree in the United States, and from 1982-1985, I received professional training that would prove to be the underpinnings of this academic study. That is to say, I learned to ask questions and to write arguments. A professional doctorate was quite a different experience from an academic doctoral exploration, and I shall discuss at length how I had to unlearn certain techniques of questioning and embrace new ones. A primary example is that lawyers are taught never to ask "why" (because it may elicit new information and thus send a trial or hearing testimony out of the lawyer's control) and qualitative researchers are *fundamentally* taught to ask why and how (so as to *obtain* new facts and expand the information-gathering process). Only in the field did I learn that an elusive answer to a question about "why" may lead to further questions or spontaneous utterances as to other matter (whether why, or a new question line, or a new source to contact); I also learned that very few of the interviewees actually did try to be elusive in their answers or narratives (and those who were tended to be either lawyers or members of the press, both seeking to promote a particular "story").

Similarly, during the years I was a legal practitioner, I was required to advocate a particular "side" of a case or decision, whereas as an academic researcher, arguments emerged and shifted in accordance with the research findings (unanticipated findings were, and remain, somewhat frightening, albeit that over time, they have become exciting invitations to the extraordinary). Throughout, my curiosity was sparked to know why a similar set of facts might lead to a different result among jurisdictions, and the question of procedural rules and their application

enthralled me. Why would medical euthanasia be so seemingly acceptable in the Netherlands and be so seemingly unacceptable in the United States?

As I shall explicitly explain, a key answer seemed to lie with the doctor, more than with the patient, and this is a point that I shall return to repeatedly in the course of this dissertation. In the Netherlands, medically hastened death was generally a low-key matter, with respect for the patient's privacy as paramount. In the United States, and particularly in regard to the criminal law, medically-hastened death was (when brought to the attention of the public by the media) more sensational and focused upon the doctor. However, this begged the question of whether the key answer was actually with the American *media* practices, rather than the American *medical* practices, as I shall amplify throughout the field chapters. At this point, I do need to offer the disclaimer that in a thesis which became more and more focused upon the media, I decided against considering religiously-framed politics of death.

Jack "Dr. Death" Kevorkian, who began a public campaign focused on his assisted deaths, created rituals that he brought to the media with flamboyance, so that my research questions – originally focused on a lacuna in the criminal law relating to how, if at all, physicians had a formal, professional role in organising the end of life and on an attempt to understand the Anglo-American criminal justice perspectives – became an exploration of a (as opposed to "the") character and activities of particular person repeatedly in the public eye and the criminal courts. Kevorkian, a former pathologist, exerted a powerful control over methodologies designed to assist in the death of a consenting – indeed, beseeching – practice. The parallel profession of funeral directors "liaise with all other agencies and coordinate the after-death system to provide a service which aims to resolve and dispose of mortal remains with the least amount of 'fuss' and the maximum amount of 'dignity'," (Howarth 1996, p.2). I

shall argue that many a physician also acts in the shadows of the criminal (as well as the administrative, law), but that Kevorkian arguably created a maximum amount of fuss and a minimum amount of patient dignity in the drama of his (purportedly) medical practice (as I shall amplify at length in Chapter 6). Thus, rather than offering an interpretation of releasing society from the dirty work of patient care of those who were beyond treatment, hope and hospice, Kevorkian provided an “in your face” shock approach relating to the practical and psychological aspects of euthanasia and assisted suicide (a term made common world-wide as a result of his activities).

I had originally planned, in the early 1990s, to engage in a comparative study of the criminal law and the criminal justice system in the United Kingdom and the United States, with a focus on the lack of legal clarity in this area. I had not planned a qualitative ethnographic study, but that is what the project became. Although I selected the time when I began the academic research, selecting Michigan (one of the 50 states) as the focus for this research proved to be an opportunity that rapidly evolved, as did Kevorkian’s activities. Not to have selected Michigan would have been a missed opportunity, although at the time, it simply seemed practical to one interested in studying criminal law and medical euthanasia.

Kevorkian was not the norm of physicians, as I shall discuss at length in Chapter 2, Chapter 3 and Chapter 6. His conduct in Michigan was *designed* to violate the norms of particular counties in that state, as I shall amplify in Chapters 2 and 6. However, in the course of attending and juxtaposing a series of criminal trials for some of his earliest and some of his latest acts, commonalities emerged among those involved in the trials. I shall discuss this as a methodological matter in Part II of Chapter I. Here, I note that while I am not seeking to demonstrate that Kevorkian was typical of anything (indeed, I am arguing to the contrary in both the case histories and

the case study), he did provoke the emergence of some interesting issues. Doctors in the United States share a common elite professional training – they share a given status, similar values, knowledge, aims and objectives and they provide the product of health care. Over time, the profession rejected Kevorkian (and he was stripped of his licenses to practice medicine) and he was ejected from the trade. Kevorkian's changes in (and challenges to) ritual and custom resulted in his loss of licensure and ejection from the profession, as compared with other doctors who hastened the deaths of their patients, as I shall discuss, for example, in Chapter 5. Thus, not only was Kevorkian no longer considered to share much in common with his colleagues, but he was rejected from being one of them (part of a lengthy pattern, as I shall discuss in Chapter 2 and Chapter 6).

In examining the social worlds (plural deliberate) that were to become built on the Kevorkian cases (plural also deliberate), I adopted (and adapted) an ethnographic approach. As I shall amplify, I engaged in participant observation of (all but one of) the trials and a number of related hearings, read transcripts and appellate cases, and conducted in-depth interviews with doctors, lawyers, judges, jurors, legislators, clergymen, nurses, task force members, lobbyists, decedent family members and members of the media. My timing was fortunate, partly because I commenced the research at a fortuitous moment, and partly because I suspended and reactivated research as dictated by the events of the 1990s.

As I shall discuss in Chapter 1 and allude to in other chapters where pertinent, I was a beneficiary of institutional processes from which I learned how to deal with sensitive research topics (anti-stalking articles, as well as assisted death) and had my original *aide-memoire* bolstered by an Institutional Review Board and risk assessments. As a result of these, I had an approved IRB consent colloquy (which

included asking for permission to conduct the interview, to tape the interview, to use the interview in my writings) from the University of Minnesota (March 1996).

Unusual for an IRB request, I included in the consent colloquy a disclaimer disclaimed that confidentiality could not be guaranteed unless specifically requested, due to the practical matter that everyone involved was almost immediately identifiable by their role, and anonymity was a virtual impossibility.

That people were willing (indeed -- as I shall show in chapter after chapter regarding juror, judges, family members and those in the legislature, the media and the professions -- *eager*) to meet with me in private to discuss public events was surprising enough. That they were willing to volunteer information (that I frankly did not necessarily know to ask about) regarding their private worlds, along with insights and experiences as to the nature of the public world, was nothing short of a miracle that repeatedly befell me. The rich irony was that Kevorkian and his mid-1990s lawyer did not themselves give me formal interviews. This made the miracle of formal access to those identified in my field chapters even more acutely appreciated, although I shall also devote an entire chapter to Kevorkian (along with Fieger and others) regarding control over media representations and narratives. In addition, both the informal discussions and the formal interviews tended to lead to access to other sources (such as the Miller parents, who granted me a formal kitchen table interview after one of Kevorkian's acquittals) in a snowball effect. In this introduction, I must credit Paul Rock, who gave me the single best interview question of my academic and professional life -- "is there anything I haven't asked about that you want to tell me or any information you want to give me?", which with rare exception led to information or additional sources.

My discussion here aims to present a series of ethnographic snapshots of the developments and implementation of criminal law and criminal justice policy in a particular geographic region of the United States, along with a Rashomonesque account of the social structures. This will come from the rich detail and narratives of lives and deaths and values from key players “in their own words.”

With verbal snapshots, I have to offer another disclaimer – the language of medical euthanasia and physician assisted suicide developed in detail over the course of the decade in both written law and the culture of the courthouse, and was used in different ways by many different people. Thus, while I might have offered a vocabulary at the outset (as I have in other writings), different people used the same terms differently in ways that even one steeped in the events had to constantly distinguish. Words and phrases were frequently politically charged, and setting and demeanour charged them further. Thus, I repeatedly found myself engaging in revisions of vocabulary, and much of this work is devoted to taxonomy as a result, perhaps because words and phrases developed as spoken on many an occasion. I concluded that this itself was illuminating, and so I have sought to document the contested and nature of the phenomena I was studying as it developed, which I shall reveal throughout the chapters of this dissertation.

What I can (and shall, particularly in Chapter 6) offer the reader, the literal “seer” of the words is the actual words at trial (from transcripts and trial notes), media tapes and interviews, along with critical commentary (Hulme 1986). My exploration of issues pertaining to demeanour and dramaturgy developed over time and became such a fascination to me that I even found myself focusing upon visual detail of transcripts, as a differentiating factor of status (one such example was reference to Kevorkian as “Dr. Kevorkian” notwithstanding his loss of licensure and status).

Similarly, I became fascinated with plays and movies relating to the law and “workshopped” some of these during grant studies funded by Seton Hall University (including a Teaching, Learning and Technology Center grant relating to demeanour; an Oral Infusion grant relating to communication and dramaturgy; and a Reading and Writing grant relating to juries and media issues). That said, I shall repeat at various points, that “seeing was believing,” and some of what was visually and auditorily available did not readily translate to the printed page. In some cases, I have documented visual cues (a habit developed from my work as an appellate lawyer, when panel judges would say that the record did not describe this or that in the scene). However, I realized that the whole of what I saw and heard amounted in practice to more than the sum of the parts, or the words spoken.

Also, some of what I saw and heard (including some transcript matters and Kevorkian’s comments on the network television tape that he prompted, which in turn prompted the indictment and trial under which he was finally convicted) sounds literally unreal or mistaken. In most of those instances, I have taken pains to cite the primary sources for my. In some, cases, I asked people at interviews if they heard or saw some particular thing, as much to confirm my own experience, as well as to invite their comment about their own experience, One such example was when I asked reporter Jack Lessenberry in our March 1996 post-acquittal interview if he had seen a famous COURT TV reporter -- who shall remain nameless -- snap his fingers and shoosh Kevorkian and the press gaggle, which was setting up shots of him pitching dimes during deliberations in March 1996, with Kevorkian complaining that they should be using pennies). To me, the gallery photo-op shoot was a shocking example of setting up a press photograph in the first instance, while the television reporter editing out the noise and excitement was additionally shocking to me for making the

COURT TV reporter, rather than the actual newsworthy defendant, the focus. Matters such as these will get further attention in Chapter 6.

Professional survival was a factor among the professions practiced by the elites involved in the Kevorkian cases, yet the theatrical practices felled not only Kevorkian, but some involved in the cases (such as Chief Prosecuting Attorney Richard Thompson, as I shall discuss). While Kevorkian and his agents (including legal and media workers, as I shall also discuss) staged displays as a way of promoting the issue and the man, the 1999 conviction sent a message that this did not advertise a quality of service that prior juries found compelling to the point of acquittal. I shall argue that part of this was inevitably due to the 1998 media display of medical euthanasia, rather than assisted suicide. Whereas Kevorkian played out scenes for the public, physicians generally kept these end-of-life *tableaux* private (and I shall argue that issues of the perception of patient respect and dignity came into play in this regard).

One consequence of the changing rituals, both public and private, was that physician-assisted suicide became a “coming out” issue during the 1990s, not unlike women’s suffrage at the beginning of that century or same-sex marriage at the beginning of the new millennium. An argument which I did not make explicitly earlier, but now see implicit in hindsight, was that this was perhaps my own experience as well, in terms of my father’s illness and its social consequences, my various choices (including embarking upon, and completing, this research project) and their legal consequences. (For example, a writer for the *New Scientist* brought this out with regard to insurability of those at risk of certain genetic and other illnesses, ironically this was an issue that was not of much interest to me in my decision to seek testing for Huntington’s Disease in 1993, the moment non-linkage testing was put into

clinical trials to establish protocols in the U.K., where I resided.) During an interview with Lord Mustill on March 10, 1994, I was told that Americans were rights-based, whereas the British were duties based, in their approaches to life and death matters.

Although I decided to reserve my interviews of members of the House of Lords Select Committee on Medical Ethics and the simultaneously convened Michigan Commission on Death and Dying for another piece of writing, this comment was one that I found to be an excellent clue as to how the two jurisdictions should be juxtaposed, which I shall take one step further. Those favoring legal assisted suicide in Michigan spoke of rights, whereas those in opposition spoke more of duties, which I found to be consistent with Lord Mustill's observation. These frames were not limited to assisted suicide, they could, like spectacle frames, fit end-of-life health care issues in a variety of ways that seemed implicit in what they (whoever the "they" happened to be) said and how they said it. While the assisted suicide and euthanasia trials of Kevorkian may have been a theatre in which both sides had (and created) their share of drama, this was a quiet undercurrent of the script played for the audience. To see the drama, one needed metaphoric bifocals, and to hear it, one needed parallel text.

Trial lawyers make a drama for a jury from a crisis of an alleged crime, and as a profession, have had hundreds of years to perfect this art, this trade. In Michigan, for Chief Prosecuting Attorneys and Judges, I note that as elected officials (even from behind the scenes, as with the chiefs), they may also play to the gallery in ways that their British counterparts do not. While the legal justification is that the public has been harmed by a crime, the bereaved family members seemed to find the ritual of trial offensive, and seemed to embrace the narrative process (whether by interview or at sentencing) to overcome the trauma they felt done to their dignity, as well as to the

dignity of their loved ones. This interpretation may be similar to families of victims of homicide (Rock 2004) generally, or of families of offenders (Condry 2007), but these Kevorkian families were families proclaimed, not families shamed. The rituals of court pegged each of the groups I shall examine into a role, and nobody was unfettered (except perhaps Kevorkian himself, and society punished him duly with the progressive events of loss of licensure, loss of trial, and loss of liberty).

The chapters that follow will be divided into two sections. The first is general in nature, and it touches upon the social and legal consequences of death and of the death rituals comprising hastened death. The question of how medical euthanasia and physician assisted suicide came to be considered by the criminal justice system in the 1990s, implicit in the master's thesis that led to this project, is expanded upon, yet refocused in a kaleidoscopic fashion.

The second part of this dissertation will present an ethnographic account of a series of criminal trials in Michigan. I should say that I am neither arguing in favor of nor in opposition to assisted suicide or euthanasia (which is a finding in and of itself, since I started the work with a definite position). I do not aim to condemn or endorse any views or arguments in the debate, which I truly believe to be in good faith on both, or all (given that there is a range of gray, in addition to black and white), sides. By providing a critical interpretation of the roles of those in the medical euthanasia and physician assisted suicide controversy in Michigan, this project is concerned with perceptions and organizations of roles in criminal trials of a man, as much as an emerging debate.

In Chapter 1, I consider some of the circumstances leading to the possibility of a phenomenon like Jack Kevorkian. I also have brief discussions of literature reviews outlining debates and historical perspectives, as well as a methodology

statement. The word “abbreviated” may perhaps be the most important signal word of the last sentence for any future reader, and warrant an explanation (or road map). The original debates were outlined in a master’s thesis of some 17,000 words (where 10,000 was the requirement) subsequently published by the Michigan Commission on Death and Dying (Pappas 1994), the historical perspectives outlined in a 3,500 word article (Pappas 1996), and the methodology outlined in a number of essays and articles (Pappas 1997, 2000), and the original draft chapters totaled more than 120 pages (approximately 50,000 words). Two matters came together to formulate the decision to abbreviate (or even truncate). First, because I am considering a variety of social and legal constructions in the four field chapters, theoretical matters are raised throughout. Second, in a dissertation and a topic which inextricably intertwines many theoretical matters, to properly address theory would have meant going nearly into a parallel (or second) full-length work, and *still* not have read (let alone discussed) everything in a burgeoning topic. The solution (for me) was to take up a suggestion in *Writing Up Qualitative Research* (Wolcott 2001, chapter 4). His “proposed alternative to devoting an entire chapter to examining the underpinnings of your inquiry is that other than presenting a brief justification for your study, you draw on the work of others on a when and as needed basis” (Wolcott 2001, 74). Thus, for the required literature review, “I also touch upon *which literatures* I am including in terms of history, theory, prior research, social significance of the problem, philosophical underpinnings of inquiry, implications for policy, applications to practice, and so on” (Wolcott 2001, 72) (emphasis in original for “literatures,” emphasis added for “which”) I have prepared in such a way as to introduce the case study.

Chapter 2 considers how medical euthanasia and physician assisted suicide came to be an issue in Michigan in the early 1990s. In a sense, it is a bridge from the general to the particular, the bridge of the specific. Chapter 3 draws upon fieldwork conducted in Michigan and introduces the Chief Prosecuting Attorneys who initiated charges against Kevorkian, and the judges who managed the trials. In a very real sense, Chapter 3 also introduces the trials against Kevorkian that are at the center of this study. Chapter 4 considers the Kevorkian juries and the *voir dire* juror selection process. In the course of Chapter 4, I examine the roles, values and beliefs of medical professionals (especially nurses) at the end of life. The ordinary citizens of a standard jury pool provided access to a small indicative study of a variety of attributes of Michiganders. In addition, the bird's eye view of a jury sitting in judgment of Kevorkian (and assisted suicide) in the mid-1990s showed how the jury interpreted both the facts of the case before them, and the debate of the larger issue of the law.

A further interpretation of the Kevorkian trials is offered in Chapter 5, regarding the families of the decedents whose deaths Kevorkian hastened (either by assisting in suicide or by medical euthanasia). It is in this chapter that a theme emerges about Kevorkian's patients engaging in a process similar to that of coming out (as opposed to coming forward). In Chapter 5, family members who gave interviews (in the acquittal cases) or gave narrative statements at the Kevorkian sentencing (after the 1999 conviction) sounded less bereaved and more political (particularly in comments about the criminal justice system). Chapter 6 analyses the social and legal constructions of (and by) the media in the Kevorkian cases, in which the media precipitated news as much as reported upon it, and literally created the 1999 prosecution. Parallels between the drama on the small screen and drama in the courtroom are explored further in this chapter. In this chapter, theatrical analogies are

themselves kaleidoscopically shifted, then placed under the microscope, bringing the metaphors of drama and visual lenses together.

At the end of the field chapters, the concluding chapter considers some of the inextricably intertwined issues that emerged in this comparative case study of the criminal trials of Jack “Dr. Death” Kevorkian. This final Chapter reviews the development of the politics of euthanasia and physician assisted suicide in Michigan. In addition, by the concluding chapter, I shall hope to have shown that that the families at the Kevorkian trials were clear that the decedents were atypical of Durkheim’s suicidants. By this, I mean that the types of suicide-inducing social pressures of the patients began to develop in patterns showing social integration of the decedents. I shall also have shown that Kevorkian was atypical of the doctors originally under consideration in the 1950s by Glanville Williams, Norman St. John-Stevas, and Yale Kamisar.¹ While the Kevorkian cases did not postulate a typical case, the trials are indicative of a pattern (Pappas 1993; Smith, Blagg, and Derricourt 1988). These matters were all the more highlighted by the interviews with the prosecutors, judges, jurors and members of the media.

Ultimately, my uneasy conclusion was that the systems of values were never internally consistent (let alone externally so), as regarded the hastening the death of a willing, indeed requesting, patient, were not resolvable. Michael Ignatieff, writing the biographical *A Life: Isaiah Berlin*, put it well. He said:

[s]ystems of values were never internally consistent. The conflict of values - - liberty versus mercy; tolerance versus order; liberty versus social justice; resistance versus prudence –was intrinsic to human life (Ignatieff 1998, p.285).

¹ While Kamisar, a Michigander, and Kevorkian were antagonistic to one another in the 1990s, their personal animus is beyond the scope of this dissertation, relying upon the 1950s theoretical criminal law.

I take some comfort in that greater minds than mine have wrestled with issues that led to no winners, only more matches. Robert Reiner, in an essay honouring the work of Stan Cohen,, went further backward and forward in time, noting that “Weber contrasted two moralities that politicians may be guided by: the ethics of responsibility and the ethics of conviction, or “ultimate end (Reiner 2007, 409). In matters of assisted death, there are discrepant goods which are not complementary, and the attempts to litigate, legislate, and relitigate made them neither compatible nor resolvable. Any one system (legal, social, political, medical) had contradictory elements internally. Kevorkian’s trials, and the legislation that made efforts to keep apace, showed that there were no easy answers to these questions, which continued to emerge on both sides of the Atlantic. What I argue *is* certain is that in the Kevorkian cases, “[i]ndividuals who had hitherto been separated ... came together and they experienced in their encounter[s] ... meaning, structure, purpose and identity” (Rock 1998, pp. 324-325). Prosecutors, judges, jurors, family members, members of the media, and Kevorkian himself found meaning, purpose and identity in the course of these trials, played out in the drama of the courtroom (Goffman 1959, p.211).

Chapter One: History, Literature Review, Methodology

Introduction

This dissertation seeks to fulfill elements for a doctorate in law and sociology. I shall aim in this chapter to fulfill certain required elements of the dissertation. In this chapter, I shall include relevant versions (some of which have been published at length elsewhere, as noted) of historical perspectives and literature review outlining debates, as well as a methodology statement. These will expand upon the original theoretical criminological debates about medical euthanasia that I outlined in my M.Sc. thesis (Pappas 1992) and an article about the “then” recent historical perspectives pertaining to both medical euthanasia and physician-assisted suicide (Pappas 1996) an article about comparative perspectives amongst the U.K., U.S and the Netherlands in a paper also published in 1996, but orally presented at the first of a series of conferences about Death, Dying and Bereavement, organized by Glennys Howarth and Peter Jupp (1993). Interspersed will be information gathered along the way for other pieces and talks, but with the ultimate focus upon this dissertation.

I also note that because I am considering a variety of social and legal constructions in the four fieldwork chapters, theoretical matters are raised throughout. In addition, I came to the work after a number of years in a variety of roles as a legal practitioner as a criminal trial and appellate lawyer and judicial appellate clerk. Thus, I did not arrive at sociology and criminology from the traditional route. If I had, I might have been at home with those who, as Robert Reiner wrote in “Copping A Plea,” felt at ease with “theory, everyone’s first love” (Reiner 1998, p. 75). Moreover, I was working on a rapidly developing and evolving set of cases and hearings, and had to (sometimes literally) run around libraries to acquire theoretical

knowledge about sociological,² criminological,³ anthropological and bioethics,⁴ as well as criminal legal theory.⁵ I found myself seeking to study the history, theory and methodology possibilities as work proceeded, as well as to acquire and to participate in the burgeoning sociology of death.

I shall, in large measure, defer defining euthanasia and assisted suicide, because the terms themselves were subject to renaming (and naming, as to the latter) throughout the decade in a variety of ways, including (but not limited to) court decisions and testimony, as well as interviewees for this dissertation. Rather than simple definitions from which to work, these became politically charged phrase subject to fluidity. I found myself in the good company of task forces (including the Michigan Commission on Death and Dying, as well as the House of Lords Select Committee on Medical Ethics, both of which issued reports in 1994) , as well as legislatures (including Michigan, on more than one occasion, and Oregon) in this regard.

Was the subject defendant, Jack Kevorkian a “Dr.” since he was formally medically trained? Or a “Mr.” since he had been stripped of his licenses or simply a status stripped “defendant?” Hulme (1984) pointed me to visual representations of words and names ordinarily left oral; in the Kevorkian cases, it rendered a murder defendant an expert. Labeling also became a politically charged matter (Downes and Rock 1998 pp.177-178), particularly in the arena of victim decedents and family

² The LSE was my initial introduction to readings and conversations in this regard.

³ During my Master’s year, I was fortunate to be permitted to audit a course taught by Paul Rock and David Downes on :”The Sociology of Deviance,” in addition to the core course chaired by Rock, Downes and Robert Reiner.

⁴ To compensate for this, I spent a year as a Post-Doctoral Fellow at the University of Minnesota Center for Bioethics, from 1995-1996 (the basis of which was my JD credential). In order to learn more, I developed a university level Special Topics course regarding “Life, Death and the Law,” and later took on teaching in a course “Sociology/Anthropology of Health and Medicine.”

⁵ I took a course in “Theoretical and Comparative Criminal Law” with Leonard Leigh and Ian Dennis to acquire a theoretical background in this regard, but found myself reaching further to learn more about issues of causation (particularly *novus intervenous* or supervening cause of death) and intention, as well as homicide.

members (Rock 2004, Condry 2007). A great challenge for me was to use the phrases that others used to self-identify in this work. While the *actus reus* and the *mens rea* were being legally defined, I found myself drawn again and again to the difference between euthanasia “victim,” “client,” “patient,” Tom Youk, and the possibilities of the Youk family as “victims,” “bereaved,” “activists.” These were categories that other families, such as the family, friend and clergy of Kevorkian client, Merian Frederick, also struggled.

Thus, at different times and in different ways, I shall define, refine, and redefine, as per either the words of interviewees, testimony or legislative enactments. However, at this time, I shall make two broad comments. First, because I started this research as a criminal lawyer, I made certain taxonomical distinctions from the outset; these were, to my surprise and dismay, not at all universally accepted (or even understood). So it is that I now wish to state what my initial assumptions were in defining (and to note that these definitions were challenged over time, as I shall develop throughout the dissertation). I (originally) *assumed* a patient who had the legal capacity (over 18, with nothing diminished by insanity, drugs or alcohol, or mental illness or defect) to voluntarily (without duress) request that a medical doctor (in license, i.e., someone who had professional training, and a member of the profession in good standing) administer or help administer drugs or pharmaceuticals (this will also be subject to some redefining) to the patient at the behest of the patient; in short, I assumed informed consent (Katz 1999, pp. 76-77). However, under Anglo-American legal theory, “[t]hough we are inclined to think of homicide as a secular interest, the historical background of desecration is essential to an adequate understanding of both the history of

homicide and the current survival of many homicide assumptions. For example, consent is not a defence to homicide” Fletcher 2001, p. 236). I shall argue later, and particularly in Chapter 6, that this was an avenue of Kevorkian’s downfall, met at the street corner of publicity (Rojek 2001).

There were both question and implied answer that I brought to the research: "Patients' Orders and Doctors' Duties When Healing Hands are Requested to Render Lethal Aid: Should There be a Review of Criminal Justice Policy Regarding Physicians who Perform Active Euthanasia?", subsequently admitted into evidence as *Document A-128 Michigan Commission on Death and Dying* (1993). In that document, I spent a good deal of time enumerating definitions. However, since I shall be parsing a great deal, and the voices and writings of others will be issuing delimitations, I shall now state only that the original assumption did not include children, the incompetent (such as one in a persistent vegetative state or the clinically insane), or those without biological terminal illness that would result in imminent death in less than one year..

Second, in the original assumption, only the patient (not the patient’s husband/wife or family members) could be the source of the consent, by oral request or written document enumerating the conditions of the request (such as an advance directive) and the consent had to be voluntary (not flowing from duress or psychiatric infirmity). I found my construction to be, consistent with the Oregon Death with Dignity Act (also known as Measure 16 of 1994). (Hilliard and Dombrink 2001). I shall at various points in the dissertation, deal with distinctions that interviewees, enactments or cases employed. Whether I agreed with these distinctions or not may perhaps be less important than that

they existed. Indeed, I shall argue at various points that the simple existence of point and counter-point constituted a finding, when the same words were used to express different things or ideas.⁶ In the process of this, I traveled along a path in Michigan, learning “what is a crime?”. The Law Commission of Canada offered a useful secular analysis by Jean-Paul Brodeur and Genevieve Oulette, by discussing the “criminalized behaviour” a phrase that stayed with me (Brodeux and Oulette 2004, p.8), although it did not address purportedly consensual assisted suicide, and certainly not euthanasia. In Part I, I shall seek to examine some of this “criminalized behaviour.”

Part I: Recent Historical Perspectives⁷

In this part, I shall discuss why medical hastening and/or termination of life, whether by euthanasia or assisted suicide, became one of the most hotly debated topics of the end of the 20th century. While euthanasia had been a subject of controversy for thousands of years, the historical influences vis a vis the medical profession were primarily rooted in the hundred years prior to Kevorkian’s 1990s practice.

I shall now explore some of these historical developments which had an impact on the emergence of medical euthanasia and physician-assisted suicide as legal and regulatory matters. My objective in so doing is to

⁶ A relatively easy example of this is, what is the definition of “terminally ill” when the time a patient was predicted to live was itself subject to interpretation. Should one have a year or less to live, or six months or less to live, before they are to be considered in a terminal condition? What if the illness is fatal, but has a long death trajectory? What if an illness will make a sane and competent person lose their mental and competency facilities? The simple answer must be that it was not so simple, although earnest minds and groups of people worked hard to deliberate to conclusions.

⁷ Earlier versions of this Part were presented in D. Pappas, “Recent Historical Perspectives Regarding Medical Euthanasia and Physician-assisted suicide,” in G.R. Dunstan and P.J. Lachmann (ed.), *Euthanasia (British Medical Bulletin)* Vol. 52, No. 2 (Royal Society of Medicine Press for the British Council),(1996) and in “Euthanasia and Assisted Suicide: A Twentieth Century Chronicle,” at the New England Historical Association (2003).

juxtapose events in a way that relates historical fact (and fiction) to events and debates of the 1990s. Sociology, law, medicine, bioethics each had roles in the emerging debate previously limited to philosophy and theology. As a lawyer commencing a research project on an area of law replete with lacunae, I took comfort in an analogy to what Howarth and Jefferys offered in their 1996 article, “Euthanasia: Sociological Perspectives,” that “sociologists [were] beginning to study the circumstances surrounding the issues and the wider societal implications of possible changes in the law, professional practices and normative values [and t]heir work may well begin to influence public policy as well as private practice.” (Howarth and Jefferys 1996, p. 376).

In Part I, I shall use the term “medical aid in dying” as a term which euphemises the concept of medical assistance in the termination of life, and embraces the practices of both euthanasia (as performed by members of the health care team) and physician-assisted suicide. I feel obliged to note that while I was comfortable with that phrase in 1996, I became less so over the next decade. The word “aid” specifically became one which was infused with politics as to both practitioners and patients.. Equally cumbersome phrases (such as “medical hastening of death,” an expression that wholly omits assisted suicide) were either incomplete or politically charged or both. Hence, I shall use the phrase in this Part (with departures in wording as noted).

By any nomenclature, medical aid in dying had arguably become the most important issue facing the medical profession, and a number of professions and trades having a relation to medicine. Assisted or hastened death also became important to an increasingly consumerist and sophisticated base of patients (whether terminally or chronically ill) and their families, as I

shall especially show in Chapters 5 and 6. This argument will be supported by *sua sponte* statements of interviewees in the field chapters, including judges, jurors, decedent family members, and members of the media, among others.

That said, “social phenomena do not appear spontaneously and autonomously.... [History] can generate an understanding of the processes of social change and document how a multitude of factors have served to shape the present” (Vago 2006, p. 425)

Developing a historical perspective of medical euthanasia started with the dictionary definition of history offered by J.M. Hawkins in *The Oxford Paperback Dictionary* (1990, p.383) as the “continuous methodical record of important or public events ... the study of past events, especially of human affairs.” I accepted that history was the record of human society. This said, the first difficulty for a criminal lawyer developing a historical perspective on medical euthanasia (and I use that phrase deliberately, as pre-dating the 1990s construction of physician-assisted suicide) was the fact that essays advocating (legally permissible) active euthanasia in the context of modern medicine first appeared in the US and the UK in the 1870s (Kemp 2002; New York State Task Force on Life and the Law 1994, p. 81). This was nearly contemporaneous with the emergence of eugenics; a concept defined in 1883 by British scientist Francis Galton with reference to a scientific and social movement whereby better breeding could be effected by manipulating heredity (Kemp 2002, pp. 87-89; Stepan 1991, pp. 1-2), notwithstanding millennia of debate of the topic in other disciplines.

I argue that this is unsurprising given that the modern hospital was considered to have existed for approximately 100 years and that its function

and efficacy had changed dramatically. Hoefler and Kamoie, in *Deathright: Culture, Medicine Politics and the Right to Die* (1994, pp.67-68) observed that before the twentieth century, 25% patient mortality rates and 10% medical *staff* mortality rates were not uncommon annual figures, and that many members of both groups succumbed to acute infections derivative of their presence, rather than their role, in hospital.⁸ Therefore, in considering medical aid in dying, my exploration of historical perspectives ultimately found itself rooted in the early part of the 20th century (Kuepper 1981, p.56 n.84; Kemp 2002, p.45-46).

With the modernization of medicine, religion was replaced by medicine as the major institutional moulder of cultural death fears and immortality desires. This was because modern medicine, like religion and the law, sought to discover, control and eradicate undesirable elements (Kearl 1989: 406). Breakthroughs during the 20th century empowered doctors to successfully battle acute infections and to perform life saving surgeries; in turn, the hospital was transformed from a place essentially functioning as a hospice to an institution for the sick and injured to receive medical, surgical and curative treatment (Fins 2006, pp. 63-64). Technological advances further armed the medical profession, enabling success in the battle against untimely deaths brought on by failing organs (Fins 2006, pp. 64-67) (I note explicitly that the technology related to organ failure and transplantation is beyond the scope of this dissertation, other than to say that it exists). The roles of doctors

⁸ Hoefler and Kamoie, after citing these astonishing statistics, went on to attribute subsequent reduced hospital mortality rates to Florence Nightingale's crusade against unsanitary conditions in hospitals, which she waged during the 1880s's (*sic*) (Hoefler and Kamoie 1994, p. 67-68), before which hospitals were relegated to being primarily religious and charitable places for warehousing the sick and the poor (1994, p.67). I am grateful to Glennys Howarth and to David Downes for pointing out that Nightingale's activism in this regard was primarily during the 1860s.

in relation to the dying came to bear even less similarity to their counterparts of two centuries ago than hospitals.

Consider, for example, how doctors were involved with hastening the death of George Washington, the first President of the United States. In 1799, President Washington developed a sore throat; his doctors, in the two days before his death, “bled” five pints of blood from him, in accordance with what was then the state-of-the-art in medicine. Washington’s death was probably (and obviously inadvertently) as likely to have been caused by physical shock and loss of blood as by the strep throat (for which he also gargled). Hoeffler and Kamoie in recounting this series of presidential events (1994, p. 46-47) went one step short of what I shall now say -- this may well have been the first publicized (though neither intended nor prosecuted) “assisted death” by a physician in America. Of course, in the present day, Washington would likely have received any number of antibiotics, retained his-life blood, and likely lived to die of one of the degenerative diseases now common to old age.

With public health awareness and medical technology, the 20th century saw the defeat of acute and infectious disease. That of course, left aside the advent of HIV/AIDS in the 1980s, which was infectious, degenerative and terminal and raised the question of a young and vigorous population seeking assisted death (Ogden 1994) in cases where there was no cure and insufficient (albeit much improved) medical management. Overall, degenerative illness rose into prominence at the end of the 19th and the beginning of the 20th centuries. These fuelled the beginnings of the modern medical euthanasia controversy. Degenerative and late onset illnesses increased in visibility as society changed, and life expectancy doubled from a norm of 40 years in 1851

(Taylor 1993, p. 43-44). One measure of this was that between 1886 and 1913, cancer deaths in New England and the Mid-Atlantic area of the United States rose from 41 per 100,000 to 90 per 100,000. I would note that cancer also served as the paradigmatic referent for chronic and degenerative disease in discussions of suicide and euthanasia in the early 1900s. One early example of this, on the cusp of the century, was an 1899 editorial in *The Lancet*, advising a physician that in the use of morphine and chloroform to relieve the pain of a patient with ovarian cancer:

We consider that a practitioner is perfectly justified in pushing such treatment to an extreme degree, if that is the only way of affording freedom from acute suffering ... [and] we are of the opinion that even should death result, the medical man has done the best he can for his patient (Editorial, *The Lancet* 1899/1, p. 532).

When I wrote about this in 1996, I commented “thus, the introduction of the concept of double effect of medication as a response to intolerable degenerative disease has an introduction into mainstream, modern medical practice” (Pappas 1996, p. 3/8). While I still argue that this 1899 editorial in *The Lancet* advocated the use of morphine in abundance for pain relief, even if it inadvertently led to the secondary effect of hastening death, I shall now make additional comments. First, note that the “medical man” in this opinion piece was treating ovarian cancer – a *female* specific form of the illness. Later in this thesis, I shall recall and to contemplate the gender specific aspect in that Kevorkian was acquitted of hastening the death of Marjorie Wantz in 1996, where her central complaint was vulvadenia, euphemized as “chronic pelvic pain.” In drafting this dissertation, a rhetorical question emerged – were we always prepared to silence female pain and suffering? Would the same piece have found friendly placement in *The Lancet* had the pain

complained of been associated with testicular cancer, and would Kevorkian have assisted in the death of a man complaining of chronic penile pain? Do we as a society medicalise” and “treat” female pain? Did the 1899 piece, which regarded hysterical pain in the literal biological sense, suggest and that the shortening of life for female pain was perhaps more acceptable? Or was there a possibility that women were more literally vocal about their pain, and the professional trend was that male doctors in question were more professionally comfortable with medicating the pain away and silencing the female complaints (Strauss and Glaser 1970, p.21)..

Next, I would like to consider the concept of double effect (Biggs 2001, pp. 54-59) The primary intention is of medication is purportedly to alleviate pain, yet the drugs cause a secondary or inadvertent effect of shortening life, i.e., hastening death). This affirmative (and, if successful, complete) defence to homicide charges was introduced as a response to intolerable degenerative disease or whether it was a medical response to complaints of pain and suffering, it nevertheless *was* introduced and *did* arise in modern medical practice (Devlin 1985). Moreover, as I shall argue later, some pro-life advocates argued a “bastardized” version of double effect, as a fall back position, rather than assisted suicide or euthanasia. In such an instance, the truth of the matter asserted would be that the drugs were actually being used to hasten death, rather than to alleviate pain. In another “bastardization” based upon the historical theory of double effect, Kevorkian was able to use this to great effect in the mid-1990s trials, even in cases of asphyxiation by gas mask.

I that this gave perspective to much of the activity in the modern medical aid in dying movement to legalize euthanasia (where the doctor was the primary actor) and physician-assisted suicide (where the doctor provided the means to a patient, who was then the primary actor). For example, interest groups who devoted time and economic support to campaigns in America to legalize assisted suicide in Washington State (the failed *Proposition Initiative 119* in 1991) and California (failed *California State Terminal Illness Assistance in Dying Initiative 161* in 1992) were heavily supported in time and money by the AIDS lobbies. Russell Ogden, particularly acknowledged the community of Persons With Aids (PWA) as welcoming in his study, *Euthanasia, Assisted Suicide & AIDS* (1994).

I argue that AIDS (and other fatal degenerative illnesses, such as ALS, MS and Huntington's Disease, all of which have adult onset) became the late century referent in the euthanasia and developing assisted suicide legalization debates. Ogden wrote:

In an article on the ethics of euthanasia and AIDS, Yarnell and Battin (1988) argue[d] that AIDS is *the* disease that makes the case for euthanasia, since for many AIDS patients, it is not a matter of choosing between life and death, but between choosing to die now or to die later. They (Yarnell and Battin) suggest[ed] that taboo ethics, based on rigid moral rules, govern current laws and regulations with respect to euthanasia (Ogden 1994, p. 38).

Steve Kuepper, whose 1981 doctoral dissertation for Rutgers University, entitled "Euthanasia in America, 1890-1960: The Controversy, The Movement and The Law," used cancer as the paradigmatic referent. I met Kuepper in Minnesota in 1995, when he told me that he had had (and survived) cancer, with treatment unavailable in the early part of the century. To me, this presented a juxtaposition to a highly publicized witness at the

March 4, 1994 public hearing (which I attended) of the Michigan Commission on Death and Dying – a 37 year old woman who had what she testified to as “a 97 percent probability of developing Huntington’s Disease,” a fatal degenerative dominant genetic neurological illness (of a 10-20 year duration, during which a patient would inevitably and inexorably experience a “parade of horrors”⁹ commensurate with the loss of physical and mental abilities

Take together the following. First, consider a historical perspective of Kuepper’s (unpublished) 1981 thesis,. Second, consider Ogden’s 1994 book (which started out as a master’s dissertation),. Third, consider the perspective of 1994 testimony of the woman at risk (who appeared to be exhibiting Huntington’s physiologic impairment).

Considering them *together* leads to an important question. What does it actually mean to be terminally ill? Opportunistic and acute illnesses which would have resulted in death are now sometimes treatable or medically manageable, as with cancer. Degenerative illnesses, with their related syndromes and parades of horrors have now emerged as the central vehicle carrying us to natural (read, biological) death. I argue that this was, in fact the case and that the equally inevitable result was that our concept of illness, as well as our perspectives of how to manage it, has changed radically. However, not only were doctors’ powers expanded by medical technology and pharmaceuticals, but patients’ roles and rights were, with a heavy emphasis on patient autonomy. Indeed, I argue that patients became consumers of the health care industry, rather than passive recipients of medical treatment, and I

⁹ In 1994, Dr. Howard Brody, former Chair of the Michigan Commission on Death and Dying, was the first person to use this expression with regard to this illness in my presence, and I have used the phrase since. In Huntington’s Disease, a patient loses lucidity and mobility relentlessly, until rendered effectively bed bound in a persistent vegetative state.

shall amplify this in Chapter 5, along with family participation in health care decision; related issues will arise in Chapters 3 and 4.

It was with these questions in mind that I shall next proceed to briefly review some of the literatures (plural deliberate) relevant to this dissertation. In so doing, I shall explore the historical perspectives of Nazi doctors and euthanasia, and some of the theoretical perspectives regarding medical euthanasia in the post-War period, and consider some of the relevant topics in the sociology of death.

Part II: Literature/s Review

In the course of the field chapters relating to chief prosecuting attorneys/judges, juries, families and the media, I shall point the reader to a embedded literature for reference, I am deliberately not taking a position either in favour of, or in opposition to, medical euthanasia and physician-assisted suicide in this dissertation. Rather, I am inviting any reader of this piece to draw his/her own conclusions. Thus, I do need to make a disclaimer at this point. .Life-spans expanded, medical technology improved, treatments became available. This invited older patients, who were proceeding with less urgency, to contemplate the issue (Kuepper 1981, Ogden 1994).

Nonetheless, the essential questions remained the same. That is, should competent adult patients be allowed to renegotiate death? If so, should the law provide either for a policy whereby doctors would not be prosecuted for participating or should there be a legal regulatory mechanism to allow for medical euthanasia and/or physician-assisted suicide? Suicide was decriminalized as a matter of Anglo-American law throughout the United

States in state by state legislation (and in the United Kingdom by *The Suicide Act 1961*, which read, in pertinent part, “a person who aids, abets, counsels, or procures the suicide [defined as the act of intentionally ending one’s own life] of another or attempt by another to commit suicide shall be liable on conviction to imprisonment for a term not exceeding fourteen years).”

Fletcher commented on “the tension ... in particular circumstances by recognizing a special offense of killing on request,” which he likened in a footnote was, in the German code, “killing on demand” ... an infelicitous association [of language] with the phrase “abortion on demand”:

This offense of “killing on request should be distinguished from related variations of homicide. First, voluntary euthanasia obviously should be distinguished from involuntary euthanasia where the victim has not requested or consented to the termination of his life.

Secondly, killing by request should be distinguished from assisting another person to commit suicide. The difference between the two types of offense is a matter of degree.

Killing by request requires that the suspect be the active party in the termination of life; assisting someone else to commit suicide implies that the suicidant is the prime mover in bringing on his own death. If the defendant lays hands on the party wishing to die – the case is readily classified as killing by request. If on the other hand, he merely makes pills available to the suicidant, the degree of participation comes closer to merely aiding in someone else’s active decision (Fletcher 2000, p.322)(paragraph breaks inserted).

Whereas doctors in the past were left to watch helplessly (or arguably inadvertently hasten) the deaths of their patients, then modern medicine, with its treatments and cures (or life-prolonging technologies) created a circumstance whereby both doctors and patients began to renegotiate death. Notwithstanding the fact that the doctor-patient relationship is key; doctors and *families* of patients also were engaged in negotiations. An example of this was the death of King George V in 1936, which I argue was predictive of the families of those who are imminently terminally ill might intervene. It was

said that the King's personal physician, Lord Dawson of Penn, allegedly ascertained that Queen Mary "saw no virtue in allowing the King's suffering to continue," and took whatever steps were necessary to cut it short (Barrington 1990, p.87). In 1992 Nigel Cox was prosecuted in Winchester, where family members made similar statements (after which he injected his dying patient, in hospital, with potassium chloride). Dr. Jack Kevorkian was convicted in 1999 of euthanasia murder, for he injecting patient Tom Youk with a lethal cocktail (including potassium chloride, the same death inducing compound Cox used), notwithstanding the fact that their families were similar in mindset. Ronald Dworkin suggested that "the crucial question is whether a state can impose [the majority's] conception of the sacred on everyone" (Dworkin 1993, p.109). A number of ways of answering this question are available (as to doctors, patients, and families), depending on the literature one wishes to train their lens upon, and I shall offer some choices.

If one wanted to answer this in terms of moral issues expressed in law, Glanville Williams' *The Sanctity of Life and the Criminal Law* (1961), Norman St-John Stevas' *Life, Death and the Law: A Study of the Relationship between Law and Christian Morals in the English and American Legal Systems* (1961) and Yale Kamisar's seminal article in 46 *Minnesota Law Review* 969, "Some Non-Religious Views against Proposed "Mercy Killing Legislation" (1958) formulated a trinity of arguments. These three engaged in a debate long before assisted suicide was introduced as a concept in medico-legal literature or technology. Williams argued for permissive legislation regarding euthanasia. He suggested that the "purpose of such legislation would be to set doctors free from their fear of the law so that they

can think only of the relief of their patients [and that] one result of the measure that doctors would welcome is that by legalizing euthanasia it would bring the whole subject within ordinary medical practice” (Williams 1958, p.305).

St. John-Stevas wrote against euthanasia as a theological, as well as a legal, matter. He noted that a criticism he had to contend with was that the Christian conservative attitude toward suffering was “sadistic” (St. John-Stevas 1961, p.272). Kamisar noted that the law on the books condemns all mercy killings, but that “the Law in Action is as malleable as the Law on The Books is uncompromising. The high incidence of failures to indict, acquittals, suspended sentences, and reprieves lend considerable support (*sic*)” (Kamisar 1958, p.971).

Were one to apply these three constructions to the 1936 actions of Lord Dawson, the 1992 case of Cox and the 1999 case of Kevorkian, the outcomes might not be so different. Lord Dawson of Penn was engaged in a private matter, operating in the shadows of the law (notwithstanding the Queen’s request). This appears to be the case, although he might have been providing a drug that would have fallen within the *technical* double effect principle as regards relieving suffering as the primary intention (with death as a result), and was not prosecuted. In Chapter 2, I shall argue further about how the double effect principle may be misapplied.

Cox operated within the shadows of the law, using a heart stopping drug that had no therapeutic effect. Nonetheless, he received the criminal justice system’s equivalent of a slap on the wrist when the court imposed a suspended sentence after trial. Likewise, the General Medical Council required him to take a palliative care course. and required him to be supervised

for six months. (I would note that hospice physician Dr. Timothy Quill, who provided an illegal prescription for an overdose to a cancer patient, was given an even greater pass by a grand jury in New York in 1992, by refusing to indict him).

Kevorkian, as I shall argue in the field chapters, operated publicly and with self-promoted publicity. He was, in 1991, stripped of his licenses to practice medicine after his second and third assisted suicides (conducted on the same occasion). However, he succeeded in persuading more than one jury that he was alleviating pain and suffering by providing carbon monoxide to patient clients. This fit both within the double effect and within Kamisar's theory of acquittals. Kevorkian was only convicted and sentenced after he precipitated a national of medical euthanasia by injection.

Vago (2006: 425) suggested that "the study of history ...informs us who we are and that we are links who connect the past with the present and the future." Thus as an analytical matter, it is interesting to point to the timing of the politics of euthanasia. Williams, St. John-Stevas and Kamisar were not writing in an academic vacuum. During the-1950s (and in what I would suggest was not many publication cycles earlier) doctors in both the United States and the United Kingdom were brought to criminal trial for alleged euthanasia or medical murder.

In 1950, Dr. Hermann Sander was prosecuted (and acquitted) in New Hampshire after he administered four injections of air into the arm of a patient, in circumstances strikingly similar to the 1992 Cox case. The theory of the defence was that Sander's patient was "already dead" when he administered

the injections. Thus, an intervening cause of death broke the chain of causation.

In the United Kingdom, Dr. John Bodkin Adams was acquitted in a mere 44 minutes following a defence that “treatment” was to relieve pain. Lord Devlin, in this case, issued the first jury instruction regarding the “double effect” principle. That where medicine was administered to relieve pain, but death was hastened, the requisite intent for homicide was absent (and hence a not guilty verdict appropriate). I read this jury instruction in an extant transcript at the Institute for Advanced Legal Studies in London. Further, I argue that the prosecutions may well have precipitated the line of academic contemplation.

At this point, I shall make a disclaimer, with regard to language. I shall use the phrase “mercy killing” to distinguish from medical euthanasia and physician-assisted suicide cases in which a husband shoots or suffocates a terminally ill wife, or a parent commits such acts on a child who is ill. I would note that mercy killing has itself remained a political term. For example, in the Written Evidence of the House of Lords Select Committee on Medical Ethics (Volume II 1994, p.18) the Home Office included a table, “Offenses Recorded as Homicide where Circumstance was Coded as Mercy Killing: for a 10-year period of 1982-1991; the table was illuminating of more than the number of deaths and arrests – of the 22 cases, only one was prosecuted as a murder, and in that case, the perpetrator was an “acquaintance male,” who was convicted and received a life sentence, and the only other case involving an “acquaintance male” resulted in a two year period of incarceration. I question whether these acquaintance males were homosexual partners. I also question

whether the victims, who were aged 50 and 25, respectively, were persons with AIDS. I further question whether the criminal justice system marginalised people already marginalised by their sexual preference.¹⁰

I argue that legislative histories also yielded a number of intriguing questions for Williams, Kamisar and St. John-Stevas. For example, King George V's death in 1936 coincided with the year in which the then-recently formed Voluntary Euthanasia Society initiated *The Voluntary Euthanasia (Legislation) Bill in the House of Lords*, "to legalize under certain conditions the administration of euthanasia to persons desiring it and who are suffering from illness of a fatal and incurable character involving severe pain." The 1936 bill, and a subsequent motion to introduce some years later (in 1950) an investigation by the House of Lords into the matter of legalizing voluntary euthanasia, were both defeated (Williams 1958, p. 293-311), just as the House of Lords Select Committee on Medical Ethics rejected this possibility in 1994. Similar legislation to the 1936 bill and efforts to legalize voluntary euthanasia of adults were paralleled in the United States by the birth of the Euthanasia Society of America, and an unsuccessful bill in Nebraska, also in 1936.

A principal objection to proposals to allow for voluntary euthanasia would be the "thin edge of the wedge" in allowing for any hastening of death. Over the course of the next four chapters, I shall argue that Kevorkian managed to put a wedge in the legal door in Michigan, and widened it

¹⁰ The remaining 20 cases in the Home Office survey involved family members. These were variously prosecuted for manslaughter, infanticide or not at all. Two were imprisoned, one for 18 months and one for four months, twelve were put on probation, and two received suspended sentences. A related table of convictions under Section 2 of *The Suicide Act 1961*, reflected that 31 individuals had been convicted, but there were no statements as to what, if any, sentence was imposed on these individuals. I shall offer a contrasting case in Chapter 5, of a mother who shot two sons dying of Huntington's Disease, and was permitted to plead guilty to a lesser charge of assisted suicide, rather than murder, served minimal time and received felony probation.

considerably, until the 1998 Youk euthanasia and 1999 conviction. This wedge argument should be distinguished from the theological objection which is that the sanctity of life must not be violated by the taking of a human life through medical euthanasia, physician-assisted suicide, or otherwise, even where there is a compassionate motive.

There are again two literatures to juxtapose here. First is legislative task force literature, such as the Michigan Commission on Death and Dying, which issued a report with a split recommendation in 1994 as “a group of people” since the legislation enacting it was invalidated on judicial appeal. I shall argue in the next Chapter that the MCDD may perhaps have been destined to fail from the outset, and I note here that Senator Fred Dillingham told me in interview that as a member of the Michigan Legislature’s Appropriations Committee, he was able to help ensure that it would not have funding. Other legislative task forces were treated with respect. The House of Lords Select Committee on Medical Ethics, was a blue ribbon panel that issued a unanimous report in 1994, after a retreat that was partially intended to find unanimity. The New York State Task Force on Life and the Law, which also issued a report in 1994, was a gubernatorially appointed commission with interdisciplinary backgrounds that promoted the sanctity of life while recognizing patient autonomy

These 1990s task forces were convened in response to physician prosecution. In New York, the prosecution was that of hospice physician Dr. Timothy Quill who was not indicted by the grand jury. In the United Kingdom, convening the Select Committee on Medical Ethics was partially in response to the prosecution and conviction of Dr. Nigel Cox. Named as one of

two factors, the other was a declaratory judgment action brought with regard to whether to discontinue care of Tony Bland after the Hillsborough soccer stadium tragedy left him in a persistent vegetative state. In Michigan, the legislative task force was created in response to Dr. Jack Kevorkian in a piece of legislation that, similarly to the United Kingdom, had a civil root as well (which I shall discuss in Chapter 2). Each of these task forces expressed concern that to allow for doctors to engage euthanasia or assisted suicide in even the most sympathetic and compassionate of circumstances, would allow for an ultimate breakdown of accepted legal standards and medical ethics. At that time (early 1990s), assisted death was not legal in Anglo-American jurisdictions.¹¹

Each of the task forces was concerned about the perspectives relating to Nazi doctors and euthanasia, and many were concerned as to whether there was a slippery slope in the Dutch experience. While the Dutch experience is generally beyond the scope of this dissertation, other than where used as a specific referent. The former was held to be the paradigmatic referent of the slippery slope from the voluntary to the most grotesquely involuntary of euthanasia programmes, abuse of medical technology, and erosion of traditional medical ethics.

In 1986, Yale Kamisar observed that the original Nazi euthanasia program was to have been a benefit to the elite, “the blessing of [which] was only to be granted to [true] Germans.” (Kamisar 1986, p. 140). The notorious “euthanasia Aktion T4” regarding the killing of the mentally ill and

¹¹ Since then, Oregon, by ballot initiative, enacted assisted suicide legislation, including tightly regulated safeguards. The Oregon Death with Dignity Act survived an effort to repeal it in 1997 and a procedural challenge in the United States Supreme Court in *Gonzales v. Oregon*, 546 U.S. 243 (2006). At the end of 2009, the population of Washington State also voted to allow for physician-assisted suicide.

handicapped in 1940 and 1941 and the “Aktion 14 f 3” which led to the involuntary “medical euthanasia of some 275,000 people, were actually – and as a matter of law – criminal in nature, whereas voluntary euthanasia, as originally contemplated had been *rejected* by the Nazi dominated Reichstag in 1933. Many doctors who participated in the programme did so with impunity (not indicted at Nuremburg), profited from the unique opportunity to experiment on living human beings and they supported the Nazi utopian view of a society cleansed of everything sick, alien and disturbing” (Pross 1992, p.38). The doctors were described as “average” physicians in terms of their attitude, thinking and daily routines whose diaries and journals have only come to light in the ten years prior to the 1990s.

In stark contrast, Humphrey and Wickett noted that there was no record of the Nazi doctors either killing or assisting in the suicide of a patient who was suffering intolerably from a fatal disease” (Humphrey and Wickett 1986: 23). Another aside was that it was nearly 50 years before a full-length study was published in English with regard to the Nazi euthanasia programme, Burleigh (1994). Moreover, Caplan (1992, p.vi) commented that it took him a decade to organize a two-day conference to examine “The Meaning of the Holocaust,” for the University of Minnesota Center for Bioethics. Caplan observed that there was a question as to why it was that “bioethics had paid so little attention to the obvious dilemma raised by the reality that Nazi doctors and scientists had ground their actions in moral language and ethical justifications, a question that was largely overlooked initially in the last Kevorkian case, in favour of a “crime story. A conclusion emerged from the 50 year dearth of study of the Nazi doctors, taken together with studies during

the 1990s polling American doctors about their attitudes and private conduct relating to hastening death. The Nazi journals emerged decades after the fact, and doctors engaging in euthanasia in the 1990s and 2000s were protected by quiet complicity of patients (with the exception of Kevorkian's clients and cases) and by doctor-patient privilege.

The three legislative task forces, each interdisciplinary in membership and composition, had concern as to the potential erosion of the doctor-patient relationship. Perhaps the greatest are of concern here is vulnerable populations. John Sanford, the sole African American on the Michigan Commission on Death and Dying pointed out that blacks were the new population to have to worry about a slippery slope (Sanford Interview: March 1994), an interesting commentary given that he was also disabled (that said, there were a number of disability interest groups represented on the MCDD). Howarth (2007, p.151) noted that Seale and Addington-Hall (1995) found that "women were more likely than men to have asked for help in dying." This was also an issue raised by Michigan Medical Examiner Dragovic with regard to the fact that an overwhelming proportion of Kevorkian's clients were women, as I shall discuss further in Chapters 5 and 6.

While Seale and Addington-Hall posited that women are particularly vulnerable in the final years of life and are less likely to have people emotionally close to them, most of Kevorkian's female clients were middle-aged. This raises the question of whether the "final years of life" refer to an emotional decline, a physical decline or advanced age. Moreover, as Howarth commented, "as people age, they may no longer think of death as appropriate at 65, 75, or even 85" (2007, p.17). This raised for me a question as to

whether Kevorkian's female clients were vulnerable due to "final years" in life (as might be the case with ALS or MS) or whether they lacked social support systems. This is something that I shall draw further attention to in Chapter 5.

The New York State Task Force on Life and the Law noted that "the Hippocratic Oath enjoins physicians not to harm patients and in particular not to 'give a deadly drug to anybody if asked for it, nor... make as suggestion to this effect'" (1994: 302). It went on to comment:

The debate about assisted suicide and euthanasia raises complex questions about the duties of physicians and the goals of the medical profession. What is a physician's obligation when a patient requests assisted suicide or euthanasia? How does this obligation relate in the central goal of medicine? In response to the growing public debate, the organized medical community has focused on the special questions posed for its profession (New York State Task Force on Life and the Law 1994, p.103).

This concern was not singular, and it was reasonable to conclude that erosion of the profession by the practice was a central concern. However, this both Oregon and Washington State passed assisted suicide laws during, and after the Kevorkian cases, respectively. These statutes provide for prescription medication to be dispensed upon request, under strict regulatory schemes; however, these statutes also specify that physicians do the dispensing. In Chapter 4, I shall consider some of the arguments and views of doctors and nurses in regard to assisted suicide and euthanasia.

I chose to not define euthanasia or assisted suicide until dealing with either cases, statutes or interviews, because these terms were in flux during the period of study (itself a finding), perhaps these reflected a public and political perception that assisted suicide. However, I note a comment by Ian Kennedy, in his essay, "The Last Taboo," in *The Unmasking of Medicine* (1981, p.169), in discussing a potential right to die versus euthanasia, which

included an axiom that the right to die was a right belonging to the *patient* (not the doctor or medical team):

[The right to die is the] right to be allowed to die without further medical intervention ... the call for the ultimate right to self-determination and control, the right to have your own death” (Kennedy 1981, p.159).

The sociological perspectives of euthanasia, “however that is defined,” (Howarth and Jefferys 1996, p.376) continued to have evolving definitions, while and assisted suicide was a new topic and evolving during the 1990s. Howarth and Jefferys noted that a sociological application would “seek explanations for observed variations in normative practices, beliefs and values” (Howarth and Jefferys 1996, p.376). A reasonable conclusion, which I shall discuss and argue at length in Chapter 5 is that the Kevorkian clients in the cases tried were not the alienated and marginalized suicidants suggested by Durkheim’s *Suicide: A Study in Sociology* (1951 translation). Rather, and within the ambit described by Howarth and Jefferys, they had strong families. From these families Kevorkian required consent. The cases that were brought to trial regarded patients who were fighting against degenerative illnesses that medical technology could not improve or stop. With Kuepper’s thesis in mind, whereas cancer was a referent now less involved, so too may some of the neurologic disorders become).

The Dutch compromise was for many years a source of discomfort to one practiced in the adversarial system of Anglo-American law, though in other publications, I have given some discussion to the Dutch (Pappas 1996, Pappas 1994). This said, it is not only the legal culture that is distinguishable, since “social policy in the Netherlands reflects the country’s cultural commitment to social equity and socially [and] virtually everyone in the

Netherlands is covered by health insurance (with less than 1% of the population having no health insurance) (Griffiths *et al.* 1998, p.: 31). Prior to legalization, perhaps the most important case, which regarded non-somatic suffering, regarded the 1991 case of a psychiatrist, Dr. Chabot (Griffiths *et al.*, pp. 80-82). Chabot prescribed lethal drugs, which his depressed patient took in his presence. The District Court and the Court of Appeals found a defense of necessity. However, the Supreme Court ruled that a defense of necessity would only be viable if there were two conflicting duties and chose to perform the one of greater weight – which in a non-terminal case would not be applicable (Griffiths *et al.* 1998, p. 81). Such a decision was consistent with the mitigating excuse of necessity articulated by Fletcher (2001, pp.818-829). I suggest that this Dutch case highlighted the inappropriateness of Kevorkian's assisted suicide of gynecology patient Marjorie Wantz, which I shall discuss at length in Chapters 4 and 5.

Kevorkian's procedures, as I shall amplify, did not have the protections of confirmed terminal illness and second opinions, as would have been required in the then comparable Australian Northern Territory Rights of the Terminally Ill Act (Keown 2000, pp.153-166).. While the law was nullified in 1997 by the federal Parliament by the *Euthanasia Laws Act 1997*, this was effectuated by removing the Northern Territories' constitutional ability to legislate lawful euthanasia. While I hold to my commentary and the criticism that will follow in later chapters regarding gender vulnerability, citing in particular the example of Marjorie Wantz, I do note that the first person to have voluntary euthanasia under the Northern Territory Rights of the Terminally Ill Act was a prostate cancer patient named Bob Dent. I also note

that once the law was nullified, the response of the first doctor to administer voluntary euthanasia founded Exit International; this activist measure will stand in contrast to Kevorkian's repeated

Also, I have left to the side civil challenges such as *Quill* (allowing for disconnection of a life support of a woman in a persistent vegetative state), *Cruzan* (what is the clear and convincing evidence of what a patient now in a persistent vegetative state would have wanted), *Glucksberg* and *Quill* (by which the United States rejected a liberty interest and an equal protection claim alleging a right to assisted suicide), and *Gonzales* (by which the Supreme Court upheld the validity of the Oregon statute allowing for regulated assisted suicide). I had at one point viewed my work as picking up from the point where Dr. Carlos Gomez left off in 1991 in *Regulating Death: Euthanasia and the Case of the Netherlands*; Gomez, a medical doctor engaged in hospice, provided a counterpoint to Dr. Timothy Quill's 1996 book *A Midwife Through the Dying Process: Stories of Healing and Hard Choices at the End of Life*. Gomez, in particular, conducted a small study of Dutch doctors who had been involved in euthanasia cases (which were technically illegal at the time, and only recently legislated as non-crimes).

Part III: Methodology Statement

A. Field Research

When I began this study (for a master's dissertation), the common parlance for the conduct I was investigating was "euthanasia," or "medical euthanasia," or as Kevorkian initially contemplated it "medicide" (Kevorkian 1991). During my master's year, Kevorkian made the papers for his 1991

assisted suicides of Marjorie Wantz and Sherry Miller (which I shall discuss at various points in this dissertation, most particularly Chapter 5 and Chapter 6) and I was invited to engage in doctoral study. My original application process had no contemplation of fieldwork or field methods, and much of what I learned in this regard over the years was prompted by sudden questions as opportunities presented or challenges occurred.¹² It was only over the course of innumerable micro steps over a dozen years that my study became about those surrounding the man in the defendant's chair, an homage to Harry F. Wolcott's *The Man in the Principal's Office: An Ethnography*. In 1973, Wolcott defined ethnography as the "science of cultural description." To be in the same room as the group, let alone to gain an insider's perspective of the beliefs values and norms (McIntyre 2006), was something I had not contemplated.

Certainly, my prior work as an appellate lawyer, dealing with transcripts, was qualitative in nature (rather than quantitative). However, the point of a lawyer was not so much "to gain access to the conceptual world in which our subjects live so that we can, in some extended sense of the term, converse with them" (Geertz 1973, p.24). The role of the legal system for the legal professional (which I was in practice) is very different from the sociological eye in reviewing the prosecutor, defendant, witnesses, family or decedent, a social construction that Lisa McIntyre articulated in her case study of convicted murderer Hernando Washington (McIntyre 2002, p.18-20).

¹² In this regard, I must make two additional acknowledgments of my supervisors. I am particularly grateful to Paul Rock, who was invariably curious and informative during random stops in elevator wells and hallways. I am equally grateful to Robert Reiner, whom I called from more than one phone booth in Michigan when I found myself confronted with thorny issues, many of which have found their way into this dissertation in a far more articulate phone than my original queries. Both were especially supportive of my field efforts and taught me everything from how to ask a question to how to interpret a response.

Studying the criminal trials of Jack Kevorkian entailed studying aspects of Michigan and Michiganders (Quinlan 2004, p/5). The site selected itself, because it was replete with litigation (as I shall discuss in the field chapters) and press (as I shall discuss in detail in Chapter 6). Michigan was geographically, politically and socially new territory for me, and the language of assisted suicide was new to virtually everyone involved (Quinlan 2004, p.5), and developing apace.

Ethnography requires considerable investment of time in the field, which translates into economic investment, as well. For me, that was not just travel costs, but it was also forfeited income opportunities. While I never resided formally in Michigan, I went there on extended (multi-week) trips from 1993 through 1999. These coincided with the trials, with civil litigation, and other events until 2004, when (with considerable uneasiness) I withdrew from everyone I had associated with in Michigan.¹³ My purpose at the Kevorkian trials was literally academic, and thus different from those at the scene of the trials, as one of “peripheral membership” (Condry 2007, p.191; Adler and Adler 1985, p.85).

The fieldwork for this study took place in trips of varying lengths (ranging from a week to six weeks) over this relatively long time period (approximately 10 years) and in numerous locations in the United States, the United Kingdom and the Netherlands. Primarily, the setting, site and population were in areas of Michigan, bounded into the Kevorkian phenomenon (Marshall and Rossman 2006, p.61). Within Michigan, and similarly to Condry (2007, p.191), “the research was not tightly bound,

¹³ I am grateful to Glennys Howarth who discussed this issue with me in a formative conversation in May 1993.

temporally or geographically, but can still be broadly defined as an ethnographic study. The ethnographic methods employed were treated flexibly and adapted to fit the research problem and the environment.”

Individuals involved in the Kevorkian cases lived and worked far apart (other than at times when they may have converged on courts for trial, and some acted behind the scenes), but shared a culture of emerging criminal law and criminal justice policy. I would suggest that their folkways and ways of understanding or communicating with each other were shared, even if their positions in the debate and/or roles in the cases were divergent. Some groups (such as trial judges, chief prosecuting attorneys and members of the media) shared ways by which they understood each other and networks developed among many with similarly situated persons (such as family members, who developed a support group, as I shall discuss) This research provided for “reflexivity” in that the social research was part of the very world I studied (Hammersley and Atkinson 1983).

When confronted by arguments that quantitative data, supposedly neutral and objective by sheer fact of numbers, I was forced to re-examine my choice of the case method and of ethnography within the case method.¹⁴ I found reassurance in the construction of case law as setting precedent, whereas surveys might be used to establish a large amount of data collected at one time Vago (2006, pp.427-435). However, a series of precedent setting (in both the legal and colloquial sense of the phrase) cases provided an opportunity to study trends in opinion and behaviour over time (Vago 2006: 432) and to tease out cultural understanding about the emerging vocabulary and debate

¹⁴ I am grateful to David Field, who helped me to tease this out after a conference paper I gave in 1994.

about (lawful or unlawful) assisted death, and its relationship not only to illness, but to deviance (cf. Quinlan 2004, p.5). This was not necessarily a debate about positivism as opposed to naturalism (Glaser and Strauss 1967), but rather an eclectic combination of methods as issues arose. Among these issues were historical debates (Williams 1958; Kamisar 1958 St. John Stevas 2002), case studies (Glaser and Strauss 1957 *et seq.*) interviews (Rock: 1993, 1998; Howarth 1996) and judicial writings (as cited in the body of the dissertation).

In the course of the dissertation, I shall have an opportunity to consider preconceived ideas (Chapter 4), as well as shifts and trends among professions (Chapters 3 and 6), families (Chapter 5). What was in common amongst *all* the groups in the study is that they had associations with death and with Jack Kevorkian, even if their association with the latter was not first-hand (as with jurors and legislators). As I shall discuss, some considered Kevorkian to be a folk devil. Others saw him as a crusader precipitating a moral panic about the mode, rather than the fact, of death and dying. Perhaps he was a dark and mysterious figure seldom encountered in any environment other than the work he did (compare, Howarth 1996). However, that would place him in the company of medical examiners and morticians throughout the country (if not the world), most of whom are not prosecuted for unlawful activity. A question (perhaps never to be answered) emerged: was Jack Kevorkian a dark unknown or was he a white knight?

In seeking to find the answer, over a long period of time, some of these elements were bounded by time (in a particular trial, for jurors). Others were negotiated or renegotiated (such as the ouster of one chief prosecuting attorney

by local electoral politics, based upon willingness or lack of willingness to prosecute Kevorkian; or of one judge who was favourable to Kevorkian in 1996, but harsh in sentencing him in 1999). Common language and phrasing evolved over time in Michigan, in ways that I shall note as they arise, but which I now call “colloquial terms of art” (such as “jury nullification,” which took on a special meaning in Michigan in the Kevorkian cases, not necessarily in common with academic or legal commentators). Some information was communicated “off the record,” yet meant for public consumption; to the part of me that was (and still self-identifies) as a criminal lawyer, I did not repeat these pieces of information. However, much more information that was formally “on the record” either in court transcripts or interviews would seem shocking to an outsider, yet seemed for the course of the cases (to which I, and others, became regular attendees).

My aim became progressively more focused upon the culture of the criminal trials (Goffman 1959, p.211). The goal became to understand and depict how some of the legal elite and some seemingly ordinary people who were pulled into the cases. How they made sense of the Kevorkian cases often was couched in how they made sense of their own lives, or in how they were seeking to do so.

It would behoove me to alert the reader to this (unanticipated) development over time, across racial and socio-economic boundaries, and professional status. While I did not go into the project with the intention of being absorbed by the legal culture, the trials ultimately did serve to build up relationships among those with “familiar faces,” in a belonging within the court culture. While I attended proceedings as a stranger to the matter (as

contrasted with Kevorkian's 1999 comments to Judge Cooper that he was a self-invited "guest" or defendant), over time, everyone got to know everyone (whether they wanted to or not) (compare, Condry 2007). There was only one cafeteria in the suburban Oakland County courthouse where the 1996 trials and the 1999 trial took place, and only one "real" restaurant in the town of Ionia (location of the 1997 mistrial).

I was in the same gallery as the media (and in the second 1996 trial, occasionally the designated room). Over time and over trials, people would begin to recognize me, include me in conversations and lunches (one of which was with Kevorkian and his entourage during the deliberations of the second 1996 trial, where the entire table was exhibiting stress, except for Kevorkian, who complained about the 35 cent cup of coffee). People in the gallery shared notes, comments, resources, insights, although in theory they were peripheral members (Condry 2007, p.191, citing Adler and Adler 1998, p.5). My role as an academic observer was somehow in flux, as was my interaction with different participants in the proceedings (for example, going from a student sitting in a gallery to interviewing a judge to a nodding acquaintance in hallways). My status as a (relatively) young female of diminutive stature somehow served to have a largely male group of lawyers seem more willing to explain things to me; I felt extremely uncomfortable about this initially, until someone told me that "if [I was] a guy, I'd go to the squash court with the guys and get information."

Initially, I did not know if I would be granted any interviews, nor did I know how I would conduct them. Because my first field trip was precipitated by unpredictable events (an indictment), and I was a neophyte at interviewing

in a non-adversarial setting, I sought guidance. David Downes suggested to me that I compose an “*aide memoire*,” when I expressed concern that I would not be able to remember my lists of questions. This proved to be excellent advice, as I could outline in a few words on one page my main “points” (a phrase literally taken from the points of an appellate brief). As interviewees answered questions, I could check off items; as interviewees brought up new topics, I simply added phrases to my hand-scribed lists on my yellow legal pads.

The IRB procedure I underwent in 1996 did not much alter this, other than to include a colloquy prior to interviews. In that colloquy, which became somewhat ritualistic (for me) in nature, I would state my name, and affiliation. I would ask for consent to do the interview for the thesis and its affiliation. In the colloquy, I would state *why* I wanted to interview individuals (read, what their role in the Kevorkian case/Michigan Commission on Death and Dying/civil legal challenges, etc. was) and ask their permission. I would also ask permission to record the interview (with a small hand held tape recorder), offer to go off the record when requested, and provide my additional contact details and offer interviewees opportunities subsequent to the interview to add to (this sometimes happened) or subtract from (this did not happen) their comments.. While the IRB process was not required at LSE during the period of research, my IRB process was in compliance with mechanisms later put into place.

The IRB process was essentially set to ensure that research subjects (interviewees) were voluntary in their participation and that they consented to participate by an informed consent process. Generally an IRB process

provides for confidentiality, but my IRB colloquy had a clause in it to the effect that because people could be easily identified by their role in the cases (or other proceedings), I could not guarantee confidentiality unless specifically asked. Rarely was this request made, and when it was, I noted in large letters (usually underlined) and did not use the material requested to be confidential. Ironically, while I thought that it would be difficult access the raw data of interviews (a phrase that I am still not comfortable with, because I feel that it depersonalizes), to my surprise, people were not only willing, but *eager* to talk. To speak unfettered seemed – over and over again – to be a chance to unburden the unspeakable, whether it be the stress of the trials (Chapters 3 and 6) or about how the media constructed what people said (Chapters 3 and 5) or to have a chance to speak out other than by a verdict (Chapter 4) or about their own professions (Chapters 3 and 6).

I would bring my yellow pads and lists to my interviews, which took place in times and locations agreed upon. Over time, I noticed that family members (and the juror I interviewed) generally had a preference for home or kitchen interviews, while a number of professionals preferred to meet in offices or local restaurants. In these interviews, and surprisingly to me, interviewees were grateful of the chance to talk about issues that in ordinary life might seem too sensitive for discussion (cf. Howarth 1996).

This said, there was no question that I had extraordinarily good luck with access to interviews, which were preceded (starting in 1996) by an Institutional Review Board approved colloquy designed to protect human subjects (interviewees). This was approved by the University of Minnesota IRB in March 1996 (interviews prior to then were ruled exempt under the

guideline). Reviewing tapes and notes years later, I found that the ethnographic work developed through a conversation, and I sought to keep this intact in the analysis phase and writing up. In the next section, I shall touch upon some areas where I either had to acquire new skills or place myself in a new role. I had to “listen hard” as Paul Rock instructed, and to hear the cultural silences in a criminal court context, so as to draw inferences I might have been reluctant to in practice (especially in appellate practice, which is largely a paper profession bounded by a particular trial record).

In briefly recapitulating this subsection, I argue that while ethnography might be one side of the qualitative/quantitative continuum, it was a valuable way to show insight into the life of the trials of Jack “Dr. Death” Kevorkian. I shall argue throughout this dissertation that the ethnography ensured that the social world of the Kevorkian trials would not be irretrievably lost to those who were not in the courtrooms interacting with the key actors. In concluding this subsection, I argue that the combination of interviews, the categorization of interviews, is original. That is to say that while I interviewed people in a variety of roles in the cases (and related matters, such as the Michigan Commission on Death and Dying and the civil challenges), *how* I chose to group the interviews for presentation in this sensitive and political debate was where I had to meet a great challenge (cf. Condry 2007; Howarth 1996).

B. Analysis

I took cues for writing up from a variety of sources. I was captured by the anecdotal approach to case recitation that Hazel Biggs offered in *Euthanasia: Death with Dignity and the Law* (2001) and Rose Weitz offered

in chapter introductions in *The Sociology of Health, Illness and Health Care: A Critical Approach* (4th ed.) (2007). I suggest that this was a likely outgrowth of my original training in law, where students read cases, and had to discern facts, issues of law, court holdings and rationales. A confession is necessary in this regard – it was ingrained in me to develop and marshal facts in evidence and principles of law, and to lead a jury or appellate panel to an inevitable conclusion. In writing up, others would comment that I had not made conclusions that were clearly intended by the descriptive facts and analytical tools. It was alternately liberating and terrifying for me to say what my conclusions were, which seemed unseemly to the core of me that self-identified as a lawyer. I shall hopefully demonstrate that I have drawn (or at least offered) reasonable conclusions, and linked up the research to theory.

As I wrote, I emulated sources such as Jessica Blank and Erik Jensen's play, *The Exonerated* (2003), composed of the words of six former Death Row inmates, who had been exonerated post-sentence. I deliberately chose to allow the words to speak, rather than to account for behaviour of any one person at any one time or at any one place. In this regard, I allowed the record made by interviewees to speak for them (in a "flip side" to the argument that I shall make later in this dissertation with regard to demeanour). This was, in part, also due to the many complaints about constraints made by the court or misinterpretations of members of the media. I offer this as a mirror image of the promise that confidentiality would, when requested, be guaranteed (but not otherwise). That is to say, that information communicated because interviewees felt that had not been heard (family members) or that they could not otherwise voice their concerns (judges) was given sensitivity of *allowing*

them to be heard, which is generally the reverse of what sensitive analysis of the circumstances is ordinarily perceived. Here, the sensitivity was in giving the interviewees voice, *their* voice.¹⁵

With the interviews, I also grouped thematic elements (factors) across a longitudinal study of participants (actors) in the drama that was the Kevorkian cases (drama singular as representative of a long term project, cases as representative of individual trials over time). By use of paired interviewees, I juxtaposed the court statements, testimony, argument., appellate matters. In a different form of the narrative, in a way similarly to Hillary Jordan's *Mudbound* (2008) or David Hare's *Murmuring Judges* (1995). This was done with purpose, so as to create a Rashomonesque three dimensional experience for a curious reader, and to deploy the dramaturgical metaphor (Goffman 1959, to which I shall frequently allude. In Chapter 6, I shall take the dramaturgical metaphor to the courtroom itself, where Kevorkian offered explanations of his use of props, technical and visual aids, refined medical consent colloquy protocol (or "script") and lead (Kevorkian) and minor (patient) roles; whether one views these as medical protocols or ritualized homicide is up to them.¹⁶

As I shall specify in depth in field chapters, I worked from accumulated field notes of interviews, trials, the full transcript of the final 1999 Kevorkian trial and sentencing, appellate cases, and academic writings. Interviews were not confidential (unless confidentiality was expressly requested, in which case it was honored), initially because participants were

¹⁵ In response to the possible challenge that I am interpreting by using what I consider to be important in the tapes and in my notes, I offer the reply that another person could take the tapes or notes (with redactions for any matter that was communicated off-the-record).

¹⁶ I am grateful to Dr. Linda Wasserman and to Olga Sekulic, Esq. for challenging me to consider this.

readily identifiable by their roles. Only in the course of interpretation and writing up actively did I realize that many of the interviewees not only did not have no problem in either granting me access or information; in a number of cases (especially judges, family members and one juror), this was their opportunity to speak unencumbered by the role they had to play in the drama of the court. This was only revealed in time, and over time, and after reviewing notes and tapes many times. Time itself was a factor in the work – as much in the writing up and detecting patterns as in the good fortune of access.

Hand notes on yellow legal paper were my primary recordkeeping and record retrieval system in writing up. I took comfort in spreading these pads around me and flipping through the pages and, in time, became familiar enough with some so as to know which pad, which day, which person to look for. Because some events and/or statements were shocking, I looked for secondary backup (sometimes listening again to tapes).

Sometimes, however, the comments themselves were social action. In Chapter 6, I shall consider legal interpretations of Kevorkian's statements relating to a broadcast "segment" (an American term for a self-contained 7-18 minute piece of a television broadcast, most usually referring to a news chat show or news magazine). I shall juxtapose this with Kevorkian's narrative account, in which he sought to reconstruct, as well as to justify the events. This is in contrast to the possibility of excuse, which would have promoted a manslaughter conviction, or mitigation of sentence to probation (rather than incarceration) This was also the case with testimony at sentencing by family

members (compare Condry 2007, p.192-193), in which they sought to locate their own actions within a social frame of reference.

Taking the private world of a family member's deathbed out into the public world of the criminal justice system was not limited to the family members of the Kevorkian decedents. It was a revelation (to me) that influences of family illnesses and deaths permeated almost every aspect of the proceedings and that almost everyone involved in any way in the Kevorkian cases brought these experiences into the courtroom with them, whether openly stated or not. It was only in the analysis and writing up that the imprint of this pattern became obvious, perhaps because I had believed the law to be an objective instrument.

C. Skills Acquired in the Course of this Doctoral Project

During the course of both the research and the writing of this project, I was confronted with skill limitations. I would like to briefly list some of these. In fieldwork, I had to learn to drive, or more accurately *become* a driver (cf. Becker 1963). In New York, where I grew up, a rite of passage was to take a Drivers' Education course at 16, get a license at 17, and use it as identification. I had driven for a cumulative two weeks in the 15 years after that, and someone kindly took me on a driving detail in the Wall Street area the Sunday before my first field trip. For all intents and purposes, I learned how to drive, and learned the rules of the road, on the highways and byways of Michigan.

Likewise, I spent a number of years on crutches and in physical therapy in the course of this project. The most important of these during the

research period was 1996, when I postponed surgery for a number of months so as to attend the two Kevorkian trials in Michigan. This was not a responsible decision (I was on crutches and canes in snow and ice, and driving in addition), but it was one for which I daily took responsibility (and have no regret). Twice again I had to do this, in 2004/2005 and 2006/2007, when recoveries were slower. In recounting the 1996 experience, a colleague (seeking to compliment me) told me that I was “committed,” to which I reflexively commented that I was “insane.” A number of years later, I read and taught D.L. Rosenhaun’s piece in *Science*, “On Being Sane in Insane Places” (1973, p.250-258), and came to the conclusion that many (myself included) did things that were not within the norm, yet seemed normal in the context of the Kevorkian trials. For me, it was a practical matter, since I had the knowledge that the trials would take place, with or without my ability to be present; hence, I was present for the proceedings, in a matter-of-fact way.

In addition to the field related skills pertaining to driving and walking, I found that I had to unlearn certain folkways of lawyers. A prime example of this was “unlearning” not asking (double negative deliberate) “why,” for the reason of not knowing what the answer would be on trial), while maintaining the professional standards and demeanour of a lawyer.

In 1994/1995, I underwent genetic counseling and testing for Huntington’s Disease, and cast myself in the role of the client. This is inn what I now consider a political use of language, I did not conform with the mores, norms and customs derivative from the established practices of medical society. Since I did not consider myself a patient, because I was asymptomatic of the disease, which I learned at age 34 that I did not have the

dominant gene for (this was well-into my field work, but nevertheless challenged me as to whether I was “entitled” to write about these issues).. I gave invited talks about the testing process, and wrote about it at length in 1996 in an essay entitled, “Am I My Father’s Daughter?”

In hindsight, I did not learn how to be a patient, or perhaps I refused to be one. I called the doctors and nurses by their first names, as they did me. , I was never subjected to the mortification rituals associated with being one (such as disrobing and putting on a hospital gown, and dealing with successive waiting rooms). During the year long process, I was impatient with protocols at the Institute for Neurology in Queens Square, protocols to which I was subjected (and which were designed to ensure psychological security, as well as to develop a medical record and family history).

I was, in a sense, a deviant as a patient, by not learning how to be one (cf. Becker1963; Katz’ 1999 Consistent with a compelling need to know and to learn about medical processes and culture, I developed a special topics course in 2004, “*Life, Death and the Law*” (an homage to St. John-Stevas’ 1961 book) and later, in 2006 and 2007, taught an advanced class in *Sociology/Anthropology of Health and Medicine*, in which I focused upon issues relating to end-of-life and patients with chronic and terminal illnesses.

In a related vein, I created and taught courses on *Crime and Civil Rights* and *Crime, Law and Society*. During the former, I deployed a project relating to various aspects of demeanour in court, inspired in part by Goffman’s 1967 essay “The Nature and Deference and Demeanor” in *Interaction Ritual: Essays on Face-to-Face Behavior* – that of lawyers (I used the 1990 movie *Reversal of Fortune* for this), defendants (I used the 1998

Kevorkian euthanasia television segment for this), judges (I used the 1992 movie *My Cousin Vinny* and court visits for this) and convicted felons who were exonerated after they were put on Death Row (I used the 2002 movie *The Exonerated* for this). I affectionately dubbed the grant project “The *My Cousin Vinny* grant.” In actuality, the only one of these not to actually be related to an *actual* criminal case (or a half dozen, in the case of *The Exonerated*) and post-conviction proceedings was *My Cousin Vinny*. In a related vein, I showed the Kevorkian tape and read transcript cuts in the course of two teaching grants, in which I focused on (respectively) the jury and the media aspects of the case. Some of what I developed there, I decided to write up in the dissertation (and vice versa). What I discovered was that in choosing what “clips” to include for student viewing, I was learning to edit myself with instructional technology (specifically *wikis*).

Conclusion

In this chapter, I have introduced some of the recent historical perspectives and literature that created an environment where doctors might either have been within or outside of medical practice when engaging in medical euthanasia or assisting in suicide. Of particular concern was that doctors (either acting alone or, as with the Nazi doctors) could go from granting a compassionate benefit of relief to the elite down a slippery slope of involuntary or non-voluntary euthanasia. I have also argued and justified use of legal case studies and ethnographic methodologies. The field work that I shall discuss in the following chapters will regard adult patients, who had the mental capacity to consent and seek assistance in ending and their lives.

However, as this chapter has shown, some of the concepts were flexible in nature, and could therefore be subject to abuse under all but (or even) the most stringent regulation. Also, there are valid concerns that even with the strictest of regulations, abuse could occur, and this theme will emerge repeatedly.

In the next chapter, I shall proceed from some of the general concepts discussed here to the specific social and legal background of Michigan that existed when Jack Kevorkian commenced his activities. I shall also introduce some of the controversies and players in Michigan, and then move on to the heart of the ethnographic field work in the chapters that follow.

Chapter Two: The Comings of Kevorkian

Introduction

In the first chapter, I examined how a confluence of factors came together to create the elements for a perfect storm of hurricane strength in which judicial approaches, legislative responses and prosecutorial policies would hail. First, were largely theoretical and academic debates over euthanasia and physician assisted suicide. Second, were recent historical perspectives of medically hastened death. Third were issues created by emerging medical technology.

In this chapter, I shall begin the process of delimiting this dissertation. The title of this chapter was constructed as an invitation to the reader to follow the first of a series of less-than-intuitive leaps in this regard. This chapter will best be described as a specific introduction to how euthanasia and physician assisted suicide became hot topics in the emerging criminal justice policy and in the criminal law in Michigan, as the result of the activities of Jack “Dr. Death” Kevorkian. By the end of this chapter, I shall have set the stage for comparing a variety of outcome-determinative factors in the Kevorkian cases during the 1990s.

First, to set the stage, my examination here has a “before” and an “after” element, which will be an ongoing thematic issue in the course of this dissertation. This will be further reflected by chapters divided into Part I and Part II, and each part subdivided with A, B, C and so on. In this chapter, the “before” will relate to matters before Kevorkian began his Michigan assisted death activities (which will be discussed more fully throughout this thesis). The “after” will relate to events emerging after he began his practice, but prior to his first trial in 1994) Second, there will also be information introducing the *de jure* (on the books) law of Michigan, and the *de facto* law of Michigan. This will set up the comparisons between trials, which

at first blush may seem identical in nature. However, they were legally different – partly *because* Kevorkian’s activities prompted changes in the law,¹⁷ but also partly because Kevorkian himself changed some of his activities. This was perhaps in response to the law and what I shall infer was his intention to flout it (although my arguments will be not necessarily be the same as those espoused by prosecutors).¹⁸

Third, while comments as to the scope (or more correctly, that which I am delimiting and enumerating as beyond the scope) of this thesis will be made as particular issues arise, I shall offer one at the outset in this chapter. During my fieldwork, my focus was on the state of Michigan, on criminal prosecutions for hastened death, and for those against Kevorkian. It was not on the Netherlands, nor was it on civil litigation in Anglo-American law (for example, seeking declarations of the validity or invalidity of law). There are many important studies relating to the Dutch experience (Griffiths *et al.* 1998; Keown 2007; Gomez 1991) and to the developments in civil challenges to Anglo-American law,¹⁹ which I shall amplify in pertinent part as relates to relevant portions of this dissertation. The Dutch experience was fairly well settled in its trajectory from *de facto* decriminalisation to *de jure* legalisation by the time I began this study (as I alluded to in the “Bitter Pill,” Pappas 1996) and the civil challenges were fairly well funded and academically explored (largely as a result of *pro-bono* litigation and *amici*).

I do, however, wish to make two comments in this regard. First, is a comparative observation of the media regarding Dutch experience versus the

¹⁷ Although this was widely accepted as a given, it was also explicitly stated by legislators involved in the initial passage of anti-assisted suicide legislation in Michigan, as I shall discuss herein.

¹⁸ Some of these changes were practical in nature, as in the different *modus operandi* in the Wantz/Miller assisted suicides, because one methodology of hastening death did not work for both women he assisted at the time and place of the double occurrence. Other changes were deliberative and political in nature, such as the Youk euthanasia, which I shall explore at great length throughout this dissertation, but will be considered in terms of evidence most particularly in Chapter 6.

¹⁹ Some of these were timed during the Kevorkian prosecutions and trials, although one might argue that this was due to a social issue that was in legal turmoil, as opposed to any plan.

American social and legal responses to medical euthanasia. Nationally broadcast programmes depicting medical euthanasia in these respective jurisdictions had different outcomes. Since the latter was Kevorkian's medical euthanasia of Tom Youk, for which Kevorkian was prosecuted and convicted a brief juxtaposition is warranted here.

On March 16, 1995, the BBC aired the death of Cees van Wendel de Joode by euthanasia in a documentary called "Dutch on Request." Controversy weeks in advance of the broadcast of the medical euthanasia of the retired café owner (who had a progressive degenerative disorder) focused upon the fact that the BBC "won the right to show the segment only after agreeing not to cut the Dutch film."²⁰ After the broadcast, the *Late Show* scheduled a discussion about euthanasia.

In 1995, I watched the broadcasts on television with a flatmate, who remarked that it was interesting that euthanasia was then illegal in the Netherlands, but the doctor was called in for the patient's "birthday euthanasia" and not prosecuted. Less than three years later, Jack Kevorkian would be on the CBS network broadcast of Tom Youk's euthanasia, the cornerstone case of the prosecutions I shall discuss in this thesis. The media aspect of this is the basis of an entire chapter, Chapter 6.

The CBS network and *60 Minutes* programme aired the Youk euthanasia with immediacy and with a lack of balance (which I shall discuss further in Part I of Chapter 6), so that the network produced another segment for national broadcast around the time of the Kevorkian (1999) trial and sponsored a full-day conference in Ann Arbor regarding euthanasia, the law and the media.²¹ I shall limit my comment here to the specific note that the legal responses to the two euthanasia acts (and

²⁰ I am grateful to Jacquie Gauntlett, who gave me a clipping of an article by Richard Brooks, Media Editor of *The Observer*, entitled "'Sick' BBC to screen Dutch mercy killing," with a hand noted date of 29-1-95, i.e., weeks before the broadcast.

²¹ This conference, which I attended, is a central focus of Part I of Chapter 6.

doctors) were different and that the social responses and media filters were different. The BBC perhaps did a better or more thorough job than CBS, but I argue that the Dutch euthanasia was advertised and perceived as a segment about a general social *issue*, whereas the Kevorkian euthanasia was perceived as a segment about a specific social *deviant*.

My second comment, which is also one of delimitation with a note, regards the civil challenges to bans on assisted suicide in the United States. Little known is that the first such major challenge took place in Michigan, and would ultimately be the 1994 *Hobbins* case considered by the Michigan Supreme Court. In a related case, the same appellate panel reinstated Kevorkian prosecutions for the 1991 Wantz/Miller deaths and the Frederick/Khalili assisted suicides, which I shall discuss further. The famous civil challenges brought by Compassion in Dying (among others) that went to the United States Supreme Court in 1997 (brought by groups of plaintiffs, including Dr. Timothy Quill in the New York challenge that became the *Vacco v. Quill* case) were actually initiated later, as Michigan ACLU Legal Director Paul Denenfeld told me.

Denenfeld speculated in the mid-1990s that the reason that the United States Supreme Court would not take the Michigan case was because Dr. Kevorkian's name was attached to it, although that was by virtue of consolidated appeals. I offer two other possible factors. First, the Compassion in Dying cases were jointly constructed and filed (on opposite sides of the country) with plaintiffs chosen for their level of professional respect (again, I cite the example of hospice physician and author Quill) and patients chosen for their level of illness (such as end stage AIDS). Second, these cases were brought as declaratory judgment actions in federal court, and travelled a fast paper path with a minimal record, citing administrative, civil and criminal

liability as concerns for doctors (although Quill had briefly been brought before a grand jury in New York, which declined to indict him).²² During the course of those fast paths, they were cited and implicitly argued in the Kevorkian cases in the mid-1990s (especially the two 1996 trials). This was actually a in a construction of the debate having nothing to do with the factual matters at trial in Michigan. Again, because my focus was more and more trained on Michigan, I set the federal cases to the side.

Part I. The Michigan Back Stories (Pre-Kevorkian)

It may be difficult to ever ascertain how many doctors were asked to assist their patients in dying before (or, for that matter, after) Jack Kevorkian become a household name. In 1994, Ward and Tate argued that 60% of British, 40% of Australian and 75% of Dutch doctors had patients who requested their assistance in hastening death (1994, p.323). As I shall discuss later in this dissertation, at the end of the 1990s a survey of Michigan doctors was reported on in *The New England Journal of Medicine*, but that was only after Kevorkian had been tried several times. Thus, I would argue, these surveys could not be considered without considering Kevorkian as a factor.²³ However, at a conference regarding “Euthanasia: The Unfinished Debate,” on 21 May 1994, Dr. Sam Ahmedzai (then of the Trent Palliative Care Centre) said that it was a widely common, if unspoken, practice.²⁴ In 1992, Drey and Giszczack reported that a poll by *Physician’s Management Magazine*

²² This was not unlike the *Bland* (1993) AC 789 case brought in the United Kingdom.

²³ The article, by Jerald G. Bachman *et al.*, “Attitudes of Michigan Physicians and the Public Toward Legalizing Physician-assisted Suicide and Voluntary Euthanasia,” appeared in *The New England Journal of Medicine* on February 1, 1996, v. 334 pp.303-309.

²⁴ This represented a recurring theme – that as long as assisted death was a private matter, it was tacitly allowed; if hastened death was made (especially by medical personnel) into a public matter, civil and criminal liability issues were raised. A question kept occurring to me – was it assisted suicide and euthanasia that were being condemned by administrative and legal authorities or was it acknowledgement (or worse, publicity)?

reported that some 10% of 500 physicians responding to a survey stated that they had “deliberately taken clinical actions that would directly cause a patient’s death and 3.7% said they had provided information that could be used to cause a patient’s death.”

There was, however, one doctor in Michigan, who was unquestionably assisting people in dying. The criminal trials of Jack Kevorkian, who was arguably the most controversial (former) doctor alive in the 1990s, became the focus of this research. In terms of percentages, his impact was perhaps seemingly small. Nevertheless, he and the principles involved in his cases arguably precipitated an internationally famous law reform movement. Besides Kevorkian, there were other lawyers, judges, legislators and private citizens who left their mark on the cases. Perhaps they needed Kevorkian (or someone like him) to be a focal point for medical changes (such as improving palliative and hospice care), legal regulation (such as delimiting what would be lawful, as well as what would be legally banned), and social changes (such as how family members related to lengthier death trajectories from chronic, rather than acute, disease).

One of the central issues in the early 1990s, during which Kevorkian ended the lives of Marjorie Wantz and Sherry Miller, was that there was no law against assisted suicide or medical euthanasia in Michigan. This was the basis for a decision by Judge David Breck, in which he dismissed charges against Kevorkian. However, the charges were reinstated on appeal in 1994, and the cases were subsequently tried in 1996 (before Judge Breck, as I shall develop more in my analysis of my interview of him in the next chapter). Sherry Miller and Marjorie Wantz, both from Michigan, died together in the fall of 1991 in an Oakland County \$35-a-day cabin bare of furnishings and lacked electricity and indoor plumbing. The two were Kevorkian’s second and

third assisted deaths. According to the autopsy prepared by Medical Examiner

Dragovic:

This 58-year-old white female, Marjorie Wantz, *died as a result of poisoning by multiple drug injection administered by a system of intravenous lines into the cubital vein of the immobilized right arm.* In consideration of the circumstances surrounding this death, investigation of the scene, the autopsy findings and the toxicological findings, the manner of death is homicide (Autopsy Report for Marjorie Wantz: October 24, 1991) (emphasis added).

However, Dragovic's autopsy of Sherry Miller, the same day, concluded:

This 43-year-old white female, Sherry A. Miller, *died as a result of poisoning by carbon monoxide administered by a facial mask connected via a tube to a commercial pressurized carbon monoxide tank.* In consideration of the circumstances surrounding this death, examination of the scene of death, the autopsy findings, and the toxicological findings, the manner of death is homicide (Autopsy Report for Sherry Miller: October 24, 1991)(emphasis added).

I offer a rhetorical question here. If a non-physician male defendant, who was further a casual acquaintance, ended the lives of two women in the same remote cabin by lethally injecting one and asphyxiating the other, what would the likely criminal justice consequences be?

A. 1990s Rivlin (Right to Die), Harper (Acquitted Assisting Husband), and the Earlier Appellate Precedents Roberts (Plea Bargaining Husband) and Campbell ("Hopeful" Friend)

I would argue that the Michigan controversy actually began in 1990, with a civil request for a right to commit suicide, brought by David Rivlin. A source of information about this case was my interview with Janet Good -- variously President of Hemlock (when I interviewed her on August 19, 1993), a Vice Chair of the Michigan Commission on Death and Dying, a Kevorkian advocate,. She was also a Kevorkian co-conspirator -- she was initially indicted as a participant in the Ionia assisted suicide of Loretta Peabody, for which Kevorkian was prosecuted to mistrial in June 1997, while her charges were dropped as a compassionate measure). Last,

Janet Good was a Kevorkian decedent (in August 1997, attended by Kevorkian and his then-lawyer Fieger, after she choose to give up a battle against pancreatic cancer).

Good, who was quite probably the person with the most social roles in these cases, told me that Rivlin's civil suit brought no legal relief for the competent, but dying, man (Good Interview: August 19, 1993). Around the same time, the criminal trial of Bertram Harper, who was prosecuted for second-degree murder in Wayne County after he helped his wife commit suicide, resulted in acquittal. Last, there was a brief effort in Oakland County to prosecute Jack Kevorkian for the assisting in hastening in his first death, that of Janet Adkins (which I have deeming beyond the scope of this dissertation, as one of the cases not tried).

Inextricably intertwined was what Good perceived (in 1993) as a lack of resulting changes in the law in Michigan.²⁵ Timothy Kenney, then Assistant Prosecutor, who tried and lost the Harper case found himself assigned in 1994 by Chief Prosecuting Attorney John O'Hair to try the Wayne County Kevorkian prosecution. Kenney offered an explanation in interview the Harper case Kenney stated that Harper was a distraught husband who wanted to help his terminally ill wife of 28 years, to commit suicide. Because the couple knew that California had criminalized assisted suicide, they came to Michigan (Kenney Interview: August 20, 1993).

Kenney identified Kevorkian as one of the reasons the Harpers went to Michigan for the suicide. He told me this was because it appeared that Kevorkian

²⁵ During my 1993 interviews, I began to delimit Kevorkian's first assisted death, that of Janet Adkins, as beyond the scope of the dissertation. In reviewing the interviews, I realised that a primary reason why I did this was that *they* – the *interviewees* – did so. Oakland County Chief Prosecuting Attorney mentioned the Adkins death and unsuccessful effort to prosecute as a reason why he began to seek legislative clarity, but otherwise, the Adkins case did not seem to be given much attention. For example, Good did not consider the Adkins case as presenting a lacuna. However, I offer a conclusion in this regard -- for people who were pro-assisted suicide, the unsuccessful prosecution was a favorable outcome, whereas for Thompson, it was a negative outcome, which served as kindling for his anti-assisted death (or anti-Kevorkian) activism).

would not be subject to criminal liability for assisting in his first case, that of Janet Adkins (Kenney Interview: August 20, 1993). In concept, the Harpers (albeit as patients) followed the same procedure as did New York hospice physician Timothy Quill. They sought to obtain an unlawful result by lawful means. Quill provided his patient, Diane, with sufficient drugs for an overdose. However, they arranged for her to take them when he was not present, so as to avoid criminal liability and for him not to know when the death would take place. Similarly, the Harpers went to a place where the conduct they were engaging in would not be considered to be a crime.

Harper was both less and more fortunate than Quill. Harper was, unlike Quill, indicted in Michigan for first-degree murder, whereas the New York grand jury refused to indict the doctor. Kenney, a line trial prosecutor, said that “she tried to put the bag over her head three times and failed, so after she fell asleep, he put the bag over her head and she died” (Kenney Interview: August 20, 1993). In our interview regarding the freshly indicted Kevorkian, I asked Kenney why the prosecutor’s office (headed by Chief Prosecuting Attorney O’Hair, whose interview I shall discuss in the next chapter), which was openly sympathetic to the issue of assisted suicide, did not simply decline to prosecute. This was a question that Kenney politely did not take a position in answering, and declined to comment upon. I shall argue in the next chapter that O’Hair’s decision to prosecute Kevorkian was actually politically motivated to further the issue.

Kenney was candid regarding what he believed to be the reasons for the Harper acquittal. He told me that “with the state of the law then, we had to charge Harper with murder – there was a real sympathy factor” (Kenney Phone Interview: March 1, 1994). I now argue that Harper was more fortunate than Quill because he

had open and consistent public backing in Michigan. Quill accumulated progressively over time *after* he was briefly prosecuted in New York.

Moreover, Harper had the sympathetic support of the judge in his case. Judge Isidore B. Torres contributed to the defendant Harper's cause by instructing the jury "that if they found Defendant only assisted the suicide, then he would not be guilty." The source of this jury instruction, which would normally not be available after an acquittal, was the original writing of Judge Breck in *People v. Kevorkian* CR 92-115190-FC, 92-DA 5303 in which he initially *dismissed* the charges against Kevorkian for the Wantz/Miller deaths. In an earlier draft of this chapter in 1994, I wrote, "[n]ote that this instruction, which went (unsurprisingly) unchallenged in the Wantz/Miller (Breck) appeal, could devastate the prosecution for open murder if it is deemed to be the law of the case" (Pappas draft chapter 2/1994, p.7). The Wantz/Miller cases, which were reinstated upon appeal by the prosecution in the course of the *Hobbins/Kevorkian* (1994) cases, were in fact subsequently tried, to acquittal, although, as I shall discuss in Chapter 4, the jury members did not identify this as a line of thought as they proceeded to a pair of acquittals in May 1996.

The social construction of the Harper legal case was explained by the then-state-of-the-law, which pointed to a social construction of the Kevorkian Wantz/Miller case as well. Betram Harper claimed that they understood that they would not be prosecuted because of Michigan's "gray law," according to a 1993 publication by Hemlock, *Cases of Euthanasia, Mercy Killing, Suicide and Assisted Suicide*. This was similar to the experience of Oakland County Chief Prosecuting Attorney Richard Thompson, who complained that he could not secure a prosecution against Kevorkian for the death of Janet Adkins. The latter, the first of Kevorkian's

hastened deaths, resulted in a dismissal because the law allowed for murder charges, but not assisted suicide,

Thus in both cases, prosecutors were dealing with an undefined set of laws.

Two cases were at the center of the 1990s controversy regarding this lacuna: *People v. Roberts*, a 1920 Michigan Supreme Court case, and *People v. Campbell*, a 1984 Michigan Court of Appeals case.²⁶

In *Roberts*, just as in the Harper case that would follow 70 years later, a husband assisted a wife in suicide. Unlike Harper, who affixed a plastic bag over his wife's head (and thus engaged in the final act) Roberts gave his wife poison, so that she could end her life (and thus assisted her in the final act). Katie Roberts' life was intolerable and beyond recovery from the illness of multiple sclerosis, a progressive, degenerative and always fatal illness, and Roberts entered a plea of guilty to a charge of murder. The coroner gave considerable evidence that the wife had had a "long, drawn out sickness [and that] her body was considerably wasted" (211 *Mich.* at 190). There was, in addition, evidence that Mrs. Roberts had tried, but failed, to commit suicide to end her suffering on previous occasions; this was similar to testimony by Marjorie Wantz' husband Bill during the 1996 (2) trial.²⁷ However, Medical

²⁶ As a point of information, the Court of Appeals is an intermediate court of appellate jurisdiction in Michigan, whereas the Supreme Court is the high court. The Supreme Court can overrule the Court of Appeals, but not vice-versa; thus, where two opinions are in conflict, the Supreme Court governs.

²⁷ I was present for the trial testimony of Mr. Wantz, whom defense attorney Geoff Fieger reduced to tears on the stand. I have to make two comments, albeit fleetingly, in this regard. First, Fieger was not attacking Wantz; rather, Wantz was clearly pained to relive his wife's medical and psychiatric history. Second, Marjorie Wantz was suffering from vulvadenia, euphemized by the media as "chronic pelvic pain," which has repeatedly prompted the query from me as to what would Kevorkian have done if a man came to him complaining that penile pain made him want to end his life? This gendered question is rhetorical in nature, but points to an issue that was also raised in an article printed in *The Detroit Free Press* in 2000, that 71% of Kevorkian's clientele were women. The article "2000 Study Connects Many of Kevorkian's Cases: Vulnerability Chief Among Traits of People Asking Him to Help Them Commit Suicide," written by Patricia Anstett and originally published December 7, 2000, identified Wantz as one of a number of patients who had no organic chronic or terminal illness, but who did have major depression, and was reporting upon a work in progress by Medical Examiner Dragovic and three University of South Florida psychologists whose preliminary findings were in a short piece in *The New England Journal of Medicine*, "Dr. Jack Kevorkian and Cases of Euthanasia in Oakland County, Michigan, 1990-1998" (Dragovic *et al.* 2000, pp.1735-1736).

Examiner. Dragovic did not find physical evidence of a terminal illness, in Marjorie Wantz and testimony at the ultimate 1996 trial (while compelling) referred to chronic Wantz' vaginal pain that did not respond to treatment. I therefore conclude that the set of facts adduced was quite different from those regarding Roberts.

In the *Roberts* decision, the court pointedly noted with regard to Roberts' claim:

that defendant's wife committed no offense in committing suicide, that if she as a principle committed no offense in committing suicide, defendant committed none as an accessory before the fact" (211 *Mich.* at 195) ... if defendant were charged with being guilty as an accessory of the offense of suicide, counsel's argument would be more persuasive than it is. *But defendant is not charged with that offense... He is charged with murder and the theory is that he committed the crime by means of poison. He came into court and confessed* (211 *Mich.* 190)(emphasis added).

The court, in concluding that Roberts' conviction should be upheld, reiterated, "the real criminal *act* charged here is not *suicide*, but the *administering of poison*. And to this criminal act there may be accessories and principals in the second degree" (211 *Mich.* at 197, emphasis in original). Thus, the court rejected the concept of a theory of common law accessorial liability and issued what was thereafter called "a strong public policy statement against those who assisted suicides" (Jezewski 1991, p.1930). I argue that whether or not the court collectively thought that Roberts's conduct was detestable in supporting his wife's suicide, his plea of guilt undermined what may have been a colourable claim on appeal. The appellate court was faced with a statement of culpability and a legal tradition that had no category in which to place it. Query whether, had Mr. Roberts proceeded to trial, a jury would have convicted him on sympathetic facts and sent him to prison for the rest of his life, or whether it would have sent him home for the rest of his life.

In discussing the case with Oakland County Chief Prosecuting Attorney Richard Thompson, the unswervingly pro-life prosecutor told me, "the husband [in

Roberts] prepared the poison, he killed the wife, its first degree murder, that's the Michigan law. Or was it ..." (Thompson Interview: April 28, 1993). The "it" Thompson was questioning was a reference to *People v. Campbell*, in which the intermediate appellate court was asked to "consider whether the Roberts case still represents the law of Michigan, and [held] that it does not" (124 *Mich. App.* at 337). Thompson (in my opinion, correctly) took the Michigan Court of Appeals to task for taking upon itself to overrule (and usurp) the Supreme Court of the state. While Thompson's expressed view was that the intermediate court was required to follow Roberts, my conclusion is that the facts were easily distinguishable, thus removing the defendant in Campbell from the ambit of any criminal law or criminal justice policy flowing from the Roberts decision. Unfortunately, this potentially availing claim was an argument that went unmade.

The facts of the Campbell case were simple. The defendant and the decedent got drunk one night two weeks after the defendant had found the decedent in bed with the defendant's wife. During a drunken escapade, the decedent spoke of committing suicide, which he had apparently never spoken of previously. The defendant initially refused to give the decedent a gun, but later changed his mind and further "encourage[ed] Kevin [the decedent] to purchase a gun and alternately ridiculed him" (136 *Mich. App.* at 336). The decedent's girlfriend knew of this, but told nobody, because the defendant had told her that the bullets were blanks and that the firing pin would not work. The former were not, and the latter did; thus, the decedent wrote a suicide note and killed himself. The defendant and the decedent's girlfriend had already left the subject premises when the suicide took place.

The *Campbell* court noted (in my opinion, correctly) that, "defendant had no present intention to kill. He merely provided the weapon and departed. Defendant

hoped Basnaw would kill himself, but hope alone is not the degree of intention requisite to a charge of murder” (136 *Mich.App.* at 339). The court’s inquiry should have ended there. Instead, the court went on to discuss “the common law as an emerging process” in a reach beyond the simple facts of the case, which would have led to a simple holding, consistent with the 64-year-old precedent. The *Campbell* court, not finding a case on point in Michigan, went on to conduct an analysis of those cases which were on point in other jurisdictions (which is proper). However, the intermediate appellate court set aside the (higher authority of the) Supreme Court case because there was supposedly “doubt on the vitality of the 1920 *Roberts* decision (p. 337). Note that it was not a case of properly overruling either the precedent of *Roberts* or of a statute nullifying the case.

Chief Judge Hohen, in writing for the 1983 appellate court, displayed an uncanny vision as to what the future would hold for Michigan. In *dicta* he wrote, “[w]hether incitement to suicide is a crime under the common law is extremely doubtful.... The remedy for this situation is in the legislature. We invite them to adopt legislation on the subject” (p. 341). In 1983, Kevorkian was in California, as were the Harpers, and Ron and Janet Adkins were enjoying their life in Oregon, before the players began to focus upon Michigan. Nonetheless, the stage was set.

Part II. Jack Kevorkian as Dramatis Persona

My discussion in the last section was to consider the Michigan cases that brought the possibility of a Jack Kevorkian to the state stage. An incredible number of lawyers and legislators invested time, money, energy, reputations and careers in the prosecutions of Kevorkian. As a general matter, the principals at a criminal trial are the prosecutor initiating, the defense attorney, complaining witness or victim, the

judge, the jury, and the defendant. In addition to these key players is the jury, which like an audience at the theatre, has a large unspoken role until the end, at which time they proclaim their reaction by verdict (rather than applause or jeers).

In this series of cases, the central characters had major roles in more than the mere drama of the trial, as I shall argue in later chapters. Elite chief prosecuting attorneys and judges shall have their own chapter, in the next chapter. Kevorkian was his own defense attorney at the final trial, but references will be made to his prior lawyer and to the lawyer who represented Kevorkian at sentencing and on appeal. Moving from elites to ordinary people, the jury and its members (and potential members, in the prosecution for the Youk euthanasia) have a chapter. The complaining witness in each of these cases involving a death (whether by euthanasia or assisted suicide) was the state of Michigan, a sore point for family members of the Kevorkian decedents, in the chapter pertaining to families. The media was (and generally, I use the phrase “media was” as an American usage, as I shall amplify in Chapter 6, regarding the media’s own self-construction) also on trial in the final Kevorkian case, although as a metaphorical unindicted co-conspirator, as I shall discuss in the final chapter.

Because²⁸ I shall discuss aspects of Kevorkian’s criminal conduct and criminal justice system interactions in all of these chapters, my introduction at this time is a consideration of how he came to be an instrument of social and legal change in Michigan. Deeply limited in scope, I took this decision because others had ample information for more than one biography. First, in Mike Betzhold’s 1993 critical book, *An Appointment with Doctor Death* as I shall argue in Chapter 6 that reporter Jack Lessenberry sought to create in his articles during the 1990s and by his

²⁸ I shall detail and comment upon Kevorkian-related arguments between former *Detroit Free Press* reporter Betzhold and former *New York Times* “stringer” (occasional reporter) Lessenberry at length in Chapter 6.

participation as a key player in the Youk tape delivery to network television producers. Second, a formal biography *Between the Dying and the Dead: Dr. Jack Kevorkian's Life and the Battle to Legalize Euthanasia*, written by friends Neal Nichol and Harry Wylie in 2006, was written in collaboration with Kevorkian.

However, one aspect that I would like to explore is how a pathologist became an instrument of social and legal change in Michigan. The culture of pathologists is an under explored area, but I took as a comparative point Pearl Katz' 1999 book, *The Scalpel's Edge: The Culture of Surgeons* and put this together with information from early interviewees in the Michigan legislature, Senator Fred Dillingham (Dillingham Interview: August 23, 1993) and House Representative Nick Ciamaritaro (March 3, 1994). Both Dillingham and Ciamaritaro were pro-life and anti-Kevorkian.

Dillingham brought one more qualification to the interview – he was, in fact, a death worker, and had been a mortician prior to taking office in the Senate (Dillingham Interview: August 23, 1993).

The 1993 Dillingham interview obviously took place before I read the book Howarth authored in 1996, *Last Rites: The Work of the Modern Funeral Director* and was shortly before I began to seek to expand my knowledge into the arena of the sociology of death. Although I am not writing a biography of Dillingham in this piece of research, I do think that some commentary is warranted. Generally, the pro-choice people I met with in Michigan pointedly mocked Dillingham as a non-lawyer, as a man obsessed with death, as defined by his job and his choice of legislation.

Ironically, Dillingham may have been *more* qualified than some of the lawyers involved, because he had an acute social awareness of death and death rituals (which I would argue euthanasia and assisted suicide sociologically are, although physicians would label them medical procedures and lawyers would label them crimes or

justifiable or excused homicide). I would someday like to write a piece comparing the two death workers, Dillingham the pro-life mortician and Kevorkian the pro-death doctor, but that is beyond the scope of this writing, both of whom were equally professionally involved with death.

Here I shall make an argument similar to that in Chapter 6. As a preview, in Chapter 6, I shall argue that Medical Examiner Dragovic and Kevorkian (representing himself at trial, and therefore cross-examining Dragovic) were arguing substantial points on a higher level of expertise. They assumed axioms in seeking to prove their theories of the Youk euthanasia case, so that neither lawyers (prosecutor and judge, as a legally trained character) nor jurors (ordinary people, with no medical professionals) may have followed a crucial and colourable argument regarding lack of criminal causation. Moreover, unlike surgeons, other specialists (save, perhaps, radiology) and general practitioners, pathologists do not have a client base, and therefore do not see (and deal) with large (or even small) numbers of people in their offices, operating rooms and hospital wards;. Neither do pathologists see patients for specialized tasks such as diagnosis, operations, or post-operative recovery (cf. Katz 1999, ix, in which Katz is actually criticizing a “negligible opportunity for a surgeon to become acquainted with an follow a particular patient through his surgical illness,” from which pathologists are even more removed, academic and esoteric).

Similarly to the two pathologists, my argument here is that Dillingham actually may have brought a higher level of understanding to the Kevorkian issue, and that this may have been overlooked (perhaps this is not unlike my assessment in the next chapter of the prescience of Richard Thompson as to the Kevorkian conduct trajectory over time). I have to underscore that I shall *not* be advocating either a pro-

life or a pro-choice position in this argument, *nor* shall I be advocating a pro-Dillingham or a pro-Kevorkian position.

Jack Kevorkian was called a “serial mercy killer” by Dr. Arthur Caplan, who was then Director of the Center for Biomedical Ethics at the University of Minnesota. Kevorkian’s response was to say that “society is making ‘Dr. Death’... why can’t they see I’m Dr. Life!”, according to an article entitled “Suicide’s Partner: Is Jack Kevorkian an Angel of Mercy or is he a Killer as Some Critics Charge?” by P. Warrick, in the *Los Angeles Times* (December 6, 1992, E1 c. 2). I argue that both statements could be true, and were in Kevorkian’s case. While Kevorkian originated the public moniker with *The Detroit Free Press* on or about February 6, 1991,²⁹ the nickname is one generally associated with pathologists and medical examiners, who deal with medical and forensic matters (such as autopsy of the dead). Kevorkian’s 1991 book, *Prescription Medicide: The Goodness of Planned Death* was a public prompt for local media attention that expanded to national exposure over the course of the decade.

The man “Jack Kevorkian” was an enigma in the early 1990s. At the time of his first trial in 1994, he was 65 years old and had never been married. Biographer Mike Betzold said this was his sole regret (Betzold 1993). Kevorkian was, however, very close to his two sisters, one of whom (Margot Janus) I had a telephone interview

²⁹ During the early 1990s, I was very fortunate to have a contact in research at the *Detroit Free Press*, Mr. Apollinaris Mwila, who gave me a computer printout -- that was some 862 pages -- of all the “Freep” articles naming Kevorkian. As of March 2, 1994, these numbered some 481 from 1988 through March 1994, and I obtained this piece of information from page 765 of the March 2, 1994 printout. The sheer number of articles, which were not subject to a content analysis, was particularly staggering considering that this was before *any* of the trials or appellate proceedings took place. The juxtaposition of this, and the 1,400 articles Art Caplan and his colleagues in Pennsylvania found between the date the Youk euthanasia was broadcast by CBS (November 22, 1998) and the Ann Arbor conference on assisted death, the law and the media (February 22, 1999) was intriguing as a pair of before and after snapshots. Because Mwila lost his job in the course of a notorious strike at the “Freep”, I did not have ongoing access to such computer runs, which at the time I considered a methodological limitation. However, because my focus shifted to the trials themselves, this became a *de minimis* issue for me.

with on March 2, 1994 and the other of whom (Flora Holzheimer) I met and spoke with on numerous occasions,³⁰ but did not formally interview. Margot, now deceased, served as Kevorkian's assistant both in terms of his assisted suicides (NBC Now Interview: January 13, 1994) and administratively, running the campaign for a failed 1994 referendum to make aid in dying legal in Michigan (Janus Interview: March 2, 1994). Flora, who was living abroad, flew back to the states to attend Kevorkian's trials. Kevorkian's Armenian family was conservative -- his father owned a small contracting business and his mother was a deeply religious Armenian Orthodox woman who cared for her first-generation American children.

People I met in the early 1990s made repeated references to Kevorkian's intellect. Janet Good told me he spoke five languages with fluency (Good Interview: August 19, 1993). He painted (indeed, after his conviction, there was a gallery showing of his work which was a fundraiser) and he played the flute. Neal Nichol noted that during the Youk prosecution, he would play the flute with advocate/juror consultant Ruth Holmes' daughter, while he was staying at their home. Kevorkian was a graduate of the University of Michigan Medical School, a top student, and served as a medical officer in Korea. He later practiced medicine as a pathologist in California and Michigan, but never practiced internal or clinical medicine and did not have or see patients.

From a social standpoint, pathology is an intellectual practice in medicine, focused upon solving puzzles (rather than curing people). Further, pathologists do not communicate with patients at all (compare, Katz 1999, chapter 6). Katz made the argument that patients are separated from clinical practitioners and surgeons by

³⁰ The last of these occasions was at the home of Kevorkian advocate and juror consultant Ruth Holmes, where Flora, the wife of an ambassador was stirring pots of food in the kitchen and on the phone with Kevorkian, who was in prison and in the process of appeal. A reasonable conclusion is that the Kevorkian's "family" *expanded* to include members of the defendant's team over time, a social construction of extended family by criminal prosecution (cf. Condry 2007).

costume (patients' robes v. doctors' white coats) and a series of mortification exercises (example, progressive waiting rooms for the patients) designed to emphasize the difference in status between doctor and patient. Unlike Katz' Goffmanesque (1967, 47-93) depiction of surgeons and their patients, my argument is that pathologists do not have even a relationship to be characterized by a power imbalance.

An argument that came up repeatedly in the course of both interviews and trials (especially the 1999 trial, as I shall discuss in Part II of Chapter 6) was that Kevorkian did not have respect for patient dignity when hastening their deaths. Whereas in the 1999 trial, the line prosecutor commented on Kevorkian not taking the time to close Tom Youk's mouth as a gesture of respect (or of lack of respect), Senator Dillingham put it far more colorfully in our interview: "if we want to live, we dial 911; if we want to die, we dial Kevorkian" (Dillingham Interview: August 23, 1993). In a prior writing, I commented that Dillingham, a central player in the Senate in producing an anti-assisted suicide bill, was colourful and lively in his usage of language, which at the time surprised me generally because he was a legislator and "a striking feature all the more so given his profession prior to legislation – he was a mortician" (Pappas 1994, p. 27). I shall now reflect upon that comment, and consider it along with what will develop as some of Kevorkian's colourful comments in the course of the chapters that follow on. I argue that Kevorkian the pathologist and Dillingham the mortician were so lively in their usage of language, not *despite* the fact that they had lifelong careers in death work (Kevorkian's post-pathology assisted death career and Dillingham's post-mortician pro-life and anti-assisted suicide legislative career, continued the trend for both), but *because* of the fact that they had lifelong careers in death work.

In retrospect, Kevorkian and the prime mover of the anti-assisted legislation (in the Senate) were mirror images of one another. Kevorkian never married and never had children; Dillingham was a single father of five with a very definite interest in dating. Kevorkian and Dillingham both came to – and furthered -- the assisted suicide and euthanasia debates after other end-of-life careers.³¹ Both were mocked, yet both were vindicated to a certain extent. Assisted suicide is now a legally regulated medical procedure in Oregon and Washington State (in a sense vindicating Kevorkian). However, assisted suicide is now illegal in Michigan (with the original 1993 temporary ban sponsored by Dillingham replaced by a permanent ban that went undefeated by a voter initiative in 1998). I project that the issue of assisted suicide will ultimately reach the United States Supreme Court again (perhaps in a procedural challenge similar to that made against the Oregon legislation) , but decline to wager what the outcome will be.

Kevorkian had never been involved with the criminal justice system, or with the law at all, until the first of his assisted suicides – that of Janet Adkins in June 1990.³² Subsequent to Kevorkian’s second and third assisted deaths – the Wantz/Miller double cases in October 1991 -- Kevorkian was stripped of his medical licenses in Michigan and in California, according to Chief Prosecuting Attorney Thompson (Thompson Phone Interview: April 28, 1993). Initially Kevorkian sought reinstatement, which was denied on August 21, 1992 (*Matter of Jack Kevorkian, M.D.*

³¹ That said, Kevorkian authored a book in 1960, *Medical Research and the Death Penalty*, in which he advocated harvesting organs of Death Row prisoners while they were still alive, but under deep anesthesia. This book was unavailable to me, but cited by Jack Lessenberry in his *New York Times* article, “In Tactical Changes, Kevorkian Promises to Halt Suicide Aid,” (December 26, 1993, p.1, c. 24).

³² Kevorkian’s first brush with the law was a civil suit he filed in February 1991 against a storage company for loss incurred when the company apparently sent some of his belongings, including surrealistic paintings by Kevorkian, to Australia by mistake. The paintings were controversial in their nature – for example, one piece Kevorkian called “Genocide” was a nightmarish depiction with its frame painted in outdated blood from a blood bank, as reported by the *Los Angeles Times* on December 6, 1992.

State of Michigan Department of Commerce, Bureau of Occupational & Professional Regulation, Board of Medicine, Case No. 92-0070), for the stated reason that the Wantz/Miller deaths violated the public health code of Michigan.

Kevorkian himself did not testify at the original July 15, 1992 administrative hearing, which was a follow-up to the original suspension of Kevorkian's license on or about November 20, 1991 (less than one month after the October 23, 1991 Wantz/Miller deaths). Kevorkian subsequently told the Associated Press that "[t]he license is immaterial to me as long as I can help suffering humans" according to C. J. Castanea, in an article entitled, "Two States Target Kevorkian," printed in *USA Today* on February 24, 1993.

Nobody questioned that Kevorkian was a man of strong views, with the courage of his convictions (in the colloquial sense of the phrase). He took no money for assisting in the suicides or euthanasia deaths of his clients.³³ Chief Prosecuting Attorney Richard Thompson offered me a different interpretation of this seemingly altruistic refusal of funds, that *fame* was the currency for Kevorkian; "Kevorkian is getting a benefit, even if its not financial ... fame is a benefit" (Thompson Interview: August 20, 1993) This is consistent with arguments made by Rojek (2001). On occasions when Kevorkian was threatened with jail, he countered with threats to go on a hunger strike. When jailed he carried out the threat on two occasions in the early 1990s (although, as I shall comment upon in Chapter 6, he did not do so when

³³ At various times, I shall identify those individuals whom Kevorkian assisted as clients, patients, decedents, and on occasion by death number order. By phrasing such as this, I shall demonstrate my own shifting taxonomy, as well as the shifting taxonomy and language of interviewees and those involved in the Kevorkian cases. A reasonable conclusion to be had from this is that the social role of the decedent changed based upon the context of the discussion. However, I would suggest that there is another conclusion – the social construction of the acts and participants were in flux throughout the period of research and that the definitions and labels of the conduct and the actors were similarly variable and evolving.

imprisoned after conviction).³⁴ The first hunger strike ended when another lawyer, a *non*-supporter, bailed Kevorkian out with \$20,000, because “[Kevorkian] was holding our legal system hostage.” The second lasted nearly three weeks before Judge Cooper issued a decision, dismissing the prosecution for assisting in the suicide of Dr. Khalili (#20)³⁵ and the Kaufman decision, dismissing the O’Keefe (#18) assisted suicide, which resulted in Kevorkian’s liberty on December 17, 1993. Initially, Kevorkian eschewed counsel, since he argued that he had broken no laws – he was soon to acquire a lawyer, Geoffrey Nels Fieger, who conversely did not have a reputation for taking on “causes.”

Kevorkian represented himself during the 1999 trial for the Youk euthanasia at which he was convicted, and which I shall discuss in detail over the course of the next four chapters. The mid-1990s representation of Fieger resulted in acquittal after acquittal after acquittal (with one mistrial, precipitated by Fieger as I shall discuss at length in the next chapter). I would argue (and shall implicitly in the chapters following on) that a major part of those favorable endings was Fieger himself. If the stage is a metaphor for a trial court (Goffman 1967, p.93), Fieger was literally schooled in the art – he had an M.A. in theatre and speech from the University of Michigan. The lawyer’s son who had wanted to be a rock star³⁶ worked *pro bono* for the penniless physician, because he “relished the idea of spearheading one of the nation’s most visible causes” (This statement he made to B. Rasher, for an article entitled, “Tale of the Terminator,” in the Sunday Magazine of *The Chicago Tribune* on February 19, 1993).

³⁴ Jail time is generally considered to be incarceration of less than one year in a local facility, whereas prison is generally a post-conviction incarceration in a state facility.

³⁵ This case was subsequently reinstated by the Michigan appellate courts, and tried to acquittal in 1996.

³⁶ Fieger’s brother, Doug, actually was briefly a rock star as a member of “The Knack,” most famous for the song “My Sharona.”

A reasonable conclusion to be had from this is that Fieger became involved with the Kevorkian cases not because of Kevorkian or the cause he was furthering, but because assisted suicide was a *cause celebre* and that Fieger was himself (successfully) seeking fame. Lisa Gleicher, an attorney at Goodman, Millender and Eden, who was working on a civil challenge to assisted suicide legislation in the mid-1990s made the comment that “he brings back big verdicts [in civil tort cases], he is very good at what he does; *Geoffrey Fieger is a story*” (Gleicher Interview: August 19, 1993). Although Fieger was not the focus of my story, without Fieger (or someone who was similarly an extreme dramatist), there would not have been a story about Kevorkian, let alone a decade long one. To give a flavour of the story, Oakland County Chief Prosecuting Attorney Richard Thompson of the Wantz/Miller cases called Fieger a “circus ringmaster,”³⁷ in reference to near daily media events Fieger arranged on behalf of Kevorkian (a compliment Fieger returned in kind, calling Thompson a “certified raving loon” among other things).

B. Michigan’s Assisted Suicide Enactment and the First (1994) Kevorkian Trial

When Oakland County’s Chief Prosecuting Attorney found himself frustrated in his initial efforts to prosecute Kevorkian, facing dismissal for lack of an appropriate law (the Breck decision in the Wantz/Miller assisted suicides), he successfully appealed to the Michigan Court of Appeals, which reinstated the indictment of Kevorkian on May 10, 1993. This followed on the heels of Thompson’s unsuccessful effort to prosecute Kevorkian for the first assisted suicide, that of Janet Adkins in 1990. In an interview (which I shall discuss at further length in the next chapter),

³⁷ The circus analogy was one that came up on more than one occasion – both Chief Prosecuting Attorneys and Judges referred to the “media circus” repeatedly.

Thompson told me “I started with Adkins to get legislation to legalize (sic) physician assisted suicide” (Thompson Interview: August 20, 1993).

Legislating Death: The Michigan Ban/s and Legislative/Legislator Perspectives

Fowlerville Republican and ardently pro-life Senator Fred Dillingham, mentioned previously as a comparative to Kevorkian as a death worker, was the first to introduce a bill to criminalize assisted suicide in December 1990. The bill, known colloquially as the “Anti-Kevorkian Bill” went through several changes and two legislative sessions before it was ultimately passed as HB 4501, Public Act 270. When questioned about the appellation, Dillingham originally said “I have been accused of trying to write this law against Kevorkian, [but] I did it to show Michigan is not the physician assisted suicide mecca in (sic) the world.”

Dillingham’s bills had the support of Right to Life, speaking through its lobbyist and Legislative Director, Ed Rivet³⁸ (who was also a Commissioner of the

³⁸ I met with Rivet on a number of occasions in the course of this research, first in his office and last in his home. While Rivet was not a visible member of the Kevorkian prosecutions (and was not a lawyer), he provided information and insights on the several occasions that we met. I would comment at this time in two regards. First, our meetings became more informal and more relaxed over time; proceeding from him sitting behind a desk and my taking notes to us drinking iced tea on his porch, while his wife and children were about. This represented a shift in our interactions, as well; going from interview and quasi-adversarial to informal conversational over several years. Second, Rivet was involved with almost all of the pro-life and anti-Kevorkian individuals I met with, who almost constantly (and certainly in 1993-1994) referred me to him as a source. This demonstrated great importance in the role of the young man who had joined Michigan Right to Life in 1988, after three years as a legislative aide in the Michigan House of Representatives, and two years before Kevorkian began his campaign. A conclusion I began to reach in the 1993-1994 field trips, which I have since decided was a very reasonable one (and not just an intuitive leap), was that Rivet was as much an conductor of a pro-life orchestra made up of sections including legislators, lawyers, activists (during a March 4, 1994 protest of a Michigan Commission on Death and Dying hearing, I overheard Ciamaritaro asking Dillingham “[w]here is Rivet?” in a way of demeanour that suggested to me not an absent child, but a missing principal). During our last meeting in April 1999, I remarked about his generosity in opening his home to me, to discuss the Kevorkian conviction, and he told me stories of his father’s decline and how that confronted him in his beliefs, and later joshed about how he “got Pappas” (to see his arguments, which he saw as a possibility of a shift of my embracing them). His comments about his father prompted a lengthy discussion about how both of us had been confronted by a variety of experiences during the Kevorkian years, and the impact those various experiences had upon us, our views, and our ongoing work. At the time of this writing, Rivet was still the Legislative Director of Michigan Right to Life, but I would suggest that his (as well as my) views of the social and legal debates had taken on more textures than when the work began. A reasonable conclusion to be

Michigan Commission on Death and Dying). While Dillingham was noted for his Right to Life views, he in fact was sympathetic of the concept of death with dignity.

This was a theme which was echoed by House Representative Nick Ciamaritaro, who told me that even if assisted suicide was permanently banned,³⁹ “we still have double effect” (Ciamaritaro Interview: March 3, 1994). To me, this was an extremely surprising (actually quite shocking) statement from a pro-life legislator, because the double effect principle states that the primary effect of a drug (such as morphine) that hastens the death of a patient in pain or discomfort is to ease pain, with the *unintended* ancillary or secondary result of shortening life, the purpose of the drug was *not* to hasten death.

An uncomfortable, conclusion that I reached was that it was not the death, or perhaps even the shortening of life, that was objectionable, but rather the public spectacle of a Kevorkian (as reflecting a lack of dignity for the event and a lack of respect for the patient and/or bereaved family) or perhaps the institutional intrusion of the criminal law into a private family matter. Thus, Ciamaritaro’s comment led me to consider that a hastened death in the context of the private family and physician with overdose by painkiller was somehow axiomatically and quietly acceptable to pro-life advocates, notwithstanding their public efforts to legislate. In this writing, I shall repeatedly find that I need to say that there were gray areas where one might have expected black and white.

Rather than concluding (as I initially did in 1994) that Ciamaritaro did not understand the double effect principle, I now conclude that this was a bastardized

reached would be to underscore his empathy for a variety of circumstances, while remaining committed to his political agenda. Although this is an aside to the actual Kevorkian prosecutions and legislation, I would argue that laws would not have been passed without Rivet, although his role was one behind the scenes.

³⁹ Michigan had a temporary 18-month legislative ban on assisted suicide at the time of the Ciamaritaro interview, on March 3, 1994.

construction of the double effect. I further conclude that this was perhaps long accepted part of the death trajectory for many in a cultural sense that was inconsistent with political or religious views. While I shall have to say that I perhaps cannot explain it (other than by a series of intuitive leaps), I have come to accept it as a view stated by more than one person. The reportable finding, in this regard, was the *existence* of this dichotomy, and I shall leave it to others to research and explain the *reasons* for the inconsistency.

This may explain why, after the Wantz/Miller deaths, Dillingham told the press, “we need to punch Kevorkian’s lights out right now by taking his medical licenses away” (October 25, 1991).⁴⁰ When I met Dillingham in 1993, he was parenting a physically, emotionally and mentally handicapped 19-year-old daughter, which was said to have had an impact upon his personal and political views as a pro-life legislator. Whether or not that was the case, he unquestionably was the leader of the Kevorkian opposition in Lansing (the state capitol and legislative seat) and he successfully sought to promote legislation banning assisted suicide at the same time that Kevorkian started his practice.

The result was Public Act 270, which enacted two things. First, it created a Commission on Death and Dying, to consider the pluses and minuses of assisted suicide. Second, it created an 18-month ban on assisted suicide, i.e., the law made physician (or otherwise) assisted suicide a crime. Thus, at the same time that Kevorkian was being asocialized from the profession of medicine, the legislative and

⁴⁰ This quote was taken from my “DFP run, October 25, 1991, p. 728-719), with gratitude to Appolinaris Mwila, formerly of the *Detroit Free Press*. As I previously indicated, Kevorkian was stripped of his Michigan license to practice medicine on or about November 20, 1991, *Mtr. of Jack Kevorkian, M.D.* No. 92-0070, for the specified reason that the Wantz/Miller deaths violated the public health code of Michigan. I shall expand upon the Wantz/Miller scenario in discussion of my interview of Oakland County Chief Prosecuting Attorney Richard Thompson, as well as by juror and family interviews in the relevant chapters.

legal institutions of Michigan were preparing to socialize him for the role of defendant at trial.

B. Wayne County Kevorkian Prosecution: Statutory Assisted Suicide (Tom Hyde #17)

Creating law has already had a flavour of Right to Life and Hemlock. In the Michigan Commission on Death and Dying, nearly two-dozen interest group advocates made their presence known, although only half of those were officially commissioners. Their role regarded politicalization of the issue of assisted suicide, while Kevorkian's was about the trial of the cases – in theory.

In reality, there was a great deal of overlap (for example, both Chief Prosecuting Attorneys O'Hair and Thompson were on the Commission, as was – initially, until she resigned – Hemlock President and Kevorkian advocate Janet Good). The Wayne County (John O'Hair's) Prosecutor's office declined to prosecute a pre-HB 4501 assisted suicide, and also declined to prosecute the first post-4501 assisted suicide, that of Ron Masur (#16). However, O'Hair found himself with a highly publicized, seemingly airtight case to prosecute in August 1993, that of Thomas (Tom) Hyde (#17).

While the next chapter will compare views of O'Hair and Thompson, I am discussing the Hyde case here. A central reason for this decision is that this was the sole trial that I was unable to attend (due to commitments in London). Hence, I shall not be examining the various actors and their roles in the same way as the forthcoming chapters, while a concise version at this time acknowledges the case, and some of the issues it raised, particularly on defendant's behalf at trial.

The facts⁴¹ of the case in prosecuting Kevorkian for his participation in hastening the death of Tom Hyde, Kevorkian's 17th client, seemed simple.⁴² The skeletal legal facts were as follows. On August 4, 1993, Thomas Hyde, a landscape designer suffering from ALS,⁴³ inhaled carbon monoxide through a mask, with Kevorkian's assistance and participation. Hyde made the "traditional," or arguably ritual, videotape with Kevorkian. In that tape, Hyde's voice was so slurred from muscular degeneration as to barely be able to support speech, but he said, "I want to die."⁴⁴

There was never any question or dispute that Kevorkian assisted Hyde in his death. Neither was there any question that Kevorkian assisted in this suicide after the legislative ban against assisted suicide had both been enacted and implemented into law. What *was* to later become an area of hot dispute was the geographic location (and thus, the county of jurisdiction) over Hyde's death. An initial report read as follows:

Hyde's death came shortly before 8A.M. Wednesday. *Fieger [Kevorkian's then attorney] notified police at the Belle Isle [Wayne County] post that Kevorkian's van was in the park.* Police, following Fieger, spotted

⁴¹ The *facts* of the case, as I shall be using the phrase throughout this dissertation, is a term of art. A criminal trial is a matter of facts adduced, or proven, at trial and in evidence. In other words, a trial is about proof (in a criminal trial, proof beyond a reasonable doubt), rather than "truth" or an interpretation of "truth." While some interviewees made statements to the effect that juries can find the underlying truth of a case, this actually points to jury nullification, as I shall discuss at length in Chapter 4, regarding the Kevorkian juries. In his interview with me, Tim Kenney, gave a clear example of this, stating with regard to the Harper acquittal, "with the state of the law then, we had to charge Harper with murder. *There was a real sympathy factor [for the defendant Harper].* {Kenney Phone Interview, March 1, 1994}(emphasis added). The cultural construction of jury nullification in Michigan is a topic that came up over and over again in interviewees involved with the Kevorkian cases almost across the board (and indeed, Melody Youk referred to prosecutorial concerns about nullification in 1999 in her sentencing remarks to the court). Parsing the difference between facts adduced and emotional truths revealed represented a difficult task in this writing, because the colloquial meaning of facts is closer to the latter, whereas evidentiary facts are more specific.

⁴² "Seemed" is the key word of this sentence; there was a trick factual question regarding geographic jurisdiction that I shall discuss, and which was used to great effect in securing an acquittal in 1994.

⁴³ ALS is amyotrophic lateral sclerosis or Lou Gehrig's disease, a fatal neurodegenerative illness. It was the same illness as that of Tom Youk, for whose euthanasia murder Kevorkian was convicted of, and sentenced for, in 1999, a case that will serve as the anchor for the remaining chapters of this dissertation.

⁴⁴ I observed this on a tape of NBC "NOW" made on January 13, 1994.

Kevorkian's van and Hyde's body was found inside alongside carbon monoxide tanks (*Detroit Free Press*, August 5, 1993)(emphasis added).

Further, and to be juxtaposed shortly, another report read:

Kevorkian's statement at the time was, "I supplied the van, which was my personal van. At no time was there anyone else in the van besides me and Mr. Hyde. *I drove him to Belle Isle*. I supplied the gas (*New York Times*, August 7, 1993, p. 28, c.1)(emphasis added).

Also contemporaneous with the Hyde assisted suicide, Fieger "admitted that although his client was committed to his cause and willing to go to jail, they wanted to avoid another confrontation with the Oakland County Prosecutor, Richard Thompson" (D. Terry, "Kevorkian Aids in Suicide, No. 17, Near Police Station," *New York Times*, August 5, 1993, p. A14, c. 1-4); the article continued that, according to a press release, Kevorkian "said he picked up Mr. Hyde at his home ... then drove Mr. Hyde the 25 miles to Belle Isle, where the doctor fitted a mask over Mr. Hyde's face". During this time, Kevorkian lived in the quaint community of Royal Oak (in Oakland County).⁴⁵

Kevorkian announced at press conferences how he put the mask on Hyde's face because he could not move much. He further detailed how he supplied the necessary equipment for the Hyde "medicide," including mask, tubing and carbon monoxide. Fieger, who vigorously challenged the constitutionality of HB 4501 in other cases, did not vigorously litigate the constitutionality of the Wayne County Hyde case. Tim Kenney in a phone interview on March 1, 1994, told me (with equal parts of incredulity as to seeming incompetence or exceedingly shrewd tactics), "he [Fieger] want[ed] a trial" (Kenney Phone Interview: March 1, 1994).

The motion that Fieger did make was couched in terms of following other lower courts (read, trial court level), rather than an attack on the assisted suicide

⁴⁵ I have been to Royal Oak, which is an upscale community perhaps not unlike Hampstead in London, although Kevorkian's apartment was very modest (and I had not been to the actual apartment; my visits to Royal Oak were with interviewees and Michigan contacts for meals and social activities).

enactment. The decision that (to paraphrase a theatrical adage), the trial must go on was reported in an (unattributed) article, "Trial is Ordered for Suicide Doctor, A Judge Says Kevorkian Must Face Last Charge, Though Others Were Quashed," *New York Times* (February 19, 1994, p. 9, c. 1):

(Judge) Thomas E. Jackson⁴⁶ of Wayne County Recorder's Court, refused a defense motion to dismiss charges against Dr. Kevorkian for assisting in the death of Thomas W. Hyde Jr., 30. Mr. Hyde, who suffered from Lou Gehrig's disease, inhaled carbon monoxide in Dr. Kevorkian's van on Aug. 4, 1993. The judge scheduled a trial for April 19 after Geoffrey Fieger, the doctor's chief lawyer, asked for a speedy resolution of the case.

This seemingly straightforward reporting contained a number of politically important pieces of information. First, the validity and constitutionality of the legislation in question banning assisted suicide was actually then pending in the Michigan Court of Appeals in the Hobbins/Kevorkian cases, which were argued on January 6, 1994. Thus, while courts of similar level jurisdiction had determined that the ban was invalid, the question of the law's validity was actually pending on appeal in a higher court. Had Kevorkian been convicted, there would have been a chance that a conviction would have been rendered null and void by operation of law if the legislation did not survive legal challenge.

Second, paperwork was neither Fieger's forte nor his inclination; trial work and the drama of a jury was. Fieger commented for the record in the same article, to the effect that the "ruling doesn't surprise me, [b]ut I want a trial. No jury will convict Jack Kevorkian." Indeed, the desire for a speedy trial was made by Fieger, although Chief Prosecuting Attorney John O'Hair proposed delaying the Hyde trial until after the Hobbins/Kevorkian decision was released.

⁴⁶ As I shall shortly discuss, Kevorkian was tried to acquittal in the Hyde case; however, I need to make a methodological disclaimer at this time. Because I did not attend the Wayne County trial in April 1994, and other matters were proceeding forward, I did not seek an interview with Judge Jackson. In hindsight, I believe that this self-imposed methodological limitation was an error, particularly since judges (as well as decedent family members, jurors, and others) involved in later Kevorkian cases provided richly detailed information.

Had the trial been delayed (which it was not), and *had* the jury convicted (which it did not), Kevorkian's lawyers could have made arguments of trial error on appeal. However, a trial ensured not only that Kevorkian would be in the news, but also that *Fieger* would be -- in local, national, and international press. In the next chapter, I shall amplify Oakland County Chief Prosecuting Attorney Richard Thomson's commentary that while Kevorkian took no money, fame was a form of payment. Here, I would make the observation that a lawyer could not *buy* the advertising that the media coverage of the Kevorkian cases gave Fieger. The Kevorkian cases catapulted Fieger from a local (albeit successful) tort lawyer to an international presence as a trial lawyer likened to Clarence Darrow. A reasonable conclusion is while Fieger made the motion to dismiss so as to be competent as an attorney, he indeed wanted the trial to take place for the fame that translated into his own economic success (bigger cases, bigger fees) as well as fame.

Because I was in London when the Kevorkian/Hyde trial took place, my information was limited to a video-tape of the trial, media updates, and comments by interviewees (who had been sought relating to other trials). However, there were a few matters that are noteworthy. First, there was a 12 page questionnaire issued to the prospective jurors, which asked questions ranging from their personal situations to their views on abortion, religion, and euthanasia. While I shall examine the *voir dire* process of the 1999 Kevorkian/Youk trial and juror comments from the 1996 trials, I would comment that this extensive instrument, in and of itself, demonstrated the importance of the issues at hand (as opposed to simply the defendant on trial).

After the *voir dire* was concluded, and the jury seated, Fieger moved to dismiss, based upon a jurisdictional issue. The jurisdictional issue in specific was that Hyde had died not in Belle Isle (Wayne County, where the body was found), but in

Kevorkian's home in Royal Oak (Oakland County), after which Kevorkian drove the body the 25 miles to Belle Isle. As Fieger put it when he moved to have the charges dismissed, "you have to bring the case where the body was." An unattributed article (which reporter Jack Lessenberry, a subject of Chapter 6, later told me he had authored) "Using Surprise Strategy, Kevorkian's Lawyers Seek Acquittal," *New York Times*, April 22, 1994, reported:

Mr. Hyde's body was discovered in Dr. Kevorkian's van on Belle Isle, a Detroit city park, early that morning. But today, Mr. Fieger said Dr. Kevorkian had actually driven Mr. Hyde from his home in the Detroit suburb of Novi to Dr. Kevorkian's apartment in Royal Oak, where the suicide took place in a parking space behind the building. After the man was dead, Mr. Fieger said, Dr. Kevorkian drove to Belle Isle to surrender to the police. Addressing a jury that is mostly black and mostly female, Mr. Fieger said: "Thomas Hyde did not die in the city of Detroit and the county of Wayne on Belle Isle. His suicide took place in Royal Oak, Michigan, at Dr. Kevorkian's home, and they never even bothered to check."

I make two comments in this regard. First, if a county does not have territorial jurisdiction (which is to say that the crime, if any, did not occur within the prescribed geographic boundaries of the county or the territory's authority), the case was brought in the wrong court. Second, by bringing this to the jury's attention, Fieger accomplished two goals – he depicted the state authorities as bumbling Keystone Kops to the jury and he undermined the jury's authority to sit on the case in the first place. I suggest that the circumstances of pre-trial publicity (much generated by Fieger and Kevorkian themselves) would have provided ample opportunity to raise this issue and allow for Oakland County prosecuting authorities to take up the matter. My conclusion, especially when juxtaposed with other Kevorkian trials, was that Fieger ensured a "friendly" prosecutor and carried the matter forward until jury selection. By arguing this matter to the sworn jury, Fieger accomplished another, more legalistic, goal – because the first juror had been sworn, the doctrine of double

jeopardy would have prevented another prosecution if the case was dismissed by the trial judge.

I have another comment, which while seemingly stylistic, actually carries social and legal consequences. Fieger's comment that "you have to bring the case where the body was" depersonalized Tom Hyde as a decedent, a client, and most importantly, as a victim. I would not necessarily construct this as a matter of pollution and uncleanness (as might Mary Douglas in her 1970 work, *Purity and Danger*), I suggest that by naming "the body" rather than Tom Hyde, it was the beginning of the process of subverting a person (who could be murdered) into a thing (which could not be). I would further argue that this "othering" and terminology of social death militated against conviction of a defendant for his conduct relating to the death of another human being, a person who had been "one of us" in society. Judge Jackson decided to leave the question of where the suicide had occurred to the jury, as the lay finder of the facts (rather than a judge as a professional fact finder, as would be the case in a bench trial), and consistent with arguments made by Jackson and Doran in "Judge and Jury: Towards a New Division of Labour in Criminal Trials (1997: 759).

Kevorkian took the stand in the 1994 trial, and testified that he originally planned to take Hyde to Belle Isle for the assisted suicide, but that he feared his "clunker" of a van would break down on the way or that he would be discovered while the suicide was in progress. Jack Lessenberry, writing for the *New York Times* in a Staff Article entitled, "Kevorkian Takes Stand in Own Defense, Says He Was Trying to Relieve Suffering," (April 26, 1994, p.A16), focused upon the question of whether Kevorkian had legally culpable criminal intent, rather than the arcane sounding (and seldom argued) jurisdictional issue. After the lawyers concluded their evidence and gave their summations (closing remarks arguing how the jury should

view the evidence adduced as facts), this theme continued to be viewed by the media as an ancillary issue. For example, Tamar Lewin wrote an article for *The New York Times*, entitled, “Side Issues May Decide Kevorkian Verdict” (April 29, 1994, p.A14). This article reported that in charging the jury (issuing final instructions as to how to construct evidence as facts versus arguments of the lawyers), Judge Jackson instructed that if the jury could not find beyond a reasonable doubt that the death had occurred in Belle Isle Park, the juror would have to acquit Kevorkian. Half of ADA Tim Kenney’s trial summation was devoted to the inconsistencies between Fieger’s August 1993 press conference and his trial claim.

A reasonable conclusion is that *any* issue that may decide a verdict in *any* trial is *not* a side issue. By operational definition any question of fact whose answer could be outcome determinative would have had to be one that went to the heart of the case. By this I do not mean to suggest that jurisdiction was the *only* outcome determinative issue (there may well be more than one in any given case or trial). Rather, I argue that it is a reasonable conclusion that the jurisdictional issue, so very important in a legal context (there is a saying that first year legal procedure professors intone, that “s/he who knows the rules, wins”), was dismissed in the social construction by the media as one less enticing to the audience or readership. I observe that ADA Tim Kenney did not underestimate the importance of the jurisdictional issue, as he spent approximately one half of his trial summation on the inconsistencies between Fieger’s August press conference and his trial claims.

Nonetheless, and as an alternative theory of defense,⁴⁷ Fieger elicited testimony from Kevorkian that, in giving Hyde carbon monoxide through a mask (as he had 16 other times, with but one exception, where he employed lethal injection), he

⁴⁷ Alternative theories of defense are not necessarily inconsistent, and were not in this case.

was seeking to alleviate suffering, not to kill. “I didn’t want Mr. Hyde to die, just as a surgeon doesn’t want to cut off a leg.... I wanted to help him to end his suffering with the only means known and available to me,” This statement was published in a “Staff Article” of *The New York Times*, “Kevorkian Takes Stand in Own Defense, Says he was Trying to Relieve Suffering,” (April 26, 1994, A16), with authorship later acknowledged to me by Jack Lessenberry. Such a claim by Kevorkian, if successful, *might* have been be a complete defense if credited by the jury, as it fell within Section 7 of the (temporary) assisted suicide law, under which Kevorkian was prosecuted. That exception to the ban on assisting in suicide, provided what I would call the “double effect” provision of the law:

(3) A *licensed* health care professional who administers, prescribes, or dispenses medications or procedures to relieve a person’s pain or discomfort, even if the medication or procedure may hasten or increase the risk of death, is not guilty of assistance to suicide under this section unless the medications or procedures are knowingly and intentionally administered, prescribed or dispensed to cause death (Public Act 270, 1993)(emphasis added).

Thus, the Kevorkian team was aiming for an acquittal under the doctrine of double effect that the carbon monoxide was administered to relieve pain and suffering, and as a secondary (unintended) effect, caused death. However, the provision required a “licensed health care professional,” which Kevorkian had not been since November 1991 (Michigan) or, even allowing for an out-of-state license, March 1992 (California). The Hyde assisted suicide was in August 1993. Curiously, this was apparently not argued by the prosecutor, who apparently focused on the outlandish claim that carbon monoxide was administered to relieve pain.

Nonetheless, the jury, after eight hours of deliberations over two days determined that *both* the jurisdictional challenge and the intent defense were sufficient to raise a reasonable doubt. Although I did not have an opportunity to speak with any

of the jurors in this case, because I was in London at the time, some pertinent information was available and noteworthy. First, the jury asked for readbacks of Fieger's statements in August and Kevorkian's at trial, with regard to the location of the van, Hyde and Kevorkian (Barry Bassis Phone Conversation: May 1, 1994), as reported on national news. The jury resolved the issue in Kevorkian's favour.

Second, a juror named Gwen Bryson gave a statement to the press, in which she said, "We [the jury] believe the intent was not to help Hyde commit suicide. We believe it was to relieve pain and suffering." (*The Evening Standard*, 3 May 1994: 25). Members of the press openly mocked this (I would conclude reasonably). For example, one Staff Article entitled, "The Kindly Gas," wryly reported, "henceforward, carbon monoxide may be considered a therapeutic agent" (*The Economist* 7th May 1994, p.57), alluding to the bastardization of the double effect principle, so as to resolve the issue of Kevorkian's intent in his favour, as well.

Now I shall make a brief argument with regard to something else that was an issue in the Kevorkian cases, generally -- timing. Just as the Michigan legislature enacted law in response to Kevorkian's conduct and brought the effective date of the law forward in response to escalation of Kevorkian's practice, so too the Michigan courts seemed to behave in terms of their judicial response to Kevorkian. Kevorkian was acquitted of the Hyde assisted suicide charges on May 2, 1994. By the end of the month, he was again awaiting trial on "open murder," as the Michigan Court of Appeals reinstated charges in Oakland County, regarding his simultaneous second and third assisted deaths (Marjorie Wantz and Sherry Miller). I shall discuss that case in the field chapters that follow on, as I attended the trial and interviewed a number of

participants (including the Chief Prosecuting Attorney, a juror and the parents of Sherry Miller).

However, on May 10, 1994, in the same set of consolidated cases (*Hobbins v. Attorney General, People v. Kevorkian* and a second *People v. Kevorkian*), the Michigan Court of Appeals invalidated the law under which Kevorkian had been tried for the Hyde death (which was not subject to intermediate appeal). My argument is that the court deliberately held back the decision, pending the outcome of the first Kevorkian trial. I would suggest that it is reasonable to conclude this based upon my former experience at an intermediate level appellate court, where court orders and decisions were calendared for release. While I have no direct evidence if this was the case in Michigan (i.e., to see the outcome of a trial before releasing a decision invalidating the charging law), I would suggest that it is reasonable to conclude this based upon the legislative responses Senator Dillingham referred to in our interview, as well as press reports.

Conclusion

In this chapter, I have introduced the cases that preceded Kevorkian's Michigan practice of assisted death, and discussed how and why those cases were relevant to Kevorkian's practice. In addition, I have given background information about Kevorkian himself, and juxtaposed this to two other death workers, who each had prominent roles in the politics of euthanasia and the emerging politics of assisted suicide. First, and to be revisited in Chapter 6 (in which I shall analyse the 1999 trial at length), was a consideration of Chief Medical Examiner Dragovic, and the culture of pathologists. These intellectual medical doctors operated at a high level of debate (notwithstanding that each was personally colourful) in as close to an academic

practice as physicians can get. When he trial testimony of the dueling doctors is later developed, and the missed opportunity Kevorkian forfeited to summarize a viable issue of causation that he raised with regard to Dragovic, I would encourage a reader to keep in mind that Kevorkian and Dragovic spoke a common medical language, above the general juror (or lawyer). They were a pair of worthy adversaries insofar as medical euthanasia went, and they each became comfortable in the criminal justice system – Kevorkian as defendant, Dragovic as prosecutorial witness.

Second, Senator Fred Dillingham, a former mortician, was also a death worker like Kevorkian. Both Kevorkian and Dillingham made themselves present and vocal in Michigan politics in the early 1990s, with assisted suicide as the focus of their oppositional teaming in second careers. It is reasonable to conclude that, as with Dragovic and Kevorkian, the social construction of their professions infused their actions in the law and legislature in development of the criminal law under which Kevorkian was first prosecuted.

In this chapter, I also examined issues that were dispositive in Kevorkian's first trial, regarding territorial jurisdiction and regarding Kevorkian's intent. The first of these, while at least partially dispositive, was sheared off from the remaining criminal trials. The second was to be an issue in each of the trials, until his conviction. The mode and means of death were also politicized, as we saw with the jury decision that carbon monoxide inhalation was somehow a form of palliative care that resulted in a double effect of shortening life while relieving pain and suffering.

In the field related chapters that follow on from this one, questions of medical and legal causation will be revisited, as will questions of criminal culpability and intent. A theme that I shall seek to develop will be oppositional teaming of

participants, who were not necessarily adversaries in the trials, but who had different political agendas or professional goals.

Chapter Three: Kevorkian's Chief Prosecuting Attorneys and Judges⁴⁸

Introduction

The central focus of this study is the 1999 trial of Jack Kevorkian, also known as “the *60 Minutes* case” or “the Youk prosecution.” The former of these is a reference to the fact that Kevorkian sent a narrated videotape of a case of euthanasia to CBS for broadcast,⁴⁹ while the latter is the surname of the person to whom euthanasia was administered by Kevorkian. I chose this final trial as the center piece of the dissertation, a decision made based upon the following factors. First, I attended the trial. Second, a transcript of the trial was available to me. Third, I attended each of the other trials (with the one exception of the first trial in 1994, when I had to be in London). Fourth, there were interviews I conducted with comparable key players and/or public statements and/or testimony to juxtapose. Fifth, a key piece of evidence was a tape recording that Kevorkian arranged to have sent to the CBS television network to be played to a national audience.⁵⁰

The 1990s was the decade during which physician-assisted suicide emerged as a *bona fide* issue⁵¹ in the fields of criminal law and criminal justice policy. In the context of debates about that issue, the trials conveyed a variety of portraits –

⁴⁸ An abstract for a related paper, entitled, “Prosecutorial Discretion and Judicial Demeanour: The Mirrors, the Masks and the Motors,” was accepted for presentation at the 2009 annual conference of the British Society of Criminology.

⁴⁹ In Chapter 6, I shall focus at great length upon analysis of various versions of this tape, including the original *60 Minutes* programme broadcast in November 1999, the prosecutor's clips of the programme played during the March 1999 trial, and Kevorkian's own tape of his September 1998 meetings with, and euthanasia of, Tom Youk.

⁵⁰ This, along with the fact that Kevorkian acted as his own attorney at trial with opening and closing statements (as well as questioning witnesses and participating at sidebars), overcame the methodological limitation of not having had formal interview access to a criminal defendant (during prior trials, I had met Kevorkian, on several occasions, but he declined a formal interview, on advice of his then attorney Geoffrey Fieger).

⁵¹ In legal practice, a *bona fide* issue is a credible, real, and legitimate issue of fact or law, or a non-frivolous issue. (Motions are frequently made to seek dismissal of a case for not presenting a *bona fide* issue or case, and a cultural construction is to say that the case is “frivolous” or otherwise not meriting the time of the court or judicial administrators).

snapshots, almost -- of Kevorkian as well as his actions and his poses. American (and international) media certainly found Kevorkian a character to study, as I shall amplify in Chapter 6.

I was enticed by the opportunity to examine the different elements and participants in a criminal trial which resulted in a conviction, and to juxtapose them with similar previous trials⁵² that ended in the acquittal of the same defendant, in the same jurisdiction,⁵³ for similar or arguably the same conduct -- I shall discuss these matters later in this dissertation when I turn to the autopsy of Loretta Peabody in Ionia versus Tom Youk's autopsy in Oakland. Unlike my time as a criminal defender or as a judicial law clerk, and rather than being bound to a simple transcript of a single trial, I was able to conduct a longitudinal study of the like components of a number of trials -- *across* trials of the same defendant.

This gave me a unique way of examining primary and secondary data, along with cases over the course of a decade during which I repeatedly closed, then reopened, and then expanded my research. I began to realize that any one trial might have served as the basis of a doctoral study, but the comparative provided a chance to consider emerging issues. Some of these were the development of medical technologies that prolonged life or postponed the death of those in persistent vegetative states; the concerns of an aging population fearful of losing control over the quality of their lives; an ever-hungry media whose representatives literally lined

⁵² I am being a bit loose in my construction here, as technically, the 1994 Detroit trial was for assisted suicide under the 1993 temporary ban, as was the first 1996 double (two victims, on different dates) assisted suicide trial. There was a 1997 Ionia mistrial for assisted suicide (that I shall argue was actually a medical euthanasia). The second 1996 double (two victims at the same place and time, but with different methodologies) "open murder" "common law" trial was actually conducted as an assisted suicide trial (as I shall discuss later in this chapter). The final trial to conviction in 1999 was for murder (with assisted suicide charges dismissed shortly before trial upon motion of the prosecutor, as I shall also discuss later). The assisted suicide charge was under a law enacted in 1998, rather than the initial statute.

⁵³ The jurisdiction was the same to the extent that Kevorkian's trials were all in Michigan; however, the first trial was in Detroit (Wayne County), the 1997 mistrial was in Ionia (seat of Ionia County) and the remaining trials were conducted in Pontiac (county seat of Oakland County).

the walls of the courtrooms in which Kevorkian's trials took place and spilled along the nearby corridors and even onto the squares outside the courthouses; the task forces fortuitously and simultaneously convened in the US and the UK to study medical ethics and euthanasia related issues. Instead, for reasons of brevity and focus, I chose to view the broad area of euthanasia through a single lens of the Kevorkian cases.

In this chapter, I shall train the microscope to examine the part played by chief prosecuting attorneys and trial judges in the Kevorkian cases. In the next chapter, I shall turn from these elites to the jurors, those ordinary men and women who sat in judgment of the facts. In the chapter thereafter, I shall examine statements made by the family of Tom Youk at the Kevorkian sentencing, and compare the experiences of families from two of the mid-1990s trials. Last, I shall examine the role of the media in creating the "Death by Doctor" segment nationally broadcast by *60 Minutes*, and how the trial prosecutor created and used clips of that tape (as well as Kevorkian's original tape) at trial.

In the final analysis, I shall show that this opportunity to examine some of the elements of the trials provided an exciting new way to examine any or all of the Kevorkian cases. Here I shall focus on two groups of elites. By elites, I refer to those having an elevated status, even within their profession. Here, judges and chief prosecutors are the governmental equivalent of partners in white shoe law firms. Chief prosecuting attorneys had the elevated status of policymaking, while the judges ruled over the cases in the courtroom workgroup (Robinson, p.2005). The status of these politicians was heightened even beyond the training, licensure and oversight of the traditional definition of a professional. In Part I, I shall examine the roles of the chief prosecuting attorneys, and how the roles differed in the late 1990s from the

earlier part of the decade. In Part II, I shall consider trial judges, their sentencing philosophies and conclude with an argument of what changes in circumstances finally led to Kevorkian's incarceratory sentence of 10-25 years (for second degree murder) and concurrent sentence of 7 years (for delivery of controlled substances) *People v. Kevorkian* 248 Mich.App. 373 (2001).

Part I. Prosecuting Change, Changing Prosecutors

Without a prosecutor willing to try a case of assisted suicide or euthanasia murder, a defendant with a consenting victim would in some ways be the proverbial tree falling in the (empty) forest. Ferguson offered the generally true and legally accurate argument in *The Trial in American Life* that "defendants come into criminal court on the state's terms [and] prosecutors decide whether to prosecute, whom to prosecute at which level, and what charges to stress in shaping the case" (2007, p.38). This is the case notwithstanding what Kevorkian referred in 1999 as his status as a self-invited guest in court, who forced the party to take place.⁵⁴ Each of the chief prosecuting attorneys chose whether to bring -- or initiate -- charges or to decline to prosecute in what Ferguson called the "loose variable" (2007, pp. 39-40) of prosecutorial discretion, as I shall discuss more fully.

Michigan chief prosecuting attorneys could choose from a large number of cases in which Kevorkian had been involved. There was a particularly rich array with regard to the acceptance or rejection of physician-assisted suicide, which has almost universally been claimed by and/or attributed to, the activities of Kevorkian. Perhaps it was an underdeveloped theme that no matter how prolific a crusader or killer Kevorkian may have been, there would have been no case without a prosecutor to

⁵⁴ I shall give Kevorkian's self-assessment greater treatment in Chapter 6 .

prosecute. An interesting question might be asked – with so many cases, could a prosecution *not* have occurred? The short answer is that a non-prosecution *could* have been possible, notwithstanding the American criminal legal culture’s adage that a prosecutor could “get a grand jury to indict a ham sandwich.” Indeed, I would argue that it was not that Kevorkian was prolific, so much as that he was repeatedly and increasingly public and self-publicising, in his activities.⁵⁵

Pakes (2004, p.58) observed that “[p]rosecution is about filtering out cases that should not go to court.” Some 130 is an openly accepted number of Kevorkian hastened deaths. That is to say that Kevorkian publicly acknowledged that he had been present, and participated in some way, when at least 130 had people died by assisted suicide (whether by providing the means or opportunity to a patient or client who was the final actor) or euthanasia (by being himself the final actor, in the process of staging deaths and depositing the bodies of his deceased clients at local hospitals for autopsy). That is quite a lot of “filtering” Opportunities for the chief prosecuting attorneys.

The men who made the administrative and executive decisions in this process presented interesting case studies in their own right. The “line prosecutors,” in the actual courtroom trying the actual cases under differing theories of the case,⁵⁶ were interesting to observe in court (and to speak with out of court), though my focus at this time is upon the elected chief prosecutors in the Kevorkian prosecutions, the executives in charge of the office. These men (and they *were* all men) presented differing philosophical, administrative and legal approaches. This had an impact not

⁵⁵ Surveys of physicians’ attitudes and conduct, which I explore further in Chapter 6, lend support to this argument. One such example, however, was Jerald G. Bachman *et al.*, “Attitudes of Michigan Physicians and the Public Toward Legalizing Physician-assisted Suicide and Voluntary Euthanasia,” in *The New England Journal of Medicine* on February 1, 1996, v. 334 pp. 303-309.

⁵⁶ Traditionally, the *theory of the case* is what the prosecutor intends to prove using the available evidence, or what the defendant may seek to rebut by way of an alternate series of conclusions to be inferred from the same or additionally elicited facts.

only upon the outcomes of the Kevorkian cases, but affected the constituencies that elected them, and their own electoral political futures.⁵⁷

Rock (1993, p. 3) noted (referring primarily to legislators and “small policy making worlds”) that “[a] stable group may well be intellectually fertile, and it can certainly foster commitments and loyalties, but it is the instability of the small group that seems to provide the stronger immediate catalyst for the innovation and diffusion of ideas.” The chief prosecuting attorneys in general are traditionally referred to as the “named” attorney, as a reference to name of the elected or appointed attorney of record. In the Kevorkian cases, the named attorneys were officials heading services in their own jurisdictions, large or small. These chief operating executives formed a small group, one that provided invigorating catalysts for the creation and dissemination of new policies. In some ways, these chiefs were the embodiment of Rock’s 1993 theoretical argument that small numbers can be great catalysts, and the applied results of my study reflect its reality in fact. During the early 1990s, three chief prosecutors in three different Michigan jurisdictions (counties) became involved in the Kevorkian cases. One (Richard Thompson) was an overly zealous prosecutor. A second one (John O’Hair) was a seemingly reluctant prosecutor. The third chief prosecuting attorney (Carl Marlinga) was what I shall call a “declining prosecutor,” in the sense that he declined to prosecute Kevorkian to trial.

⁵⁷ I shall discuss the impact the Kevorkian cases had upon the electoral politics in terms of Chief Prosecuting Attorneys later in this chapter, specifically as to Oakland County Chief Prosecuting Attorney Richard Thompson, who was ousted following a campaign contest by opponent (and former employee) David Gorcyca. One of the planks upon which Gorcyca’s successful campaign was run was to stop the (losing) Kevorkian prosecutions, which cost tax dollars. I asked an election law expert, Hamline University Professor David Schultz about this sort of administrative philosophical difference in campaigns, to see if it was a widespread pattern of prosecutorial campaigning, to which he replied (by e-mail dated October 6, 2008), “[t]here are always accusations of prosecutors playing politics at election time but no good examples leap to my mind right now.” My argument is actually that the politics of the Kevorkian cases ultimately cost Thompson his office at what Schultz called “election time.” Thus, what had seemed to me to be an outcome that seemed fluid and obvious at the time may actually have been unique in nature.

As a methodological limitation, I note that I had opportunities to interview Thompson and O'Hair, but due to time constraints,⁵⁸ I did not seek an interview with Marlinga. This was because his case was over, and O'Hair's was beginning, at the time I commenced fieldwork.

A. Carl Marlinga: The "Declining" Prosecutor⁵⁹

Zalman *et. al* (1997, p. 923) noted that Macomb Chief Prosecutor Carl Marlinga, a Democrat from suburban Macomb county, "declined to prosecute, although the case was accompanied by a high level of publicity." Although out of chronological order, I chose to discuss this case of Kevorkian's 13th assisted suicide separately *because* Marlinga ultimately made a decision not to prosecute to trial, in a case in which I shall argue that timing was (almost) everything. Marlinga declined to prosecute to trial Kevorkian's assistance in the death of Hugh Gale, which occurred on February 15, 1993.⁶⁰ This activity took place subsequent to the passage of Michigan's first legislative ban on assisted suicide. However, it was also prior to the originally scheduled March 31, 1993 effective date of the ban imposed by 1992 Public Act 270. The Gale assisted suicide was part of a series of increasingly frequent

⁵⁸ The facts leading to Marlinga's preliminary prosecution of Kevorkian for conduct regarding assisting in the suicide of Hugh Gale on February 15, 1993, and ultimate resolution on April 27, 1993, took place before my first field trip to Michigan in August 1993 (for the Wayne County indictment and related matters).

⁵⁹ In an homage to Lord Patrick Devlin's *Easing the Passing: The Trial of Dr. John Bodkin Adams*, I have taken a decision to offer "Dramatis Personae." This I shall do so ongoingly as I present chapters, rather than have a non-paginated section so entitled, as did Lord Devlin. However, I note that Lord Devlin in fact cast a dramaturgical eye over his non-fiction rendition of the trial he presided over. The court as theatre is a theme that has emerged repeatedly in the Kevorkian cases, not least because of Kevorkian's former trial attorney, Geoffrey Fieger, who had been a drama student and who used the courtroom as a theatrical venue, in my observations. In later chapters, the theme of drama will emerge in terms of juror perceptions, family experiences, and the media. However, the cases began with prosecutors and ended with judges in a highly ritualized space, complete with a formal audience (jury) and director (judge), as well as the lawyers and witnesses as players on the legal stage. Because the individuals involved were uniquely identifiable, confidentiality was never guaranteed, with the exception of "off the record" comments; ironically, it never seemed expected, with the exceptions of two administrators who are not named in this work.

⁶⁰ I shall discuss this case further in Part I of the Chapter 6.

activities by Kevorkian that prompted the Legislature to hold an emergency vote on February 25, 1993, to bring forward the effective date of the law, in 1993 Public Act 3, as Inoted in 1996 (Pappas 1996, p,172).

Hence, and further to this legislative intervention, on February 25, 1993, the Michigan ban on physician-assisted suicide became law immediately. This timing managed to place Kevorkian's actions outside the newly-enacted ban (which some called the "anti-Kevorkian law"⁶¹ Thus, the chief prosecutor in Macomb was relieved of his duty to prosecute an act that had not yet been implemented into law. Marlinga was therefore able to choose how to treat the Gale assisted suicide in a statuteless environment. Brovins and Oehmke (1993, pp.207-208) suggested that a "surprise deal" was offered to, and struck by, Marlinga at the inquest. This allowed for an "informal deposition" of widow, Cheryl Gale, in return for dismissal of the inquest. Although generally unavailable in 1993, Marlinga's April 27, 1993 decision and "Memorandum Regarding Investigation into the Death of Hugh Gale" was subsequently posted on the internet site of *Frontline*.⁶² On the second page of the 15 page document, is what might reasonably be argued to be the "deal":

⁶¹ As a comment to this, I note that Oakland County Chief Prosecuting Attorney Richard Thompson was continuing (and ultimately successful) in his efforts to appeal a trial court dismissal of charges against Kevorkian for his role in the Wantz(injection)/Miller(inhalation) deaths during this period of time. I am not saying this either as an endorsement of, or condemnation for, either Marlinga's or Thompson's decision, which I believe were both quite rightly within the province of prosecutorial discretion. This is an administrative role of the chiefs, whereby they could proceed or decline to prosecute. In explaining the apparent inconsistency, I draw support from Fletcher, who wrote in *Rethinking Criminal Law* (2000, p. 719), "[t]he problem of imprecise standards is mitigated by the sound discretion of prosecuting officers." Whatever factual distinctions may have existed, both Gale and Wantz/Miller were Kevorkian cases before the assisted suicides. Furthermore, the Gale case had a similar mode of death to the Miller case (carbon monoxide inhalation by mask) and was under the same rules of (common) law on the dates of occurrence.

⁶² The PBS (public television station) programme *Frontline* was similar to the UK series *Panorama* and had a mission of drawing attention to broad issues of social interest. Because I shall later be analyzing tapes of a CBS (network television) station programme *60 Minutes*, I make the distinction that the CBS network generally targets a mass audience, whereas PBS generally targets an elite audience of people who might otherwise eschew television. The internet page, www.pbs.org/wgbh/pates/frontline/Kevorkian/interviews/galesummary.html was very useful in subsequent information gathering.

Because the goal of the prosecutor's office was to determine the facts before charges were brought (2) (*sic*) and without procedural delay of convening a grand jury, another attempt was made to obtain witness statements on a voluntary basis.

Renewed discussion with the attorneys for the witnesses produced an agreement that full and complete depositions of two witnesses, Mrs. Cheryl Gale and Mr. Neal Nicol⁶³ would be taken on Sunday, March 28, 1993.

These depositions have produced the factual detail for a decision in this case.

It is my decision that no charges will be filed against Dr. Jack Kevorkian or any other person in connection with the death of Hugh Gale; Mr. Gale's death can only be regarded as a suicide (Memorandum Regarding Investigation into the Death of Hugh Gale, April 27, 1993: 2) (emphasis added).

This was phrased in the traditional language evocative of a plea bargain.

Although it did not involve any guilty plea in this case, certainly it was a bargained arrangement – the depositions for the dismissal, as a *quid pro quo*. Second, the agreement for Sunday depositions of potential defendants as opposed to a felony hearing to determine probable cause (an adversarial proceeding) or convening a grand jury (the more traditional practice in urban areas) was nearly unheard of. I conclude that this set, off centre stage of the courthouse and off the regular schedule, could be argued to further or promote a quiet resolution.

Marlinga's decision was that "[at the time of Hugh Gale's death there was no law in Michigan making it a crime for a person to assist another in committing suicide," (page 3, as to murder charges). Marlinga further determined, that "[i]n this case, it [was his] decision that [he] would not be able to prove to the satisfaction of a jury beyond a reasonable doubt ..." (page 9, regarding potential manslaughter charges). The Macomb chief prosecutor's decision closed the case at a time during which he was engaged in a race for the United States Senate and, I conclude, was based upon two matters of prosecutorial discretion.

⁶³ Nicol was the first author of the 2006 authorised biography of Kevorkian, as well as one of Kevorkian's early assistants.

First, Marlinga applied an intermediate 1984 Court of Appeals (*People v. Campbell*) case as overruling state law of a high court 1920 Supreme Court case (*People v. Roberts*). As I shall discuss in the next section (based upon interviews with then Oakland County Chief Prosecuting Attorney, Richard Thompson), this was legally incorrect. Indeed, the Michigan Supreme Court further so opined and held in the 1994 *Kevorkian/Hobbins* decision, although that case did not regard the Macomb County prosecution. Second, as I shall argue in Chapter 6, there was evidence that a Kevorkian document was altered, and that the decedent had wanted to stop, as was explored by Mike Betzhold in an article in 1997.

A reasonable conclusion is that Marlinga (as chief prosecuting attorney) sought to defray any political damage that he (as Senatorial candidate) might have incurred by an unpopular prosecution of the then-popular Kevorkian. The issue for argument (between jurisdictions, as represented by their Chief Prosecuting Attorneys), then became whether Kevorkian's acts were ones that might properly be prosecuted as crimes. The two views were represented by Oakland County Chief Prosecuting Attorney Richard Thompson, whose voice will be heard in the next section and by (as Marlinga and the deal that may have been struck, as implied by Marlinga's memorandum absolving Kevorkian of both murder and assisted suicide charges.

As a transition to the next section, herein lies the heart of the concept of prosecutorial discretion – whether and why to bring charges against a defendant for (allegedly criminal) conduct. I offer preliminary conclusions. First and as a legal construction, prosecutorial discretion, ordinarily out of the view of the public eye, may perhaps be where the greatest power of a prosecutor resides. Second and as a

political construction, a prosecutor might further his own personal agenda, as well as a professional agenda, through this process, as demonstrated by Richard Thompson.

*B. “Zealous” Prosecutor Richard Thompson and “Reluctant” Prosecutor John O’Hair*⁶⁴

Oakland County Chief Prosecutor Richard Thompson and Wayne County Chief Prosecutor John O’Hair each prosecuted Kevorkian, but had widely divergent approaches. My first field trip to Michigan took place, in August 1993, when it was timed to match the Wayne County indictment. Both Thompson and O’Hair were career prosecutors, with 8 and 18 years of experience respectively (although O’Hair had both previously and subsequently served as a jurist). However, the differences Republican Thompson and Democrat O’Hair brought to the cases were more marked than the similarities that one might reasonably have expected to flow from the fact that they were simultaneously the chief prosecutors of substantial offices in Michigan; Thompson’s Oakland County had a suburban population of approximately 1,250,000 of the Greater Detroit population and was just north of O’Hair’s Wayne County. The latter, which included the city of Detroit, had an urban population of approximately 2,000,000.

I interviewed O’Hair on August 19, 1993, and Thompson on August 20, 1993. This was during the week that O’Hair’s office successfully sought indictment of Kevorkian for his 17th assisted suicide, that of Thomas Hyde. Hyde was a 30-year-old

⁶⁴ This section was inspired in part by a passage in Pappas (1996, pp.165, 167) a piece informally referred to as “The Bitter Pill,” in which I noted that “[o]f two eminent prosecutors on the Michigan Commission on Death and Dying ... John O’Hair was avidly pro-choice, while the other, Richard Thomson was zealously pro-life, neither was anytheless committed to exploring and considering *all* the issues raised by the literal question of life and death” (emphasis in original). In hindsight, and based upon events in the Kevorkian cases which I later compared to interview statements, I conclude that both men furthered political agendas, as I shall amplify further in this section.

man with advanced ALS⁶⁵ (also known as Lou Gehrig's disease), a progressive, degenerative neurological disorder with (at that time) no known origin and no known cure. O'Hair's office held a press conference about the indictment, on August 17, 1993 -- which I also attended. Both Thompson and O'Hair were highly informative. Indeed, some of what they said in August 1993 was prophetic in nature as to the ultimate progress and outcomes of Kevorkian's career trajectory in the criminal justice system, and I shall amplify this point later.

For example, O'Hair announced at his press conference that he was proposing a piece of legislation for consideration by the newly created Michigan Commission on Death and Dying. He did so at the press conference ostensibly called to announce Kevorkian's indictment.⁶⁶ He said that his proposed legislation would have the effect of allowing for assisted suicide under strict, enumerated circumstances for those who were terminally ill and had less than six months to live. Indeed, Zalman *et. al* (1997, p.924) asserted that O'Hair was considered by some as the "leader of the pro-assisted suicide group" of the Michigan Commission on Death and Dying – a task force created by the same piece of legislation that had first outlawed physician-assisted suicide in 1993.⁶⁷ Subsequently, O'Hair took on a prominent role in "Merian's Friends," a group named after Merian Frederick, one of Kevorkian's Oakland

⁶⁵ ALS is the abbreviation for Amotrophic Lateral Sclerosis, a rapidly progressive and fatal (barring an intervening cause of death, such as assisted suicide or euthanasia) neurodegenerative disease that undermines muscle control; it is the same illness Tom Youk had, and will be discussed further in Chapters 5 and 6.

⁶⁶ The Michigan Commission on Death and Dying was enacted by the same piece of legislation the issued a temporary (18 month) ban on assisted suicide; this dual purpose statute was the subject of (unsuccessful) legal challenges in the paired *Hobbins/Kevorkian* cases of 1994.

⁶⁷ Co-sponsor Senator Fred Dillingham told me in interview (Dillingham Interview: August 23, 1993) that this was effectively a compromise, which he and his pro-life colleagues sought to subvert (to the extent of not allocating and appropriating funds for the CDD to meet, while at the same time holding to the temporary ban on assisted suicide for prosecution purposes).

patients, for whose assisted suicide Kevorkian was acquitted of after the first 1996 trial I attended.⁶⁸

In stark contrast, Richard Thompson was and remains a pro-life activist. If anything, his stance had become more and more firmly committed, which he attributed in large measure to his involvement in the Kevorkian cases. This was an involvement that began literally as Kevorkian began his assisted-death practice. In December 1990, Thompson sought the first of what would be dozens of indictments. That case was of Janet Adkins, a 54 year old Caucasian woman who had been exhibiting the early stages of Alzheimer's Disease for approximately two years, and whom Kevorkian assisted on June 4, 1990. Thompson, relying upon a Michigan Supreme Court decision from the 1920s, *People v. Roberts*⁶⁹, charged Kevorkian with what was called common law "open murder" charges⁷⁰ that were dismissed prior to trial.

Thompson made the statement that he felt obliged to prosecute Kevorkian after Kevorkian's first assisted suicide. Once that case was dismissed, Thompson

⁶⁸ I shall amplify upon this trial in Chapters 4 and 5.

⁶⁹ The central reason *People v. Roberts*, 211 Mich. 187 (1920) was affirmed was because the defendant entered a plea of guilty, to the charge of murder in the first degree, in which he confessed to having mixed a poison (Paris green) with water and placed in wife Katie's reach to enable her to end her own life. There are two most important aspects of the *Roberts* case.. First, Frank Roberts told the court in his plea colloquy (and in response to a direct inquiry from the court) that his wife had previously attempted suicide the summer before (211 Mich. at 192), and then knowingly drank the Paris green. This was in a way that would in today's parlance and current Michigan law be deemed assisted suicide. I draw support for this conclusion from the coroner who performed the autopsy -- who knew Katie Roberts while she was alive, had seen her "about three or four months before her death ... at her home where they lived... [and that] she was a bed patient [with] her body considerably wasted" (211 Mich. at 190). Second, the issue in the challenge in *Roberts* was whether a murder trial was required subsequent to an allocuted guilty plea. The Michigan Supreme Court held that "there is no provision of the constitution which prevents a defendant from pleading guilty to the indictment instead of having a trial by jury. If he elects to plead guilty to the indictment the provision of the statute for determining the degree of the guilt for the purpose of fixing the punishment does not deprive him of any right of trial by jury" (211 Mich. at 194-195).

⁷⁰ In Chapter 4, the 1996 "open" or "common law" murder trial was one in which jurors found themselves challenging what they perceived to be a made up law by the prosecutors, as opposed to the statutory trials held in Wayne in 1994 and the first of the Oakland trial in 1996. The latter was a staggering defeat under the statute. I conclude that if a trial based upon an elucidated statutory charge was met with defeat, then a prosecutorial theory of a common law crime involving the same defendant would be even more difficult to present, prove and secure a conviction of during the weeks thereafter.

sought “clarification” from the legislature about the law regarding medical euthanasia and assisting in suicide (Thompson Interview: August 20, 1993). What he was seeking was to criminalize the conduct and to prosecute to successful conclusion. This was an ambitious goal that was reasonable in the light of the statements he made to me, as well as statements of legislators Fred Dillingham and Nick Ciamaritaro, Right to Life Legislative Director Ed Rivet and others.⁷¹ Thompson was derided in the early 1990s and ousted by David Gorcyca (or by the constituents who voted Gorcyca into the office Thompson had held). However, Thompson was vindicated before the decade was over, albeit after he was literally run out of office. By century’s end, Kevorkian was in prison for euthanasia murder,⁷² as prosecuted by Gorcyca’s office,⁷³ while Thompson had become a founding member of the Ave Maria School of Law, and giving conference presentations there such as that of March 14, 2003, on “How Jack Kevorkian Converted Me to Catholicism.”

The interviews with O’Hair and Thompson were not limited to eliciting the views of the men as chief prosecutors, but also were an introduction to the politicalization of vocabularies that were then evolving in the pro-choice/pro-life debate.⁷⁴ O’Hair repeatedly referred to issues of “family pressures” protecting family

⁷¹ Indeed, Thompson’s stance was taken as a given throughout the Kevorkian proceedings. Off the record, it was widely held that Kevorkian and his then-attorney Geoffrey Fieger took aim at the Oakland prosecutor, knowing that he would be both a provocative actor and easily provoked. There were numerous colorful statements made by both prosecutor and defendant/defense attorney, some of which were broadcast on the evening news

⁷² This became what I would call a *colloquial term of art* in Michigan during the 1990s, commonly used both in and out of court, especially during the 1999 Youk prosecution.

⁷³ This final trial will be discussed in great detail in Part II of the Chapter 6, with great amplification as to the trial strategy of, and theory of the case presented by, line prosecutor John Skrzynski. This trial attorney had prosecuted Kevorkian without success during the first of the 1996 trials, under Thompson’s regime.

⁷⁴ Definitions and taxonomy presented a challenge for me, and I repeatedly found social and legal constructions of language to be political in nature. However, one *medical* construction was offered by William Saletan on October 5, 2008, in an article entitled, “The Doctors who are Redefining Life and Death,” posted on www.washingtonpost.com. In this article, targeting a mass readership, the author argued that “dead” has different meanings in terms of organ harvestation -- including “brain dead,” “donation after cardiac death,” or “devastating neurologic injury”. This Kevorkian-friendly parsing, however, provided for a non-Kevorkian safety net, “[t]raditional safeguards, such as separation of the

“assets” during our interview and later meetings, while Thompson raised concerns about “insurance.” These regarded concerns about paying health care costs, as I shall now discuss.

These were mirror images of axiomatic concerns in the United States, where there is no scheme of national health provided by the government. Indeed, on May 30 2008, almost exactly 15 years after these two statements had been made, the *New York Times* carried an article, “Study Finds City Hospitals Differ on Care at Life’s End,” by Anemona Hartocollis and Ford Fessenden. This reported on a study compiled by Consumer Union from a 15-year research project based at Dartmouth College, and it found “two starkly different paths toward death, one for elite private institutions, another for those at public hospitals” in New York City’s hospitals. It stated that the city’s private hospitals were “among the most aggressive [in patient testing/treatment] of about 3,000 hospitals studied across the nation, ranking in the 94th percentile as a group, while the public hospitals landed in the 69th percentile, still above the national average” (Hartocollis and Fessenden, May 30, 2008, B1).

That patients in elite, private teaching hospitals (such as NYU and Lenox Hill) provide most elderly patients deemed to be within the last two years of life “more intensive treatment, more tests, more days of hospitalization – and more out of pocket costs” than do their counterparts at city municipal hospitals. The latter, which provide care to “the neediest New Yorkers,” was immediately identified as having “huge implications for administrators, doctors and patients as they consider which model of care is best for those suffering from chronic, fatal illnesses like cancer, congestive heart failure, lung disease and dementia” (Hartocollis and Fessenden, May 30, 2008: B1). What makes this even more alarming is that the Dartmouth/Consumer Union

transplant team from the patient’s medical team, will prevent abuse.” I shall further explore this theme in Chapter 6.

study was not looking at the totality of a person's life chances, social behavioural habits and general quality of life, as compared by Howarth: (2007:18) writing in "The Social Context of Death in Old Age." Rather, the Dartmouth/Consumer Union study was simply considering the amount of consumer rankings of testing and treatment dollars that were going into the last two years of the lives of elderly patients.

The academic health center at Dartmouth joined Consumer Union in their 2008 report, which targeted questions related to consumer rankings.. The study was not said to address "the question of whether longer stays and more intervention prolong patient's lives, and the Dartmouth researchers argue[d] in general that less-aggressive treatment does not change the outcome, but spares patients the agony of unnecessary tests and reduces the risk of hospital-borne infections" (Hartocollis and Fessenden, May 30, 2008, B1). This hearkened back to O'Hair's press conference on August 17, 1993, when he said that "assets that may have been accumulated don't go to the families, surviving spouse, son or daughter ... they go to the medical profession," or, in other words, that a dying patient's wealth was siphoned off to pay medical bills. A number of people commented in the mid-1990s on the recent decline and death of O'Hair's father and a reasonable conclusion is that this may have been an influence on his views at the time and may have explained his comment to the press. A possibility is that the recent family experience of spending down assets had an impact upon O'Hair's own views. In his August 17, 1993 press conference, he said that:

if Mr. Hyde [the consenting victim] had endured for a few weeks longer, he'd have been force fed, been on a respirator, been comatose ... what [O'Hair] found difficult is that he would have to wait that additional two weeks or whatever the time period that may be to go into a comatose state before he could have his voluntary choice fulfilled.

Likewise, Thompson, in interview on August 20, 1993 commented that “there’s an unspoken and unwritten message going out to every elderly person in our society that once you become about 80 and start to become infirm, don’t waste our money – kill yourself, because your life is not gonna be real.” Thompson might have answered the challenge presented in 2008 by Kenneth Raske. The latter, who was President of the Greater New York Hospital Association, which included public and private institutions, said that the Dartmouth “data was (*sic*) flawed because it (*sic*) worked backward from patients who died, rather than looking at the outcomes for patients who had the same treatment, but survived” (Hartocollis and Fessenden, May 30, 2008: B6).

Whether or not there were empirical flaws, the fact is that in July 2008, Consumer Reports joined with Dartmouth “to launch a new free web tool to rank nearly 3,000 U.S. hospitals for chronic care” specifically with regard to patient wealth (or lack thereof) at www.ConsumerReportsHealth.org. In a somewhat rhetorical conclusion, I shall now offer a question that may never be answered – taking Thompson’s speculation and Raske’s *lacuna* together. What would be the comparative and cumulative results if the numbers of wealthy elites and impoverished ordinary people seeking assisted suicide or medical euthanasia had been the same or different?

This question, along with the 1993 interview statements of Chief Prosecuting Attorneys O’Hair and Thompson, might imply a slippery slope similar to that which I discussed in the background of recent historical perspectives of medically-assisted death in Pappas (1996). An implied question arose: would treatment of elites either in aggressive and expensive advanced care or in asset-and-insurance-saving euthanasia or assisted suicide become as bastardized as that imposed on the disabled

or those deemed defective by the Nazi euthanasia programme, as articulated by Burleigh in *Death and Deliverance: 'Euthanasia' in Germany, 1940-1945* (1994) and echoed by Cohen in *States of Denial: Knowing about Atrocities and Suffering* (2001, p. 279).

O'Hair and Thompson continued to parse views and vocabularies of the proper use of economic resources (or medical "resource allocation," a term which culturally embraced both the concept of "spending down" or asset-wasting, as well as health insurance expenditures and/or insurance denials) in their comments about euthanasia, assisted suicide, and those involved in the actual conduct (whether medical or criminal or overlapping in nature). While these were not references to the lack of national health service in the United States as a potential (or probable) source of incentive to assisted suicide, I note that in the Netherlands, "the Dutch have distinct social classes, but differences are not extreme [and] on every measure the Netherlands has one of the healthiest populations in the world. (Cockerham 2004, pp.336-337). Legal writers on both sides of the Dutch issue (Keown 2005, Griffiths 1998) and of the medical issue (Gomez 1991) have tended not to discuss socialized medicine as either promoting assisted death or mitigating it. O'Hair and Thompson may thus have seized upon a uniquely American matter.

Moving on, I shall now proceed to differentiate the distinctions articulated in the chief prosecuting attorneys' language regarding doctors and the increased emergence (or increase of the reported)⁷⁵ medical practice of illegally hastening death in Michigan

Perhaps most obviously divergent were how the two chief prosecutors expressed their views about Kevorkian himself, as an activist and as a doctor although

⁷⁵ In Chapters 5 and 6, I shall discuss physician surveys pertaining to beliefs and practices regarding assisted death in the 1990s, and what was a largely acknowledged, but rarely discussed, occurrence.

as Thompson correctly pointed out, one who had been stripped of his licenses to practice medicine in both California and Michigan, and thus could no longer actually be called “Dr.” (Thompson Interview: August 20, 1993). In a press conference, O’Hair declared

I believe that Jack Kevorkian whether he is sincere or not – and I know he is of questioned sincerity – *has tried to bring a focus on this assisted suicide issue and in doing so he has performed a public service.* The disregarding of the law is something I cannot abide, *but at the same time he has performed a public service by his effort and his crusade. I share a concern with Dr. Kevorkian [about] the need to resolve this.* (O’Hair Press Conference: August 17, 1993)(emphasis added).

In other words, O’Hair viewed Kevorkian as precipitating a social and legal reform movement, in stark contrast to Thompson’s view that Kevorkian was simply acting criminally. Thompson emphatically told me only three days later in interview,

the issue [of assisted suicide] won’t go away because the medical profession is now interested, but *I think that if Jack Kevorkian left the scene, there would be a more rational discussion by the medical community about the pros and cons of what makes this issue – there are alternatives, such as hospice, [that have] not been discussed in our media*” (Thompson Interview: August 20, 1993).⁷⁶

These statements, juxtaposed, show how one chief prosecuting administrator was using his position to advance the social and legal movement in favor of assisted suicide, while the other was doing the polar opposite. Thompson went further, talking about possibilities of resorting to hospice or anticipating palliative care. He was to say, “the medical profession maybe is starting to understand if we can’t cure them, we can care for them” (Thompson Interview: August 20, 1993). He also alluded to the “slippery slopes” argument: “once you say there is such a thing as life not worth to be

⁷⁶ As I shall amplify in Part I of Chapter 6, this was a criticism that was echoed by *inter alia*, medical ethicists, and by members of the participating members of the media itself, at a conference held in February 1999 in Ann Arbor subsequent to the November 1998 CBS *60 Minutes* national broadcast of the September 1998 Youk euthanasia, but prior to the Youk euthanasia trial in March 1999. This conference, and the background of it, will be discussed at length.

lived it opens up ... slopes (sic) are coming to fruition in the Netherlands with babies, mentally defective babies.”⁷⁷

Adults, with the legal (and medical) capacity to consent, are in an entirely different legal category than are under-age people and mentally-disabled infants who have no legal capacity to consent (and do not fall into the categories under consideration in this dissertation). However, I would also suggest that Thompson would have favoured my secular argument about the 2008 report on the Dartmouth study; while there were roles played by religious groups and individuals in the Kevorkian cases, I shall amplify these in the Juries and Families chapters, although not in my discussion of Thompson.⁷⁸

As to the self-styled “Dr. Death,”⁷⁹ Thompson said: “when I became prosecutor, this was not an issue we would talk about .. [it] wasn’t really an issue for us, it developed because Kevorkian was an Oakland County resident and he started killing people here in Oakland. But I want you to know we handle 20,000 felony cases a year in this office and we always maintain our focus on general responsibilities” [Thompson Interview: August 20, 1993]. This last phrase is a reference to the obligation to enforce law and order generally in the county (rather than to take on a specific issue or target a particular individual). One might argue (in fact, I shall comment in the next section that David Gorcyca *did* argue, when he

⁷⁷ It is largely beyond the scope of this project to consider non-voluntary euthanasia of underage minors or those with mental incapacity, and further note that this project is considering Anglo-American, not the Dutch experience. This said, at the time of the 1993 interviews, the Netherlands was the jurisdiction of reference for de facto decriminalization of euthanasia.

⁷⁸ Regarding Thompson, I would formally rely upon his move to become a Catholic and a founding member and Dean of Ave Maria Law School, rather than upon anecdotal commentary of others in deep background.

⁷⁹ The traditional convention is to call a defendant by either his surname (“Mr. Kevorkian”) or by his status in the criminal justice system (“defendant” at the trial level; “defendant” or “appellant” in the course of appellate proceedings). Kevorkian used this title and reference on a number of occasions, as I shall reference in various chapters and formats. This, along with commentary by interviewees, prompted me to use the self-appellation, particularly where quoted from an interview or proceeding transcript.

successfully challenged Thompson and was elected Oakland County Prosecuting Attorney) that to target a specific individual or issue could lead to depletion of tax dollars that could be used for other purposes. Another way of phrasing this argument is that “we have to trust prosecutors to make a *prudent* discretionary decision” (Fletcher 2000: 718)(emphasis added), and to repeatedly prosecute the same defendant was economically imprudent to a frustrated taxpaying public. While there may be occasions where exemplary prosecutions may be mounted with perfect propriety, such as where an offence or an offender is especially egregious or where a precedent is sought or a new law or legal interpretation is being tested, the economic issue here was the repeated, prolonged and expensive trials of the same defendant for similar conduct in the face of multiple acquittals.

Thompson was making statements in public and in interview that were seemingly⁸⁰ local and legally focused in nature, while his Wayne County counterpart was doing otherwise. O’Hair’s comment on August 17, 1993, at his press conference, was a good illustration:

Jack Kevorkian has certainly a national, probably an international recognition. I think I would rather characterize his status as being one of recognition throughout the county, whether or not he [Kevorkian] is destined for greatness. (O’Hair Press Conference: August 17, 1993)(emphasis added).

The surprise here was not that Chief Prosecuting Attorney O’Hair acknowledged Kevorkian’s fame, but rather that he acknowledged a possibility of the greatness (a positive attribute, without offering the alternative negative alternative that one would expect from an indicting executive), with regard to the conduct for which he was being indicted. In this case, being there made the difference – the tone O’Hair used was earnest, not ironic or tongue in cheek. This stood in comparison with

⁸⁰ The use of the word “seemingly” is because the wealth of activity over the next several years would lead to the reasonable conclusion that Thompson was in fact quite focused upon Kevorkian, and upon the issue of hastening death.

Thompson's descriptions of the targeted defendant. Thompson was not alone in this regard. According to the interview statements of Senator Fred Dillingham, among others, of "Section 7" the 18-month temporary ban outlawing assisted suicide, was commonly referred to as the "anti-Kevorkian law."⁸¹

One fact that both prosecutors noted during August 1993⁸² was that Kevorkian was no longer licensed as a professional physician. O'Hair took the approach that:

Kevorkian is not a licensed physician. I'm not sure that the method used [in the assisted suicide of Thomas Hyde] wouldn't be considered cruel by the medical profession. Thomas Hyde over in Belle Isle in a rusted broken down van [referring to the VW van owned by Kevorkian] inhaling carbon monoxide as a means of ending his life – hard to characterize that as dignity ... type of thing we want to avoid (O'Hair Press Conference: August 17, 1993).

Whereas in the earlier quote, O'Hair was considering whether Kevorkian would ascend to greatness, in this quote, he was contemplating whether Kevorkian should more properly be called a cruel former physician. Thompson went further, and observed that Kevorkian had already lost his license to practice in Michigan and his license to practice in California, and that "Michigan" subsequently passed a specific statute banning assisted suicide – the temporary ban under which O'Hair's office was

⁸¹ Reserved from discussing at this time is the concept that a law is not supposed to be enacted to target the activities of one individual, as did Michigan. This said, legislation enacted in other states as a response to the issues that arose from Kevorkian's activities included a statute in Georgia, which was used for the first time in 2006 to allow for the plea bargaining of a woman named Carol Carr, who shot and killed two sons who were bedridden with Huntington's Disease. A Spalding County grand jury reportedly indicted Carr in August 2002 on two charges of felony murder and two charges of malice murder, even as "the surrounding community has reached out to the family, which has received hundreds of supportive letters (Scott, August 24, 2002). However, Carr was permitted to enter a plea of guilty to two charges of assisting in the commission of a suicide, and served two years of the five year sentence she was originally sentenced to, and was permitted to serve a five year sentence of probation on the second count, on condition that she not live with her 40 year old son James, afflicted with the early stages of HD (Stirgus, March 2, 2004). This creative prosecutorial use of plea bargaining as a compassionate legal tool for a woman who was neither physician nor assisting in the fatal act is a potential area of further legal exploration and examination within the past few years, largely deferred to later research as an example of the way forward as criminal law and the criminal justice system seek to deal with a newly emerging issue of family assisted suicide and prosecutorial responses thereto.

⁸² Somewhat surprisingly, Marlinga, in his April 27, 1993 document, did not seem concerned with this issue.

the first to prosecute. Thompson added, “so, by his actions, [Kevorkian] has actually done the opposite” [of greatness] [Thompson Interview: August 20, 1993].

Moreover, O’Hair advocated methodologies of how to assist in death during our (August 19, 1993) interview. These included pills or “lethal injection,” a death-penalty methodology which might have been more a reflection of his own profession of criminal law enforcement. In other chapters, I shall discuss analogies regarding Kevorkian’s methodologies to those used in death penalty cases. As the Kevorkian cases progressed, this was an ongoing theme.

Further, timing had been highlighted by both prosecutors, who served as the named (executive) prosecutors and as participants in the Michigan Commission on Death and Dying during the period of my study. However, Thompson noted that Kevorkian’s timing was also acute – he observed that the “Wantz/Miller” assisted suicides⁸³ happened the week before the election [when California had a ballot measure] and the ME [Medical Examiner or Coroner] said the scene [of the Wantz/Miller Kevorkian assisted suicides] was bizarre, a cabin lit by candles.” Thompson’s description of the Wantz/Miller crime scene was a more vivid comment, but similar to that of O’Hair regarding lack of dignity in the Hyde assisted suicide – a reasonable conclusion might be that the two chiefs were commenting on the issue of death with dignity by commenting on the *lack* of dignity at the Kevorkian cases.

As I shall note periodically, Kevorkian’s actions and conduct both escalated in response to activities in the political arena and, in fact, precipitated them. Indeed, this is true of the later chief prosecutors, as I shall now argue. However, Kevorkian did not operate in a vacuum, and these senior and experienced chiefs brought political agendas of their own to their Kevorkian cases, whether with regard to seeking further

⁸³ These were the cases tried to acquittal in the second 1996 trial, which shall receive further treatment in Part II of this chapter (regarding judges), as well as Chapter 4 and Chapter 5s.

electoral office (Marlinga), or to seeking legislation to address financial asset wasting (O'Hair) or the emerging religious concerns flowing from an academic concern of slippery slopes to Kevorkian as a one man slippery slope (Thompson). In the next section, I shall be examining young Turks who took office later (Ionia's Voet) and even "away" (Oakland's Gorcyca, who defeated Thompson in election) from the old guard, and had cases thrust upon them by Kevorkian, the media, and emerging issues not of their own creation.

C. Changing Prosecutors and the Chief Prosecuting Attorneys in the "Later" Kevorkian Cases: Ray Voet (Ionia County) and David Gorcyca (Oakland County)

Changing chief prosecuting attorneys for the "later" Kevorkian prosecutions in 1997 (Ionia County) and 1999 (Oakland County), introduced a new wave and younger generation of chief prosecutors. In Ionia County, Ray Voet, at age 30 in 1992, was the youngest chief prosecutor elected in county history to that date. In Oakland County, David Gorcyca was similarly youthful when he won the Republican primary contest against 59-year-old Thompson. Lessenberry (August 8, 1996) noted that Gorcyca won 56 per cent of the 103,000 votes to Thompson's 44 per cent. Chief among Gorcyca's candidacy claims in running for office was that he would not prosecute Kevorkian again, because it was a waste of taxpayer dollars on a personalized political agenda. I briefly met and conversed with Gorcyca,⁸⁴ although I did not formally interview him; Gorcyca literally was waiting outside the courtroom where Kevorkian was being tried on the other side of the door on the day Gorcyca first made the announcement that he was seeking to oust Thompson. It seemed to me

⁸⁴ This was an ancillary benefit of my having had to wait for a break in court proceedings to re-enter the room, a procedural mechanism implemented by order of Judge Breck, as a mechanism to keep proceedings focused, as I shall discuss in Part II of this chapter. At the time, I was not pleased that I had to wait to re-enter the public proceedings. However, this proved to be the sole occasion upon which I met and spoke with Gorcyca (albeit informally).

that Gorcyca was in his acts, as well as by his words, communicating that there was work to be done aside from prosecuting Kevorkian. In short, Gorcyca was saying that he would not prosecute Kevorkian (although he changed his position after the Youk euthanasia was broadcast on national television in 1998). So it was that the chief prosecuting attorneys had changed for the future Kevorkian cases, and brought different perspectives and prosecutorial responses to Kevorkian's conduct from those of the "old guard."

Rural Ionia County, located approximately 130 miles west of Detroit, was where Ray Voet ran a small office in a small town and county seat named for the district. Jack Lessenberry⁸⁵ wrote an article about country lawyer Voet, entitled "Prosecutor Goes Against Tide in Going After Kevorkian, published on Saturday, November 26, 1996 (page 12). Lessenberry noted that the young, fair-haired Republican, a wife who was a kindergarten teacher and three small children, became a Kevorkian prosecutor by phone. In Lessenberry's rendition for *The New York Times*,⁸⁶ Voet received a "phone call after a lunchtime jog with the local sheriff," and the Medical Examiner reported a problem during the call.⁸⁷ The so-called problem was that a tape seized in Oakland County (obtained during a raid of⁸⁸ a meeting with Kevorkian and potential assisted suicide patients) contained evidence about the recently-deceased Ionian resident, Loretta Peabody, and her husband. Peabody had

⁸⁵ The role of reporter Jack Lessenberry in the Kevorkian case is discussed at length in Part I of the Chapter 6.

⁸⁶ Lessenberry's report was similar in tone (what I would categorize here as slightly colorful, although some of the quotes in Chapter 6 Part I Fieger/Kevorkian/Lessenberry interactions will approach purple prose, and will demonstrate a certain flamboyance on the part of all three men) to that expressed in an article some years earlier, in which he was cultivating a relationship with Kevorkian's then-attorney, Geoffrey Fieger. I shall comment upon the latter at further length in Part I of the Chapter 6, and use the former here as an informational source.

⁸⁷ A reasonable, though unstated, conclusion that this points to is a showing of the changing of chief prosecuting attorneys to a young, vibrant family man who was not mired in matters of parental death (like O'Hair) or personal vendetta (like Thompson). This shows a movement toward a professionalization of the professionals involved to those distant and without any personal interest in the outcome of the case.

⁸⁸ In American criminal justice practice, one does a "raid of," rather than a "raid on."

advanced multiple sclerosis, and was allegedly assisted in dying by Kevorkian and his then associate (and subsequent patient), Janet Good.⁸⁹

The grand jury Voet convened in Ionia was, according to Lessenberry, the first ever called in the history of the county. The trial opening statements made on June 11, 1997 were the beginning and the end of the trial against Jack Kevorkian (the related charges against Janet Good having been previously dismissed by Voet, who was trial prosecutor as well as chief prosecuting attorney). Kevorkian's then-lawyer Geoffrey Fieger made an opening statement that was colorful, legally objectionable and ultimately, grounds for a mistrial motion. This motion was granted from the bench after the opening statements were concluded. Among other commentary by Fieger on the prosecution of Kevorkian by Voet was that it was "selective prosecution"⁹⁰ (Pappas, 1997 trial notes). There were references to "Christian martyrs" (Pappas, 1997 trial notes), personal commentary on second seat⁹¹ and the family⁹² of Michael Modelski. Modelski had formerly worked under Thompson in the Oakland County Prosecuting Attorney's Office and, in 1997, was second seated prosecutor to Voet. As a general matter, if another lawyer's family is relevant to the case at trial, that is grounds for either self-recusal, a recusal upon request of a

⁸⁹ Janet Good had been the President of the Hemlock Society in Michigan, and was originally seated as the Vice-Chair of the Michigan Commission on Death and Dying in 1993-1994; however, due to personal conflict, she resigned from the CDD; Michigan attorney Elsa Shartsis, who was the ACLU representative on the CDD, became the Vice-Chair for the remainder of the group's hearings and deliberations. While I met with, and conducted interviews of, both of these women during the 1990s, at this point in the thesis, it is Janet Good's involvement as a Kevorkian co-defendant that is my focus.

⁹⁰ A *selective prosecution* in legal culture refers to prosecuting one person, but not others, for the same conduct – or targeting a particular person or group of people. To say this in an opening statement to a jury at trial was, I conclude, actually a political statement being made to the judge or for the record of further appeal in the event of conviction.

⁹¹ *Second seat* is a traditionally used expression to designate the lawyer who is not the "lead lawyer" at trial. Second seats (and third seats), often do background work, prepare motions, and sometimes will prepare and examine certain witnesses. However, lead counsel will make opening and closing arguments, and question most witnesses. A social construction of the status of second seats in terms of status is that they also often serve as the trial equivalent of what a theatre production might call an understudy – that is to say that the second seat stands in for the lead counsel or takes over the role in the event of an emergency.

⁹² This is legally inappropriate commentary and argument during an opening or a closing statement – the family of another lawyer is irrelevant to the case at trial.

defendant who knows of this, a recusal upon the court's own motion, or potential reversible appellate error for a conflict of interest. However, as one who was there, I do conclude that Fieger went into this arena for the specific purpose of being inflammatory in his opening argument, as part of a deliberate strategy to provoke a mistrial. I shall amplify this further in both parts of this chapter.

Over consistent objections by the prosecutors, Fieger also made accusations that the Oakland County Prosecuting Attorney's Office was conspiring with Voet and his office, notwithstanding a newly elected Oakland County Chief, David Gorcyca.⁹³ It is legally objectionable, and generally considered to be a breach of etiquette to interrupt the flow of opening and closing arguments. That said, in the course of appellate review, where a defendant has not objected (for example to inflammatory statements made by a prosecutor on summation,⁹⁴ a common appellate issue), s/he will often be deemed to have "waived" the issue or the error. What was most unusual here was that it was the *defense* attorney making the inflammatory statements, and the *prosecutor* who was objecting.

My conclusion to all of this was that Fieger,had essentially sought and secured jury nullification in both Wayne and Oakland Counties.in 1994 and 1995. The subject of jury nullification, where a jury acquits a defendant despite compelling evidence of

⁹³ In my opinion,Voet and Gorcyca would have done anything to have avoided the experiences they did. One support I shall shortly draw for this argument is that Gorcyca actually dismissed all cases pending against Kevorkian when he took over the Oakland County Prosecuting Attorney's Office,. Furthermore, t in 1998 (barely a year after the Ionia mistrial), Kevorkian had Lessenberry negotiate sending a tape of the Youk euthanasia to CBS for broadcast, and during the follow-up interview, Kevorkian told moderator Mike Wallace that he had to "force them [the Oakland County Prosecuting Attorney] to act". If the Oakland and Ionia County Chief Prosecuting Attorneys were communicating with one another, it was as likely to have been to commiserate about having to deal with Kevorkian at all, as it was to conspire. By this I do not mean to suggest that they did not share information, such as the subject Peabody tape. My conclusion is that this was completely proper as across jurisdictions, rather than any unethical conspiracy to go after one man.

⁹⁴ Examples of objectionable prosecutorial summation error are identifying with the jury, vouching for the People's witnesses, racial/religious epithets (example "Devil worshipper") regarding the defendant, personal attacks on clothing or grooming), references to a defendant's failure to testify. This last actually was an issue on the appeal of the Kevorkian 1999 conviction, though the appellate court declined to grant Kevorkian relief and affirmed his sentence.

causation and intention sufficient to establish the legal elements of the crime charged, is something that I shall amplify upon at length in the course of this dissertation in Chapters 4, 5 and Chapter 6. Accordingly, I defer a lengthy explanation of jury nullification theory and the realities of such cases for the substantive discussions in these subsequent chapters.

In 1997, Fieger had looked into the jury box of white, rural, and conservative people seated on the jury and found no friendly faces. With speedy deliberation approaching instinct, Fieger designed and provoked a mistrial. I have long held it axiomatic that trial lawyers (often called "stand up" lawyers, because they literally stand up in court to make an argument) have to have a progressively more developed set of internalized instincts. This, *sub silentio*, aspect of a lawyer's strategy and demeanor is self-selecting in nature. Those who do not have it shall never become great trial lawyers, although they may become competent – and some may not have a courtroom presence at all, which may serve in part to funnel them to choose a non-litigation legal career. A fascinating article about the science of insight (and the ability to make intuitive leaps speedily and successfully), written by Jonah Lehrer, "The Eureka Hunt: Where in our Brains Do Insights Come From?" may be found in July 28, 2008 edition of *The New Yorker* pp. 40-45. While this does not contemplate legal intuition,, I conclude this is a parallel ability.

I further conclude that Fieger provoked a mistrial for a gamble so that the trial would not end in deliberations resulting in a verdict finding Kevorkian guilty. This conclusion was based upon my Ionia observations, and underscored by the cultural practice that opening statements are arguments where there is wide latitude and where

mistrials are virtually unheard of, and of my repeated observations of Fieger on trial with Kevorkian.⁹⁵

I was presented with a unique opportunity to interview Chief Prosecuting Attorney Ray Voet on June 13, 1997, after the trial – or more correctly, after the mistrial. I note that the Peabody case would never be tried again (a phrase I use deliberately as distinct from re-tried, which would suggest a case in which evidence was taken, arguments heard, and a verdict rendered). While that was not yet established in the immediate days after the trial, this was an assumption many made and I offer a brief explanation here. The Detroit (Belle Isle) case in Wayne County was in a large urban area with great funding resources. The cases tried in Oakland County were in the third wealthiest county in the nation, with wealth from the automobile industry, as I was repeatedly told (including by prosecutors). The Ionia case in tiny Ionia County (5,000 inhabitants) had prisons or correctional facilities as its central industry, was relatively poor and rural. Hence, as a matter of economics, it was a fair decision not to seek to expend public resources any further on Kevorkian, as I shall discuss.

In our interview, Voet noted that he had, prior to trial, brought a motion for “decorum” i.e., for rules of conduct and propriety in court at trial. An unintended consequence was that instead Voet’s motion might have been an inadvertent road map for Fieger. (Voet: 1997 Motion for Decorum:,1-2).⁹⁶ Voet ruefully commented that

⁹⁵ I am not suggesting that Fieger is not flamboyant, but rather that he has method to his madness. Later in this chapter, I shall amplify with regard to Fieger’s summations (and especially how judges, who had seen them but once, reacted, in contrast to some in the gallery, such as myself, who began to see the repetitive aspects – known in the legal community generally as “canned”). In particular, the summations mimicked that of Atticus Finch, as portrayed in 1962 by Gregory Peck in *To Kill A Mockingbird*. My conclusion is that Fieger had a very well internalized sense of what is going far and what is going *too* far, and when to do either. Indeed, I would suggest that this is a superior gift for a trial lawyer to have and to be able to deploy as needed (although I would suggest that this may also be due to Fieger’s earlier academic training in drama, which has many overlaps with trial law).

⁹⁶ As a methodological limitation, I note that while I had a number of conversations with Fieger during the mid-1990s, I never had an opportunity to formally interview him. When I requested an interview

he had observed the proceedings even as he participated in them during his and Fieger's opening statements. He told me that his inner dialogue was, "here it comes, judge; there it goes; see, judge, it just went by" (Voet Interview: June 13, 1997) when referring to Fieger's lack of decorum and misconduct during his opening to the jury. Voet further told me that he did communicate with other prosecutors about their experiences in their cases against Kevorkian,⁹⁷ and that he relied heavily upon former-Oakland assistant prosecuting attorney Modelski; however Voet's overall comment about the defense attorney's opening was that, "Fieger had to commit jury arson" (Voet Interview: June 13, 1997). This I interpreted as a play on the phrase often used in court or on appeal that a statement is objectionable as "inflammatory" to the individual jurors or to the jury as a whole (and hence should be excluded and expunged from the record, with possible curative instructions or a necessitated mistrial).

While defense attorney Fieger may not have seen any friendly faces on the jury, I would argue that the "Certificate of Death," of Loretta Peabody may have provided a *prima facie* defense regarding the legal cause of death, offering a viable defense due to *novus intervenus* or a potential intervening cause of death so as to raise a reasonable doubt.⁹⁸ Further, while the Certificate of Death read that the "immediate cause of death" was "Death by IV injection," it also listed as a "significant condition contributing to death, but not resulting in the underlying cause given in Part I,"

with him in March 1996, he told me that he "would never *ever* give an interview for anyone who worked with Art Caplan [who had been the Director for the Center for Biomedical Ethics at the University of Minnesota]. Caplan left prior to my fellowship year there, during which time there was an interim director and ongoing recruitment search. I had a number of conversations thereafter with Fieger "off the record," in which he would occasionally tell me to tell Caplan something colorfully worded. However, I did not have an opportunity to speak with him during or after the Ionia mistrial. I conclude that part of this may be due to the unfavorable circumstances he was experiencing in Ionia, which led him to keep closer to himself and to Jack Lessenberry (and which I shall amplify upon in Part I of Chapter 6).

⁹⁷ This was not unique to the prosecutors – the 1996 judges spoke to one another as well, particularly after Judge Cooper's 1996 trial and before Judge Breck's subsequent Kevorkian trial in 1996.

⁹⁸ This and other issues of causation in the Kevorkian cases, will be discussed in Part II of Chapter 6.

Peabody's condition of "Multiple Sclerosis." (Certificate of Death of Loretta Peabody 1387861: September 3, 1996).

In a sense, this presented a colorable⁹⁹ issue of causation, or more accurately lack of causation (lack of sufficient evidence of the cause of death, an element of the crime). This line of colorable causation (or the legal fiction) challenges has been a successful defensive position to prosecutions against doctors for medically hastening death, as in the 1950s New Hampshire prosecution against Dr. Hermann Sander (who was acquitted) and the 1990s prosecution against England's Dr. Nigel Cox (who admitted to given two ampoules of potassium chloride to a patient, who was terminally ill with rheumatoid arthritis – a possible alternative or combination of causative factors that resulted in, and conviction of, a lesser charge of attempted murder, with a suspended sentence to the doctor – who returned to practice following supervision and palliative care remedial training).¹⁰⁰ The causation issues regarding the death of Loretta Peabody will likely forever remain legally unresolved after the mistrial (although one might medically draw the conclusion of medical euthanasia, and not assisted suicide, by a plain reading of the death certificate).¹⁰¹ That said, the case did no damage to Voet's career, as he later became a judge in tiny Ionia County.

In Oakland County, David Gorcyca, a contemporary of Voet, was the only chief prosecutor to promise not to take Kevorkian to trial. Indeed, as I noted earlier, it

⁹⁹ A colorable issue is an issue that is open to dispute; likewise a *colorable argument* is one that may be properly raised. During the ritualistic initiation of legal language in law school, when as many words and phrases were taught by classroom conversation as casebook, one common cultural expression unlikely to be found in a law text is that a colorable issue "passes the laugh test" (meaning that a lawyer would not get laughed out of court by a judge for raising it).

¹⁰⁰ As I shall argue in Part II of Chapter 6, there was a colorable claim of lack of causation in the Youk prosecution. This Kevorkian, acting as his own attorney, raised in his cross-examination of the medical examiner. Unfortunately, he failed to shut the door during closing arguments by not arguing the potentially fatally flawed element in his summation.

¹⁰¹ My argument here is that this is the 1997 Peabody case was the mirror image of the 1999 Youk case. In the latter, the jury convicted of murder,, as I shall amplify in Part II of Chapter 6. The Ionia prosecutors were trying to charge Kevorkian within a statutory scheme that offered a possible conviction, rather than to charge Kevorkian within the medically provable facts. My conclusion is that this was because under a common law murder scheme. Thompson's office had lost a year earlier.

was a major plank of his (successful) campaign platform to displace Richard Thompson in a county-wide election. In an exercise of the prosecutorial discretion that came with his office, Gorcyca was also the only one to summarily dismiss indictments against Kevorkian (which Richard Thompson had filed prior to his departure in the wake of a lost election). However, Gorcyca subsequently had the distinction of being the only chief prosecuting attorney to file euthanasia murder and assisted suicide charges against Kevorkian. New charges, regarding the September 1998 euthanasia of Thomas Youk, were filed following passage of a new piece of legislation regarding physician-assisted suicide and a new tape.¹⁰²

These seemingly rich ironies, given Gorcyca's campaign promise that he would not prosecute Jack Kevorkian with what he considered to be unenforceable laws were ones that line prosecutor John Skrzysnki was put in the awkward position of explaining during the 1999 trial. Gorcyca made the promises in the immediate wake of Thompson's office having lost two sets of trials in rapid succession in between March and May of 1996 (the Frederick/Khalili and the Wantz/Miller prosecutions).¹⁰³ Gorcyca's campaign plank was that the prosecutions wasted both time and taxpayer dollars (Pakes 2004, p. 98).

¹⁰² The tape of Kevorkian administering euthanasia to Tom Youk, was the heart of the March 1999 case. I shall devote an entire chapter to the tape. Part I of Chapter 6 will address social and legal consequences of making the tape and broadcasting the tape and a subsequent interview with Kevorkian, while Part II will address the ways in which the original Kevorkian tape, the *60 Minutes* version and interview with Kevorkian, and the prosecutor's cuts of the original tapes, were used at the 1999 trial

¹⁰³ The first of these paired trials took place separately, whereas the Wantz/Miller cases took place previously and simultaneously, as the colorful description by Thompson indicated with regard to the crime scene. Thompson might have been more elegant at that time by addressing this as a death without dignity issue. His description did hearken back to the 1944 Cary Grant movie, *Arsenic and Old Lace*, where one of his elderly aunts, Aunt Abby, said that "we always wanted to have a double funeral" as a solution to a complicated problem in this farce.

As a brief abstract, in *Arsenic and Old Lace*, Mortimer Brewster's (Grant's) two elderly aunts dispensed with gentlemen who seemed lonely and unhappy with their later life. The aunts explained that they were deliberate and responsible ("It's one of our charities"), after which Mortimer wryly observed that his aunts had developed the "very bad habit" of ending the presumed suffering of lonely old bachelors by serving them elderberry wine spiked with arsenic strychnine, and "just a pinch of cyanide". In an aside, the movie was a farce, but had originally been written as a drama (which met with no success). In stark contrast, Thompson treated the Wantz/Miller cases as a drama that seemed

Once elected, Gorcyca in fact dismissed charges against Kevorkian (and his associates) relating to no less than 10 assisted suicides when he took office in January 1997, charges previously filed by the then-outgoing Chief Prosecuting Attorney Richard Thompson (Ferguson 2007: 40). Gorcyca further kept his promise almost immediately upon his arrival in office in January 1997, stating to the press:

Hypothetically, we can charge and convict Dr. Kevorkian 100 times, but since we aren't making law nor are we setting precedents, what are we really accomplishing other than wasting a lot of taxpayer money? (Gorcyca Press Conference: January 6, 1997, as cited by Guest: January 7, 1997, 7).

Gorcyca's decision to decline to prosecute Kevorkian was announced two days after the United States Supreme Court heard the paired assisted suicide cases that challenged prohibitions on assisted suicide in New York and Washington, but it was prior to decision (disallowing assisted suicide at that time). According to Thompson (as quoted by Greta Guest, in an Associated Press article dated January 11, 1997, entitled, "New Prosecutor Drops Charges Against Kevorkian," now available on www.newsmode.com), Gorcyca's decision was simply "a giant excuse of why the law should not be enforced." However, I conclude that this was a clear example of the classic concept of prosecutorial discretion. Thompson and Gorcyca simply had opposing styles in their legal application of the right of the chief prosecuting attorney (Pakes 2004, pp. 50-52).

It was less than one year before Gorcyca, as the new chief prosecuting attorney of Oakland County, faced a new challenge from Kevorkian. This challenge will serve as the anchor event to each element of this and the chapters that follow (judges, juries, families, media). Kevorkian-tape recorded the euthanasia by

originally set up in an ironical way. A reasonable rhetorical question that emerged for me, in light of Kevorkian's summation comment to the Youk jury (which I shall amplify in Part II of Chapter 6) that he was "not much of a producer", was whether Kevorkian was responding to Thompson's commentary about his staging of the Wantz/Miller cases. A second reasonable rhetorical question emerged in a historical sense – would the *Roberts* case in Michigan have been treated more, or less, favorably had *Arsenic and Old Lace* been made previously, and in the collective consciousness of the judges?

intravenous injection that he performed on Thomas Youk, a 52 year old man who had what was described by the Medical Examiner as end stage ALS (Lou Gehrig's Disease).

On November 22, 1998, the CBS national television network broadcast a segment entitled "Death by Doctor" on its Sunday evening dinner hour programme *60 Minutes*. The Kevorkian tape was sent (by Kevorkian and journalist friend Jack Lessenberry, as I shall explain in Part I of Chapter 6) the day after Election Day¹⁰⁴ to Moderating Editor Mike Wallace and his agents, and it was graphic in nature. The tape first showed Youk alive, consenting to the procedure in monosyllables. It then showed Kevorkian describing a lethal injection device, capable of delivering a series of drugs. The programme proceeded to show Kevorkian using the drug delivery system to end Youk's life on September 17, 1998. Finally, it showed Youk slumped over and deceased, all while Kevorkian narrated. The broadcast also included an interview of Kevorkian by Mike Wallace, in which Kevorkian clearly and repeatedly said that he did end Youk's life.

Chief Prosecuting Attorney Gorcyca, and his reaction to the "Death by Doctor" segment, and the words of Kevorkian, in the Mike Wallace *60 Minutes* interview, were nationally broadcast during the November "sweeps" of American television programs. Sweeps week is traditionally when networks put forth their most attention (and audience) drawing material, to show a market share for potential advertisers. Hence it was on national television that Kevorkian threw down the gauntlet before Gorcyca, "they must charge me, because if they do not that means they do not think it was a crime." Kevorkian told interviewer Wallace during the Sunday evening broadcast that he had deliberately crossed the line from doctor-

¹⁰⁴ As I shall amplify in Part I of Chapter 6, this timing was important and deliberate in nature.

assisted suicide to euthanasia in order to force Michigan to either arrest and prosecute him, or to give him a green light to practice assisted suicide and euthanasia. The juxtaposition of the Youk death and the Kevorkian comments did indeed result in charges – of assisted suicide, murder, and drug delivery charges for the drugs that had made Youk first sleep, then stop breathing and, lastly for the potassium chloride that had caused Youk’s heart to cease beating. These events were the focus of the March 1999 trial. However, as a backdrop to the drugs administered, I would argue that these were not only not in the opiate (example, morphine) class of drugs generally administered in cases where the issue of double effect arises (primary effect is to reduce pain, secondary unintended effect is to hasten death – a defense used as a legal fiction to negate intent in some cases); rather, the lethal cocktail, while effective in its task, was similar to the lethal injection components that were the subject of a 2008 United States Supreme Court case arguing (unsuccessfully) that lethal injection was a cruel and inhuman form of administering the death penalty *Baze v. Rees*, No. 07-5439 (Decided April 16, 2008).

Factors aside from Kevorkian’s televised and self-promoted euthanasia encouraged prosecution in November 1998 (I shall argue that this was by imposing a public and national loss of face as the alternative, as addressed by the trial prosecutor in summation in 1999). First, the citizens of Michigan rejected a ballot initiative to allow physician-assisted suicide “Proposition B,” on November 3, 1998, shortly before the *60 Minutes* telecast. Second, the Michigan legislature introduced and passed a statute proscribing assisted suicide, and creating a crime punishable by up to five years in prison, a felony. A staff article in *The Seattle Times* (July 4, 1998, A4) correctly observed that the law was aimed at stopping Kevorkian -- a conclusion of fact that I make based upon my interviews in 1994 with Senator Fred Dillingham and

Representative Nick Ciamaritaro. The passing of the July 1998 law, which took effect on September 1, 1998 was barely two weeks prior to the euthanasia of Youk. The timing of the Youk case mimicked Michigan's 1993 "temporary" ban. Moreover, this might be analogized to Kevorkian's increased 1993/1994 activities which I discussed with regard to the Chief Prosecutors of Macomb and Wayne County and to the prosecutions brought by these chief prosecuting attorneys. In 1998, Gorcyca, had been a chief prosecuting attorney in Oakland County for less than one year. Kevorkian's actions were doubtless a provocative factor for the fresh chief prosecuting attorney had previously dismissed all pending assisted suicide charges against Kevorkian.

So it was that Jack Kevorkian was tried one more time, again in Oakland County, albeit at the initiation of the chief prosecuting attorney who had vowed not to do so, David Gorcyca. There were some policy decisions that surely had an impact upon the case. Chief among those was that Gorcyca's office took a pre-trial gamble, moving to dismiss the assisted suicide charges, and placing all bets on conviction for murder.¹⁰⁵ In a county that had repeatedly known juries acquit and engage in jury nullification¹⁰⁶ in prior Kevorkian cases, this was a bold move, a high risk gamble.

¹⁰⁵ I shall amplify this in Part II of Chapter 6.

¹⁰⁶ There is an extensive discussion of jury nullification theory in the next chapter, regarding Juries; however, "jury nullification" became so inextricably intertwined as almost a folkway or a folk concept, a collective cultural phrasing and construction, as to almost become a term of local legal folk art in Michigan. This colloquial term of art in Michigan specifically regarding Kevorkian, that this goes beyond the vocabulary of legal training into another, undefined arena (yet implicitly understood to Michiganders, and to those in Michigan at the time of the Kevorkian cases). My closest analogy is one drawn from the art world, folk art specifically, and the work of Henry Darger specifically. Darger, a self-taught artist who created mythic work, and who had "a pervasive influence on the contemporary art discourse and ... the examination of the work of self-taught artists is essential for a full understanding of art history" Brooke Davis Anderson, Director and Curator of the Contemporary Center. Flyer for the American Folk Art Museum "Dargerism: Contemporary Artists and Henry Darger: April 15 –September 15, 2008). I conclude that Fieger and Kevorkian created jury nullification in Michigan as a new art form, consistent with what Brooke Davis Anderson (American Folk Art Museum: Dargerism Flyer 2008) "there is a long history of academically trained artists drawing inspiration from self-taught artists and thus freeing themselves to think in unexpected ways and on their own idiosyncratic terms, almost in defiance of what they were taught." I would argue that Fieger and Kevorkian did exactly this with jury nullification, and that it was so implicitly accepted as

In addition, Gorcyca's choice to dismiss the *lesser* charge, and try the case of the *higher* charge, was a sharp contrast to Gorcyca's prior administrative actions. They were more consistent with what Fletcher wrote in *Rethinking Criminal Law* (2001), albeit that Fletcher was writing about legal excuses (which are in mitigation of sentence) rather than regarding trial and potential defense justifications and attribution (which regard exoneration from criminal liability). Fletcher further wrote that "[t]here is no doubt that one can achieve individualized justice in less visible processes of prosecutorial discretion, jury nullification and executive clemency [, b]ut every legal system, one would think should think, should be committed to bringing the question of excuses out into open where claims on our compassion are public and subject to reasoned argumentation" (2001:, p.813). Gorcyca's 1998/1999 policy shift further stood in bas relief to the process engaged in by Macomb County Chief Prosecuting Attorney Marlinga, which I discussed in the previous section and where Marlinga was squarely within Fletcher's argument of "individualized justice" (2001, p. 813), at least for Kevorkian and his cohorts.

Perhaps less high risk was that this was a case tried on simple facts – the case that John O'Hair, some five years earlier, had predicted in interview would last "an hour and a half" (O'Hair Interview: August 19, 1993), if it was not tried as a *cause celebre*. The trial, from opening statements to summations, lasted less than one week and tried the man and his conduct. The result was much less than the weeks' long cases during the mid-1990s, in which the issue, as well as the defendant, faced trial (with mixed results on the issue, and with repeated acquittals of Kevorkian, as well as

such that it became part of the basic alphabet of nearly everyone conversant with the cases – lawyers, jurors, friends and family members, and the media. Hence, I shall build a bridge in Chapter 4 between the theory and the reality of Kevorkian cases and jury nullification issues, with the disclaimer that some of what I heard and experienced in interviews and in court would seem to fly in the face of academic jury nullification theory and discourse. As a rhetorical question, I must ask what Kevorkian, a self-taught artist (whose work is largely political, although not technically proficient), would think if he were to see that I am drawing this analogy in terms of law and jury nullification.

a defense attorney provoked mistrial). It was a powerful and understated prosecutorial strategy, lending authority to conviction.

Gorcyca's tale to tell is, in a sense, self-explanatory – he went from running a candidacy against Thompson on a platform of not prosecuting Kevorkian, to dismissing outstanding assisted suicide charges Thompson had initiated against Kevorkian, to prosecuting and supporting an indeterminate sentence consistent with the sentencing guidelines (10-25 years) for a charge and conviction of murder. The sentencing minutes of April 13, 1999, at which time (trial) prosecutor John Skrzynski represented Gorcyca's office (and administration), left little room or suggestion for a lesser sentence than the standard guideline issue, and septuagenarian Kevorkian was incarcerated.

*C. Summing Up on the Chief Prosecuting Attorneys*¹⁰⁷

Chief prosecutors have a role in “filtering” the cases that are prosecuted or not, but as this discussion has demonstrated, chiefs also make use of a variety of filters with them, views of their own that may have an impact upon whether or not they choose to prosecute a case, and if so, how. In this series of cases, the chiefs under consideration were all men, the four prominently featured chiefs were all white, with an “old guard” and a “young Turks” grouping (albeit 2-2, in this focused comparison, an intriguing and unanticipated finding). I would propose a question exists as to how a more diverse group, in terms of race or gender, might have come into play.

While my question might appear to stand alone, I note that Robinson (2005: 181) observed (generally) that “minorities and women are under-represented in the American courtroom workgroup [made up of prosecutors, defense attorneys and

¹⁰⁷ I am taking literary license with the phrase “summing up” here – this phrasing is an homage to the concluding portion of a trial before sending a jury to deliberate on its verdict; the jury charge by the judge to the jury comes after the summations or closing arguments of the lawyers to the jury.

judges [and as] Graham demonstrate[d] how African Americans are underrepresented as attorneys and judges.” (additional citations omitted). In this regard, I refer to an interview I had in 1994 with John Sanford, of the Michigan Commission on Death and Dying, who asked me whether I wanted to interview him because he was the sole black or one of a small number of disabled; this question elicited the response from me that whichever would get me the interview was the answer. During our interview, Sanford, who is also a lawyer, raised many unstated issues (particularly as to race, as the sole African American on the MCDD) that he thought were not receiving attention in the legislative task force process, a process in which both O’Hair and Thompson were vocal and active members. While the MCDD proceedings were generally beyond the scope of this dissertation, Sanford invited a question that, while not directed at the Chiefs expressly, included them in its ambit.

In terms of gender, I also have an unanswered question. Observations of the differences in Judge Cooper’s 1996 court and Judge Breck’s 1996 court seemed (to me) to implicitly suggest that members of the media and both sides thought they might try to overrun a female judge, but culturally accepted that they could not ride roughshod over a male judge, as I shall discuss in Part II of this chapter. I would observe, however, at this time, that both Cooper and Breck were proper in all respects in regard to their judicial demeanour in court. Indeed, the perception seemed to be of those lawyers and media members seeking to test the limits of the members of the bench. That said, Cooper, who was the also the judge in the 1999 Kevorkian trial, brooked no interference from either side or from the media. While I realize this question will never be answered as to the Chief Prosecuting Attorneys, and may only be hypothesized, that it was implicitly raised was its own small finding.

Further, the old guard chiefs, both O’Hair on the pro-choice and Thompson the pro-life sides, used the media skillfully, if not always successfully. The rising young chiefs in some measure had the media forced upon them (in terms of prosecuting the Kevorkian cases), and encountered steep (though I would, suggest, ultimately successful) learning curves with the media machines.

I conclude that the weight of experience and age had an impact both upon the views of the old guard and on those of the young Turk prosecutors. O’Hair’s family circumstance clearly had an impact upon his articulated views, as did Thompson’s, where he talked about arguing his case vigorously with his sister, who took an opposing stance. I suggest that this was in part because they had dealt with aging parents, and were aging themselves (though they all had traditional families and Thompson was in his second marriage, with two young children).

It is necessary for me to acknowledge that while I was conducting the field work, I was a bit shocked that O’Hair and Thompson allowed their personal views and experiences to “bleed” so conspicuously into their prosecutorial policies, whilst neither Voet nor Gorcyca had done so. To me at the time, this reticence was a mark of the professionalism of Voet and Gorcyca, in a surprising contrast to their senior peers.

What if, however, the *real* finding was that O’Hair and Thompson simply had the confidence of their additional years of age and experience, and felt comfortable and confident in being open about these matters, notwithstanding the fact that prosecutors are supposed to be disinterested officers of the court (cf. Robinson 2005: 183)? By this question, I shall not suggest that Voet or Gorcyca was unprofessional (if anything, quite the opposite was my opinion), but that O’Hair and Thompson had a different style of presentation, perhaps borne of an accumulation of wisdom or

confidence, or perhaps because they did not have to prove themselves as competent chiefs. Although Thompson lost his office to Gorcyca, he went on to an equally-respected position as a law school Dean (and thus to a national presence). This said, all of these professionals were at the beginning decision-making stage of the process of trying Dr. Death, and the relationship was evidently trying to them as well,¹⁰⁸ although the challenges may have presented differently. In Part II of this chapter, I shall continue comparing factors and actors with another grouping of elite participants – the judges in the Kevorkian cases.

Part II. Contemporaneous Recollections and Sentencing Philosophies of the Kevorkian Trial Judges

Whereas in the chapters to follow, I shall examine aspects of the Kevorkian 1999 trial (specifically, jurors, family members, and the role of the media) and juxtapose them with cases from the mid-1990s, in this chapter, my focus has been upon the roles of those initiating prosecutions (the chiefs). I shall now look at those managing the trials (the judges). In the Part I, I examined the prosecutors and their emerging Kevorkian policies, and in this part I shall consider three of the four trial judges and their contemporaneous reflections on their “imminently fresh.” I interviewed the judges within days in two cases, two months in the third, after their Kevorkian trials.¹⁰⁹ The 2008 Broadway production of *Thurgood*, for which Laurence Fishburne received the Outstanding Solo Performance award for his portrayal of the first African-American Supreme Court Justice (Thurgood Marshall) highlighted the latter for me, and underscored anew that my 1996 and 1997 conversational interviews

¹⁰⁸ In Part II of this chapter, I shall discuss the issue of judicial experience of the stress of trying the Kevorkian cases, and I acknowledge that I was fortunate to have this opportunity to gather such deeply personal information from professionals who were, in my opinion, consummately professional in the courtroom.

¹⁰⁹ The reason that the fourth, which was first in time, is not included is because I was unable to attend the 1994 trial, due to obligations in London, and I conducted no fieldwork pertaining to that trial.

with these Kevorkian trial judges provided social, legal and dramaturgical insights to this series of trials.

If the chief prosecuting attorneys presented an opportunity to examine prosecutorial discretion, the judges presented an opportunity to examine demeanour. The difference in role between the judges and the chief prosecuting attorneys is that judges must manage not only the trials, but also their courtrooms, as a public space in the social world of the law (Rock 1993, p.153). The judge is the “leader of the courtroom workgroup [and] has the goal of ensuring that proper legal procedures are followed as a case is processed through the courts [; t]he roles of judges include adjudicator (passing sentence), negotiator (referee between parties), and administrator (keeping up the docket)” (Robinson 2005, p.185). The work has attendant stress, as I would argue was evident in a quote from an interview that I conducted with Circuit Judge Jessica Cooper, who presided over both a 1996 trial of Kevorkian to acquittal (two months before this interview was done) and the 1999 trial that resulted in Kevorkian’s conviction and incarceration.¹¹⁰

... it was very aggravating [but] you can’t ever let it show – being a judge it doesn’t matter what you think, it matters how you conduct that courtroom, it matters what (sic) justice was being done here. It doesn’t matter if I was irritated with attorneys, it doesn’t matter if my nose was out of joint, it doesn’t matter how I feel about the subject – what matters is I was able to conduct a trial in an utterly fair fashion. Did I like it? NO! It was deeply stressful! (Oakland County Circuit Judge Jessica Cooper, May 17, 1996).

Judge Cooper here gave voice to a commonly experienced (but seldom expressed) challenge that they must meet. As neutral and impartial arbiters, judges have to hide their true feelings, even (or especially) if they at some point act upon them. As I shall later argue Judge Cooper was to so act when sentencing Kevorkian

¹¹⁰ Judge Cooper, by her staff, declined to grant interviews on a pending matter likely to be proceeding to rise through the appellate courts. This is consistent with the requirement for transparent judges in the United States, as described by Vicki C. Jackson, “U.S. judges are ethically required to avoid discussion of pending cases with outsiders, an isolation ...” 119 *Harvard Law Review* 109 at 118 (2005).

in 1999 (Ferguson 2007: 35). The judges were required to present – and they presented -- the public face of a neutral and impartial arbiter at trial, sitting behind a raised platform, costumed in a black robe (or in more informal chambers meetings, a suit or professional attire; in either event, differently and with status identifying clothing, compare, Katz 1999: 6, regarding different treatment based upon medical garb/surgical attire), with a stenographer, bailiff, court officers, and an entire courtroom to manage and control procedurally during the trial, while making substantive and procedural decisions of law along the way up until the time came for the jury to withdraw and to deliberate and return a verdict (Rock 1993).

During the period of study, I had an opportunity to meet with three judges who presided over six of the Kevorkian trials (two of the trials were for two different patients each, and one in Ionia was a mistrial). These were instructive as to their expectations and their aspirations, as well as to their credentials. Particularly, they were a glimpse of the two worlds of the judges – their formal and their informal worlds (Rock 1992, p. 183).

Because there were a number of cases, and a number of times that similar parties (or the same parties as to the defendant) and judges were involved, I shall offer a brief introduction to the judges involved, to allow for me to distinguish between them. Jack Kevorkian was the defendant tried in each case.¹¹¹

A. Who and Where the Kevorkian Judges Were

Oakland Circuit Court Judge Jessica Cooper presided over the first of the “double” trials in March 1996, in which Kevorkian was acquitted after a trial that

¹¹¹ The first trial in 1996 was for the assisted suicides of Merian Frederick and Dr. Ali Khalili (though the times and places of the deaths were at different times), which were bundled together. The second trial in 1996 was for the 1991 Wantz/Miller side-by-side deaths (through different methods) prior to the assisted suicide enactments.

went on for approximately two weeks. Additionally, she presided over the final and four day long trial, the *60 Minutes* euthanasia murder prosecution of Kevorkian when he was convicted of homicide and drug delivery charges in 1999.¹¹² Cooper, the only one of the judges to be a woman, was a petite¹¹³ formerly married woman who self-identified as Jewish.¹¹⁴

Judge Cooper was a youthful, 50 years old, had been a judge for 17 years. Prior to ascending the bench, she had gone to a local college and law school, then embarked on a legal career first as a civil rights lawyer and appellate defender. She described her ascent to the bench as virtually on a fluke, having been asked to run against a seated judge., .In a visual context, Judge Cooper appeared to be a woman with a judicial robe trimmed with a white Peter Pan collar, surrounded by a sea of men in suits. The lawyers, who were prominent and powerful (and in Fieger's case in 1996, loud) were silenced by her with what I believe was the most powerful technique I have ever observed a trial judge deploy. The louder they got, the quieter she got. The phrase "gentlemen, gentlemen" was a quiet code to precede the possibility of her walking off the bench and leaving them to be loud in a silent space. The underlying message was that they were not behaving in compliance of the custom and the etiquette of their profession (compare Rock: 1993, p. 153).

In print, one does not experience the full impact of the visual experience,,something with which I found myself wrestling to express. Shortly after the viva, I found the expression in the experience of the 2009 Broadway production of

¹¹² The conviction and sentence were upheld on appeal, as I shall discuss in greater detail in the course of the following field chapters.

¹¹³ I am grateful to Bob McGreevy, Esq. for questioning me as to the importance of this, and for making me explain my thoughts in detail, which led me to articulating that which had been an intuitive, albeit obvious, leap..

¹¹⁴ While I conclude that Judge Cooper's religious affiliation was not a factor in any of her rulings in 1996 and 1999, nor in her 1999 sentencing, I note that one of the members of the 1999 jury pool, identified his "Jewish faith" as a possible impediment in sitting on the Kevorkian jury, as I shall discuss in the next chapter.

Friedrich Schiller's 1800 play, *Mary Stuart*. The accompanying *Playbill* had an article by Ruth Leon, entitled 'Queen to Queen,' in which costume designer Anthony Ward engaged in the "risky idea to have the two queens in period dress while the men who surround them wear business suits. This sets them off as iconic, in a different world ... isolated by a fate nobody else shares." (Leon/Playbill 2009:,. p.10). So too was Judge Cooper isolated – the only one of the Kevorkian trial judges to be a petite woman in what was an otherwise gendered legal workgroup in the Kevorkian cases (Robinson 2005).

My interview of Judge Cooper was on May 17, 1996 took place approximately two months after her trial was concluded, and a few days after the acquittal of Kevorkian by a jury in the courtroom of Judge Cooper's brother judge, Judge David Breck, whom I also interviewed during that trip. Judge Cooper's staff advised me that she could not give any interviews after the 1999 trial, citing that the matter would travel up on appeal. However, her sentencing minutes and related trial and bail minutes were available and they were also instructive.

Judge David Breck, a gentlemanly¹¹⁵ judge of many years, presided over the second double trial in 1996, which lasted a substantial 6 weeks. He granted me an interview the day after the acquittal verdict, on May 15, 1996. He was a self-described "liberal," whose wife had died of cancer at the Palliative Care Unit of Harper Hospital. Breck's family experiences were profound and also professional. Breck was a founding member of Cranbrook Hospice, and stated that one of his goals was "to make hospice big in this country." Judge Breck had a daughter who was a nurse in Alabama, and another daughter had Master's degree in bioethics and was married to someone who was pursuing a Ph.D. in bioethics.

¹¹⁵ My use of this phrase relates to Judge Cooper's comments that the law and judging were gracious and "gentlemanly" professions.

Judge Charles Miel of tiny Ionia County (population 5,000) had been a judge for approximately 6 months prior to the trial of Kevorkian in June 1997, and he was interviewed within 48 hours of the mistrial of June 12, 1997. He was a young judge in both senses of the word, recently seated on the bench and approximately 35/36 years of age at the time of interview. Prior to being elected on a non-partisan ticket to the Circuit Court of Ionia, he had worked as an assistant prosecutor and for legal aid, as well as engaged in general practice with his father.

Each was read a lengthy consent colloquy I had prepared consistent with, and approved by and in accordance with, an Institutional Review Board (IRB) requirement by the University of Minnesota, where I was on a fellowship during that year (and consistent with London School of Economics human subject research ethics later developed and implemented). Each interview was instructive about the perceptions of the judge as to the trial before him or her.

In reviewing the tapes and notes, certain thematic patterns emerged, areas of interest or concern or comment or surprise,. These themes might not have seemed as prominent in any one interview, but in a group of interviews, had a cumulative effect (i.e., presented an indicative finding, which was itself a finding). The judges had, in a sense, learned from watching the experiences of one another over time. In a *sua sponte* observation, Judge Breck explicitly commented on lessons he had learned from watching portions of the Kevorkian trial Judge Cooper conducted approximately two months prior to his, and as to how to handle the media. While it is likely the two of them discussed their respective trials at length, and as colleagues, I did not ask this specific question, which I now view as a slight methodological limitation imposed by my own concern for being respectful of the bench and the jurists occupying it. The judicial learning (and perhaps mentoring) curve also provided a certain stream of

patterns regarding how to try these notorious cases (as exemplified by Judge Breck's media management after Judge Cooper's trial).¹¹⁶ In fact, as I alluded to earlier, Judge Cooper's 1999 Kevorkian trial was conducted in a far more tightly controlled way, which I believe demonstrated lessons she herself learned from her 1996 Kevorkian trial.

The three prime areas I shall discuss are the judges' reported perceptions of the media and the judges' commentary pertaining to the reporting of the Kevorkian trials, the judges' sentencing philosophies (and changes in that regard in the case of Judge Cooper), and their perceptions of their respective juries. The last of these which I shall also discuss, from the juror perspective, is in the next chapter.

B. Judicial Reporting and Comments on the Media

First, was the impact of the media presence, which Judge Miel likened to "the Ionia Free Fair, with 100,000 people coming," to the county seat of Ionia, with its tiny two judge courthouse, in front of which the media members were "camped out" under tents in the sun on the courthouse lawn. Judge Cooper was likewise confronted by television reporters, still photographers and press writers from the print news, along with their equipment, their cameras and camera men (as distinguished from still photographers). Her description of this was not unlike Rock's (1998, pp.81-82)

¹¹⁶ During Cooper's 1996 trial, members of the print and television media lined the walls of the court from the elevator to the closet at the back of the hall – in other words, the *entire* length of the hall; photographers and reporters went in and out of the courtroom at will, and with a certain collegial amount of interaction, alternating with efforts to get party or witness statements. In contrast and in stated response, Breck issued a Media Order banning media presence or activity outside the courtroom, and providing for a media room (which Judge Breck told me was the old closet at the end of the hall, cleaned out for the purpose of use of media equipment and personalities), and a posted order that anyone arriving after proceedings began had to observe from the media room and anyone leaving the proceedings would not be allowed back in. There were enforced strictly, and more than once I sat in the media room to watch, while on one occasion, I was allowed back in because Kevorkian himself was entering, and he graciously embraced several people outside the door and told the court officers "we are a family, we all go in together." Kevorkian was one of the few allowed absolute ingress and egress, along with paralegals and lawyers on the case (i.e., not lawyers who were observing as academics or lobbyists or simply court watching).

description of what confronted the bereaved family of homicide victims: “[t]hrust, as many of them were, into the public space of the courthouse ... with voyeurs, the tourist, the casual spectator, the press and the defendant’s ‘supporters’ and family.” This observation held, although Judge Cooper was seated in a separate private space in the public court).

While her judicial role placed Judge Cooper in the court, it did not necessarily prepare her for the onslaught of media who might arguably be described as professional voyeurs. During Cooper’s 1996 trial, there was an entire wall outside her large suburban courtroom constantly and visibly set up by and with media. It is almost impossible to describe the visceral impact that I (a non witness or party, and a mere observer) first felt (other than to say it felt like an anvil, as I lost my breath and nearly my footing), rounding the corner from the elevator banks and phone booths to see the entire hallway corridor banked with reporters, television cameras, photographers and their equipment, running the length of not only Judge Cooper’s courtroom, but extending to the hall corners on both sides; it was a literal gauntlet (and occasionally on *both* sides of the hall, with shots being set up for photographers). In addition to this, there were media trucks outside the Oakland County Courthouse, with reporters and photographers constantly coming into and out of her courtroom.¹¹⁷ This occurred so constantly during her 1996 Kevorkian trial that when Judge Breck started his own Kevorkian trial less than one month later, in April 1996, he posted an order on his door banning entry once proceedings started, and relegated the press to a “media room” at the end of a corridor, permitting only a set number of television and

¹¹⁷ While it is reasonable to conclude that Judge Cooper was at a loss as to how to deal with this in 1996, Judge Breck handled the media quite differently in the months and trial that followed, and Judge Cooper herself learned the difficult lessons of this experience as shown by the 1999 trial, in which she allowed only three camera and videos in the courtroom, along with a similar number of reporters, and no press milling about in the exterior hallway.

press personnel in on any given day. This was, he told me, a lesson he had learned by coming into Judge Cooper's court during the earlier 1996 Kevorkian trial.¹¹⁸

All three judges appeared to relish the unusual opportunity to comment upon the press. They were able to reverse roles with the reporters who had been reporting about them and their Kevorkian trials. At the time of the interviews, the three judges were fresh from their experiences within two days (as with Judges Breck and Miel) or two months (as with Judge Cooper, who was able to engage in a comparative commentary as to her trial and Judge Breck's). Judge Cooper, the first of the three judges in the Kevorkian trials in time, said (Cooper Interview: May 17, 1996):

... two high profile sides [were] speaking, misleading, I knew there would be so much press that... I wanted to make sure I would be gracious, [that the court would be run with] formal order. If you have to raise your voice, you lost, so I had to take breaks. That's how I controlled the courtroom. I couldn't talk to the media and had a gag order on both sides. I can't talk to the media or give interviews about pending matters. (Cooper Interview: May 17, 2006).

Judge Breck's Kevorkian trial began in April 1996, shortly after the March 1996 verdict in Judge Cooper's first Kevorkian trial. He had learned a great deal from his colleague's experiences during which he noted that "they [the media even] followed Kevorkian to the bathrooms during the Cooper trial" (Breck Interview: May 15, 1996). Indeed, the gentlemanly judge found that that he was "forced to take extraordinary measures because of [the media]. I used to think having the media would have an impact on witnesses we haven't seen [and] we had to keep the jurors away and have deputies escort them to cars... [and get] a media room, I tried to find a room [myself for the press]" (Breck Interview: May 15, 1996).

¹¹⁸ Ironically, as I discussed more fully earlier, I was a beneficiary of the media room, as I would go to watch the proceedings there if I had to leave the courtroom and would hence be unable to return to my seat before the next break in proceedings, of which there were many in the six week trial, almost hourly to actual trial time.

In contrast, Judge Miel found the “media fine, nothing objectionable to me at all. I met with them several times... there was nothing offensive about the media at all. We gave them press space [outside the court building] and they [the press outlets] split the cost of the tent” (Miel Interview: June 13, 1996). One might be skeptical about how long the good behaviour of the media would have lasted in a long trial – the Ionia trial. Thjs, we shall nevr know, since the case was literally over before it began, as soon as the prosecutors obtained from Judge Miel a ruling that there had been a mistrial (based upon misconduct during defense counsel’s opening, and before the first witness was ever sworn).

C. Kevorkian Judges and Kevorkian Sentence

Two of the three judges interviewed went on the record to state that they would not have incarcerated Jack Kevorkian, whether for assisted suicide or euthanasia murder. The third judge whom I interviewed in the mid-1990s alluded to the likelihood of continued liberty had there not been an acquittal. Noteworthy is that the judges were in different jurisdictions in Michigan. They were jurists in locales suburban and rural, with constituencies on opposite ends of the economics spectrum.

A clear change of circumstance took place by the end of the decade. Judge Cooper’s presided over a double assisted suicide trial in 1996, and over a euthanasia murder case in 1999, but this was not the central reason for difference in sentencing approach, nor was the 1999 jury verdict of guilt *per se*. Support for this can be evidenced by the hearing regarding bail pending sentence; Cooper allowed Kevorkian liberty on recognizance *after* the jury returned a guilty verdict. Furthermore, and on the record, she literally and explicitly begged Kevorkian not to engage in further assistance of death while he awaited sentencing.

The only explanation for the change of circumstances was occasioned by comments by Kevorkian while he was at liberty during the pre-sentence period. He told probation authorities during his interview that he could not “be stopped,” after which his lawyer (Morgenroth) arrived and ended the interview. Kevorkian’s flagrantly contumacious words to probation authorities during his presentencing statement, rather than his actual conduct of ending Tom Youk’s life, were thus the likely prompt for the incarceratory sentence. This argument holds although the sentence imposed in 1999 by Judge Cooper followed state sentencing guidelines. I draw this conclusion based in part upon my interviews of the jurists in the mid-1990s, which I shall expand upon. I further support my conclusion with references to transcripts of Kevorkian’s post-trial bail hearing, when Judge Cooper permitted the liberty that she revoked in the subsequent incarceratory sentencing proceeding.

As I shall now argue, there was also a pattern in Kevorkian’s reactions to judicial proceedings over time and in the public space of the court. For example, at a press conference on August 17, 1993, following the Wayne County (Detroit) indictment and arraignment regarding the August 4, 1993 suicide of Thomas Hyde, Kevorkian announced, “I will continue helping suffering patients no matter what It isn’t Kevorkian on trial. It isn’t assisted suicide on trial. You know what’s on trial? It’s your civilization and your society.” This language all but parroted that of the Oscar winning screenplay written by Abby Mann for the 1961 classic film, *Judgment at Nuremberg* and Kevorkian delivered the lines with equally dramatic effect.

Three years later, Judge Cooper made the following prescient comment in my 1996 interview, some three years before her second Kevorkian trial):

Just as you have zealots on one side, you have zealots on the other. As a judge, I can’t comment, take a position, but it’s [assisted suicide and euthanasia] highly controversial and they’re zealots. *I think [Kevorkian is] a zealot, in every social movement you have zealots, people in your face, nobody*

likes people in your face and that hurt Dr. Kevorkian ...[but] then along came change in social relationships. (Cooper Interview: May 17, 1996)(emphasis added).

Judge Breck, on May 15, 1996 (48 hours before my interview with Judge Cooper) also commented on zealotry, but extended it to sentencing issues. When I asked him what he thought of Kevorkian, he made seemingly contradictory comments in rapid succession – that Kevorkian was “tough to handle” and that it:

would have been tough to fashion a sentence, I’d give a year of probation, suspended, no penalty whatsoever . . . but his disdain for the courts, made me wonder a little bit if I’d follow through (Breck Interview: May 15, 1996).

Here, the charges were those of common law homicide (or open murder)¹¹⁹ related to Kevorkian’s participation in the 1991 deaths of two women, and the sentence Judge Breck contemplated for the “tough to handle” Kevorkian was more in accord with misdemeanour shoplifting than open murder. Thus, I conclude that Judge Breck would have been basing his potential sentencing structure for Kevorkian upon how he viewed the right to die debate or assisted suicide movement, rather than upon the defendant. This view of Kevorkian regarded the issue, not the charges before him or the defendant’s conduct, and certainly not any sentencing guidelines.¹²⁰ If anything, this underscores that while Judge Cooper sentenced Kevorkian within the guidelines in 1999, she implicitly indicated a probationary sentence in the post-verdict bail hearing in March. Many Kevorkian insiders, including Kevorkian’s jury consultant and friend Ruth Holmes, were shocked that an incarceratory sentence was imposed.

An example of the judicial reaction to this defendant’s conduct before Judge Breck and during the trial – in fact, during Kevorkian’s testimony, during the evening

¹¹⁹ The common law murder cases involving the Wantz/Miller deaths predated the first physician-assisted suicide statute enacted in Michigan, PA 270 in 1993 (also known as HB 4501), and hence were brought under a different theory of the case.

¹²⁰ In fact, I shall respectfully expand upon this, to the extent of saying that stronger sentence would ordinarily be imposed where there was a defendant who continued to engage in the conduct for which he was on trial and indeed *during* trial.

between direct and cross-examination -- is that Kevorkian assisted in the suicide of Canadian assisted suicide advocate Austin Bastable, a 53 year old man who suffered from multiple sclerosis. The courtroom was abuzz with talk of the events, and their timing¹²¹ during trial and testimony. Breck was philosophical, "I was concerned about the Bastable timing ... shows also absolute disregard for the law, zealot, no doubt" (Breck Interview: May 15, 1996).

I have two comments in this regard. First, the judge might well have revoked bail at liberty in light of the defendant's demonstration that he was engaging in the same or similar conduct for which he was on trial as a violation of the conditions of bail. This was something akin to Judge Cooper's reaction to Kevorkian in April 1999. Also, the question arises that if the conduct was against the law, if a defendant engaged in sort of flouting the law while on bail status during his own trial shows show a colorable --indeed explicit threat to society.¹²² This was notwithstanding a judge who was sympathetic to the issue for which the defendant is on trial.

Second, as a purely judicial matter, Kevorkian's assistance in the death of Bastable and its timing -- literally, during the night between days of testimony on the stand -- were literally contemptuous. Kevorkian's timing was evocative of the cultural disdain of acting like a thief in the night, and on its face disrespectful to the trial, the court and to the culture of the criminal justice system. Nevertheless and somewhat surprisingly, Judge Miel, one year and many assisted suicides later, also stated that he did not know if he would have imposed a jail sentence on Kevorkian, in

¹²¹ The timing of events, by Kevorkian in response to legislation, by the legislature in response to Kevorkian, and by the judiciary and Kevorkian in response to each other, is a source of fascination to me, and while the thesis is microscopic in focus upon interviewees, the kaleidoscopic nature of three dimensional time is one that I would like to explore further at a later date. While "timing is everything" is beyond the scope of this dissertation, the list was long on both sides of the ocean as to whose conduct precipitated whose conduct and when, and I shall expand that into a writing at a later date.

¹²² One factor in receiving bail is that the defendant should not be deemed to be a threat to society. By arguing that this might be a "colorable" threat, I am engaging in a cultural legal politeness, since actual conduct goes beyond a potential threat to society and is an actualized occurrence.

light of “no prior criminal convictions” on Kevorkian’s record (Miel Interview: June 13, 1997).

Two years later, on March 25, 1999, when the jury had returned from its deliberations of the Kevorkian/Youk euthanasia with a verdict of guilty of murder and drug delivery charges, some 14 court officers were present in the courtroom. This which struck me as a visually clear first indication of a guilty verdict, as it more than quadrupled the officer presence in the court from the rest of the proceedings, with police presence at every door, both to public and private areas.

Notwithstanding the guilty verdict, Judge Cooper engaged Kevorkian in the following extraordinary colloquy during the bail hearing pertaining to liberty between conviction and sentencing:

THE COURT: Dr. Kevorkian? I understand we have a difference of opinion on this particular subject [of assisted suicide], the law and you. Right?

DR. KEVORKIAN: Yes.

THE COURT: You are pending a sentence by this Court. Can I have your word that there will be no activity during this period of today’s date and your sentence?

DR. KEVORKIAN: No illegal activity – no unlawful activity. Yes.

THE COURT: Unlawful in my definition –

DR. KEVORKIAN: Yes.

THE COURT: -- not necessarily yours, sir.

DR. KEVORKIAN: Well, I mean unlawful in general.

THE COURT: *No assisted suicide. No injection* (sic).¹²³ *No anything.*

DR. KEVORKIAN: No. No. I kept my word up until now and I’ll keep it.

THE COURT: And you understand the consequences would be severe should there be anything – if you break your bond to me?

¹²³ I believe that the court stenographer made an error in this line, the actual quote I heard and noted was “No assisted suicide, no IV push, no anything.” This quote actually became a culturally noted one in the legal community in which I was involved and was frequently compared to other homicides.

DR. KEVORKIAN: Yes.

THE COURT: And that is your word, sir?

DR. KEVORKIAN: My word.¹²⁴

THE COURT: I'll take your word, sir. (Kevorkian Transcript, March 25, 1999, Volume IV pp. 11-12)(emphasis added).

However, Kevorkian did *not* promise not to publicly declare his aims and plans for the future. Indeed, Kevorkian vigorously stated his agenda again in 1999 in his pre-sentencing interview with the Probation Department, although he was interrupted by the arrival of his counsel (Mayer Morgenroth) who had him stop speaking. The results were devastating, as can be noted by the sentencing hearing, where a very stern Judge Cooper had a very different tone than at the bail hearing post-conviction. While a sentence, even within the appropriate guidelines, may not be an easy calculation to make, Cooper showed that she would not “be overcome by the torment revealed in a courtroom ... and yet ... convey some knowledge of that torment to embody communal satisfaction over the sentence delivered” (Ferguson 2007, p.38). That is to say that she would acknowledge the controversy of both the conviction and the defendant, and formulate her own sentence considering the relevant factors. Her words spoke for themselves:

THE COURT: This is a court of law, and you said that you invited yourself here to take a final stand, but this (1999) trial was not an opportunity for a referendum. The law prohibiting euthanasia was specifically reviewed and clarified by the Michigan Supreme Court several years ago in a decision involving your very own cases, sir. ... (Kevorkian Sentencing, April 13, 1999: 35).

But we are not talking about assisted suicide here. When you purposefully inject another human being with what you know to be a lethal dosage of poison, that sir, is murder and the jury so found.

¹²⁴ As I shall argue further in Part II of Chapter 6, Kevorkian considered his word or his vow to be a matter of honor, to be kept and upheld in the absolute. I would argue that this went far beyond the cultural construction of a gentleman's word, and that anyone familiar with Kevorkian would be aware of such, as with his absolutism about telling the truth, even to his own detriment.

No one is unmindful of the controversy and emotion that exists over end of life issues and pain control. And I assume that the debate will continue in a calm and reasoned forum long after this trial and your activities have faded from public memory. But this trial is not about that controversy. The trial is about you, sir. It was about you and the legal system, and you have ignored and challenged the Legislature and the Supreme Court.

And moreover, you've defied your own profession – the medical profession. You stood before this jury and spoke of your duty as a physician. You repeatedly speak of treating patients to relieve their pain and their suffering, but you don't have a license to practice medicine. The State of Michigan told you eight years ago that you may not practice medicine. You may not treat patients.¹²⁵ You may not possess, let alone administer or inject drugs into another human being. (Kevorkian Sentencing, April 13, 1999: 35-36).

There are several valid considerations in sentencing, and one of them is rehabilitation. But based upon the fact that you've publicly and repeatedly announced your intentions to disregard the laws of this state, I question whether you will ever cease and desist. The fact that your attorney in the pre-sentence investigation says that you're out of business from this point forward doesn't negate your past statements.

Now another consideration, and perhaps a stronger factor in sentencing, is deterrence. This trial was not about the political or moral correctness of euthanasia, it was all about you, sir. It was about lawlessness. It was about disrespect for a society that exists and flourishes because of the strength of its legal system. No one, sir, is above the law – no one.

So let's talk just a little bit more about you specifically. You were on bond to another judge when you committed this offense. You were not licensed to practice medicine when you committed this offense, and you haven't been licensed for eight years. And you have the audacity to go on national television,¹²⁶ show the world what you did, and dared the legal system to stop you. Well, sir, consider yourself stopped. (Kevorkian Sentencing, April 13, 1999: 37-38).

In this pronouncement of sentence proceeding, Judge Cooper marshaled the evidence of a decade of Kevorkian's conduct in Michigan. This was evidenced by the reference to his mid-1990s challenge to the Supreme Court, as well his defiance and escalation of conduct after legislative enactments. Given her prior rulings about Kevorkian's liberty, I conclude that she was also sentencing him for his contempt and

¹²⁵ While Kevorkian raised awareness of, and was widely considered to be the poster child for, physician-assisted suicide, he in fact was no longer a licensed doctor as of 1991.

¹²⁶ I shall discuss this at length in Chapter 6.

continued statements of future intent. Albeit that her pronouncement was within the sentencing guidelines, there was significant speculation that she would grant a sentence of probation. This was particularly so since she had allowed Kevorkian to be at liberty after the jury convicted him, and pleaded with him to cease his practice. Cooper, at sentencing, became one with the class of judges that Pakes (2004, p. 97) identified when he commented that “the rule of law dictates that judges be independent.” This was even more dramatic given that Judge Cooper’s prior statements and actions during the 1990s, as well as the 1999 trial, had indicated that she had leaned against incarcerating Kevorkian,

Trial prosecutor John Skrzynski was then more persuasive in seeking bail denial:

Dr. Kevorkian has at least a 10-year history of open defiance of the law, of a guarantee to break the law on several occasions.¹²⁷ He broke the law when the initial ban against assisted suicide was passed, he challenged and broke the law when the latest assisted suicide ban was passed. He was on bond to the Court in Royal Oak when he killed Thomas Youk. And he said in his pre-sentence report to the probation officer that he intended to go about relieving pain and suffering no matter what it (*sic*) results on him. And then when his [new] lawyer arrived and his lawyer had a conference with the probation officer with Dr. Kevorkian, he suddenly amended his statement to say oh, what I meant was that I’ll be glad to stump for a change in the law.

Dr. Kevorkian has been packaged and marketed by eloquent and clever lawyers for the last ten years, but when he gets a chance to say what he really means, what he really means is that he intends to break the law at every chance he gets. He’s demonstrated that before, he’s said it, and he said it in this case. The man is a danger to other people when the men (*sic*) does not respect nor obey the law. (Kevorkian Sentencing, April 13, 1999: 42-43).

This time, Judge Cooper denied bail pending Kevorkian’s (unsuccessful) appeal, and Kevorkian, began his period of incarceration, pursuant to the indeterminate sentence of 10-25 years for murder, concurrent with 7 years for drug delivery.

¹²⁷ This actually understated the case, as Kevorkian has publicly acknowledged engaging in over 130 assisted suicides.

Conclusion

In this chapter, I had an opportunity to explore prosecutorial discretion and judicial demeanour. I did so using interviews with the perspectives of the chief prosecuting attorneys and post-trial interviews with the judges reflecting on various aspects of these (usually unexplored) factors in the criminal justice system. Kevorkian's demeanour was largely outcome determinative by the time that Chief Prosecuting Attorney Gorcyca prosecuted him in 1998.. Certainly, this was so by the time Cooper sentenced him in 1999, in what appeared to be more a state of pique at his contumacious pre-sentencing comments that he "could not be stopped," than based upon the verdict, which initially did not lead to a revocation of liberty. Thus, Kevorkian's "bad" demeanour in a criminal justice interview by probation officers related to, but not actually in, the courtroom appeared to have had the greatest impact upon Judge Cooper's sentencing application (Goffman 1967, pp.78-79). I conclude from this that the perceived (and sometimes precarious) legitimacy of the law enforcement officials in the courtroom work group had as much a role as the defendant's own (Goffman 1967, p.58, Werthman and Pillavin 1967, pp.74-75). While some jurists may feel bound by sentencing guidelines, Judge Cooper was lauded by line prosecutor John Szkrzynski for her "courage," in imposing the 1999 prison sentence. This sharp departure from the original perception that she would not impose a sentence other than probation may have been courageous, but I conclude that it was a reassertion of the state's legitimate authority, by application of procedural guidelines which Kevorkian had seemingly escaped.

Prosecutors are supposed to be disinterested representatives of the state, furthering justice (and not simply a "win," Robinson: 2005), yet the old guard

prosecutions may originally have been inspired by debate as much as by Kevorkian's conduct. Thus, in initiating charges against Kevorkian, the question arose whether, for example, the issue was a general public health issue, as in the 1973 *Roe v. Wade* Supreme Court abortion case. Certainly, Judge Cooper was correct in saying that there were zealots on both sides of the Kevorkian courtroom aisle, long before matters got into the courtroom.

That said, electoral politics proved to be a neutralizing factor in providing for a "disinterested prosecutor" who would, at least in theory, engage in prosecutorial discretion as a reflection of the Oakland County constituency. This argument is self-proving, given Gorcyca's campaign promises, which he kept, insofar as dismissing pending Kevorkian cases once he was ousted Thompson. Ironically, some of those favorable, or at least purportedly neutral, to the debate were involved in Kevorkian's ultimate downfall,. This is true of Gorcyca, who was opposed to the litigation, yet drawn inexorably into it. Equally rich in irony is that Richard Thompson finally saw a conviction of Kevorkian for euthanasia, but only after he lost his office to Gorcyca. To top it off, a central plank of the Gorcyca campaign had been to cease Kevorkian prosecutions and to thus save taxpayer expenditures, which had become a mid-1990s economic liability and losing proposition.

In this chapter, I have also questioned some of the factors that might have had an influence on the court proceedings. Race and gender could not be explored in terms of the white male chiefs (a finding in and of itself). However, questions arose as to whether these were matters that had an impact upon those appearing in, or reporting on, trial courts seated by a male or female jurist.. As discussed, there were times in 1996 that Judge Jessica Cooper was entreating the "gentlemen" in court to behave properly. The use of the word "gentlemen" was a clear rebuke from a petite,

ladylike and particularly “well-demeaned” female jurist with a white Peter Pan collar on her robe (Goffman 1967, p.77). My perception and conclusion was that her brother jurist, Judge Breck never seemed to have to engage in pleas for manners. By 1999, Judge Cooper seemed to underscore her judicial demeanour by becoming solely the “judge” in tight control of those who appeared in her court (Goffman 1959, p. 211) demanding deference and punishing antics (Goffman 1967, pp.78, 93).

I am reluctant to say that gender affected the conduct of the judges (though I believe this an impact on proceedings, in terms of style, although not substance). Instead, I would conclude that Judge Cooper showed the weight of her prior Kevorkian 1996 trial experience by 1999, and was stricter in court because of it. A mirror image finding was made in an essay in 1996 by Elaine Martin, “ Women within the Judicial System: Changing Roles,” (in Duke’s *Women in Politics: Outsiders Insiders* 1996, pp.215-227). Martin commented upon two studies of federal judges done in the 1980s that did not find differences between the behaviour of male and female judges, although women might (in theory) bring a different perspective or employ different reasoning (Martin 1996, pp.218-219). Likewise, in a sense, the weight of experience (and years) showed in Judge Breck’s more relaxed approach to enforcing decorum in his courtroom in 1996, while in 1997, the newly seated Judge Miel had difficulty with that very aspect. This was predicted by Chief Prosecutor and trial attorney Ray Voet, now a judge himself, .

In this chapter, I have also shown how elites who have elevated status within their profession had an impact upon, and were influenced by, emerging issues in the criminal law and by their attendant social forces. The media, which I shall devote an entire chapter to, was one such social force. One might reasonably observe that this “bleeding” might actually increase with age and experience, such as with regard to the

dying trajectory of O’Hair’s father (regarding personal asset depletion) and Breck’s wife (regarding service provided by hospice). In the next chapter, I shall consider those who are not elite, but who are rather “peers” (juries) and, in the chapter thereafter, families and their roles as factors and actors in this series, before finally turning to the chapter regarding social and legal constructions of the media in the Kevorkian cases.

Chapter Four: Juries in the Kevorkian Trials

Introduction

In the last chapter, I examined how the elites of the legal community created and adjudicated the Kevorkian cases. I also considered what the actors had in common (or not) as factors in the cases. I had interviewed Chief Prosecuting Attorneys prior to trial (with the exception of Ray Voet of Ionia County, who was both Chief Prosecutor and line or trial prosecutor), and I interviewed each of the judges within either days (Judge Breck in 1996 and Judge Miel in 1997) or weeks (Judge Cooper in 1996 although I had, no 1999 interview granted, presumably pending appeal).

In considering juries as a factor and specific jurors as actors, a similar division occurred in the course of research, which came to light in the course of writing. Jurors are drawn from the ordinary citizenry, and presumably are not elite in the legal profession and also not expert on the matters at issue in trial¹²⁸ As in the last chapter, my examination here has a “before” and “after” element of trial matters and fieldwork relating to the juries and its members. First, and before the trial, is the *voir dire* transcript of jury selection in Kevorkian 1999 (which resulted in conviction). Second, and after the trials, are materials from press conferences and in depth interviews after the first 1996 trial in Judge Cooper’s court, the second 1996 Kevorkian trial in Judge Breck’s court, and the 1997 Kevorkian mistrial in Ionia County in Judge Miel’s court. Because the 1999 jury declined to be interviewed by the press or others after the 1999 Kevorkian conviction, material is limited to the court transcript of jury selection.

¹²⁸ While lawyers and judges are not technically barred from jury service in many jurisdictions, there is a cultural preference against having legal trained people on any particular jury, as I myself experienced in 2007.

A comment as to the scope (or more correctly, that which is beyond the scope) of this chapter is best made at the outset. During the fieldwork, my focus was on legal elements of the cases, the parties, the trial process; it was not on juries other than as to the simple fact of their verdict or guilty or not guilty. The jurors themselves, as with the family members of the next chapter, were beyond my original scope of review in the cases. This rich area emerged in analysing data and in finding new ways of reviewing legal material through a socio-legal lens. These foci will open up new questions and avenues of the roles of “ordinary people” and the actual ordinary people involved in the criminal trials.

That said, this chapter offered an exciting opportunity to consider that most mysterious and secretive of trial factors – the jury – from three different perspectives. First, was jury selection and elimination process. Second were judicial views of the jury and its members. Third were the post-verdict observations and interviews of jury members who sat through deliberations. These are all the more important given the same presence of the same defendant in all cases, and of the same judge in two of the cases, and the related matters and parties. It was a front row seat in Rashomonesque production, which yielded much about methods of trying Kevorkian in particular and how to try assisted suicide and euthanasia in general.

Part I: *People v. Kevorkian (1999) Voir Dire Study and 1994-1996 Jury Nullifications*

A. Introduction

The final Kevorkian trial (in which he was convicted of the euthanasia murder of Tom Youk and related drug delivery charges) presented a rare opportunity – that of a court certified transcript, including jury selection, to analyse. First, jury selection (known as *voir dire*, literally translated from French as “to see to say” with regard to

potential jurors) is generally not available for review. The reason for this is simple, and practical – in cases of acquittal, transcripts and court records are sealed after trial, and minutes are not transcribed. Second, although I was travelling to Michigan to attend the trial at the time the *voir dire* was conducted (in less than one day); the transcript provided a full record of what had transpired. Given the adage that a case may be won or lost before the first witness is sworn, and given the dearth of such opportunities in prior Kevorkian prosecutions, the opportunity to find these “new facts”¹²⁹ (or pre-existing facts in a new form) was one I was loath to forego.

Accordingly, and using the methodology of an appellate lawyer, I compiled a “digest” (or an annotated index) of the *voir dire* minutes dated Monday, March 23, 1999, the day the jury was selected and sworn. In effect, a digest is an index of events, page-by-page or event-by-event. In legal practice, it is common to use this method to catalogue the salient facts of the case and/or trial errors (meaning objectionable conduct of counsel, the judge or court, and procedural law and legal matters). In American appellate practice, it used to be highly uncommon for *voir dire* minutes to be transcribed, in large part due to the expense incurred, especially for indigent defendants. However, this changed after the 1986 case of *Batson v. Kentucky* 476 U.S. 79 (1986), in which the United States Supreme Court ruled that a prosecutor’s use of peremptory (permissive) challenges (excuses or exclusions) to exclude blacks from a jury trying a black defendant. The Supreme Court held that this was grounds for an equal protection claim of purposeful discrimination by the prosecutor. The practice of transcribing *voir dire* along with hearing, trial and sentencing minutes then became common. Rock (1993, pp.101-102) noted in the anonymised case of “Grey” a similar concern regarding the presence or absence of a

¹²⁹ I use this phrase as homage to a standard generally employed in appellate review, where the finding of new facts upon a pre-existing record is a way of examining evidence or testimony that the jury overlooked or misapprehended as a matter of law.

black juror onto the panel. This was not in issue in the 1999 Kevorkian trial, but other matters emerged as being noteworthy.

In short, the jury selection in a state criminal trial in the United States is conducted in a basic way, though there are variations of the process. Jeffrey Abramson, in *We the Jury: The Jury System and the Ideal of Democracy*, noted that “[t]here is a famous lawyer’s quip about the difference between trials in England and trials in the United States: in England, the trial starts when jury selection is over: in the United States, the trial is already over” (1994, p.143). Pakes (2004, p.05), in the cross-cultural study included in *Comparative Criminal Justice*, noted:

a system for the random selection of jurors from election lists was adopted [in the United States] in 1970. Nevertheless, both parties have extensive powers to exclude potential jurors. Because of that, the actual composition of the jury often turns into a battleground, as if it were a trial before the actual trial itself. Many US lawyers believe that selection of the right 12 persons is paramount to victory or defeat at trial (Simon, p.1977).

Bloomstein (1972, p.66-67) observed that “methods vary in the several states, but as a fairly representative system, let us assume that thirty names of prospective jurors are picked out of a revolving drum and form the panel for the particular trial, out of which twelve will be selected to be the actual jurors.” The panel may be larger for a case involving a notorious crime or an infamous defendant, as Abramson observed in regard to the 1970s case of the Harrisburg Seven, where the trial commenced with a *voir dire* of some 450 potential jurors in the case considering seven members of the Catholic Resistance in the Vietnam War. The Harrisburg Seven, went on trial in 1972 for conspiring to raid draft boards, destroy draft records, blow up heating tunnels in the nation’s capital, and kidnap the American National Security Advisor, Henry Kissinger (1994, pp.155-156).

A common practice, noted by Bloomstein (1972, p.66), is for 12 cards to be randomly chosen from the total cards on the panel. In parallel form, the jury cards

containing minimal information such as name and address of the juror will be slotted into two rows of six (or, for those courts who seat alternate jurors at the same time, a common practice, two rows of seven). I have also seen on occasion judges question the entire panel at once (though this happened only once during my time practicing, both prosecution and defence lawyers – I was defence -- were startled and alarmed by this seeming chaos, which was calmed when the judge had to adjourn the case, and give it to another judge, for reasons that I was not privy to).

Voir dire is, as a general matter, within the province of a judge's questioning in *voir dire* as was the situation in the 1999 Kevorkian case, as decided by Judge Cooper (Hearing, December 22, 1998 5) or (more typically) the judge and lawyers (as in the 1996 Kevorkian cases). It is common to ask jurors about their lives, their views, their possible attributes that may make them more (or less) sympathetic to the defendant on trial in what may be an extensive "Q & A" (question and answer). In this process, the potential jurors may be asked about their families, their work, their health, their friends and colleagues, their education and association, and (as happened in the 1999 Kevorkian *voir dire*) their faith. Abramson (a former prosecutor) listed as areas traditionally within the jury selection ambit, "ethnic, religious, sexual, and occupational stereotypes" (1994, p.147). Indeed, the number of questions a judge or lawyers might ask is limitless. This is because the standard jury inquiry may lead to fruitful areas of questioning that may determine whether a juror is fit or suitable to sit on the case, and whether they can do so in an impartial manner. In some of the Kevorkian cases, potential jurors also filled out written questionnaires, which served as a platform from which to launch *voir dire*.

Information is also transmitted in ways other than the formal questions and answers,. How jurors looked, dressed, walked to and from the jury box for

questioning, and acted with or without attention, were all on display during the selection process. This sort of examination is evocative of Goffman's comment (albeit in a different context), "he must have a supply of appropriate clean clothing if he is to make the sort of appearance that is expected of a well demeaned person" (1967, p. 92). This went beyond mere attire and gait. Ruth Holmes, who worked as a volunteer jury consultant throughout the Kevorkian trials, told me in personal communication that she also looked at the potential juror's handwriting for clues as to their personalities.

Bloomstein noted that the *voir dire* "is actually a preliminary examination of the prospective juror to determine his qualifications, any reason for disqualification or any bias he may have that would render him unfit for this particular jury [but that] possibly the most important reason for the *voir dire* is to size up the prospective juror. Here is the opportunity for the lawyers to question this stranger, obtaining as much from the way he answers as from the answers themselves" (1968/1972, p.66).

While much of the *voir dire* is ostensibly spent asking jurors if their various relationships and life experiences would prevent them from being fair and impartial, it is axiomatic that neither party truly wants a fair and impartial jury – the parties want a jury that will deliver the party's desired verdict (or be more fair to their side). Where lawyers conduct *voir dire*, it is traditionally viewed as the chance to educate the jury pool regarding their theory, or perspective, of the case. Lawyers also want open-minded jurors whom they can persuade to see their respective points of view – as to the facts they are supposed to be introducing and as to the legal principles that are the judge's province to instruct the jury to apply to the facts of the case.

In seeking to divine this, lawyers have three formal categories by which they can challenge the jury or individual jurors, and seek to have them dismissed from the

potential jury. The first category regards challenges to the array (that the pool does not represent the general society racially, socio-economically, or otherwise). Second, there are challenges for cause (circumstances involving a particular juror that render that potential juror unfit to sit on the case). The third category pertains to peremptory challenges (the “hunch” challenge) as Bloomstein said (1972, pp. 68-72).

It is in this last set of challenges, the peremptory, that a lawyer’s “gut” instinct is and where art must meet technique. This is where cognitive ability and speed to recognise become vitally important. Lawyers may tend to think in patterns in this way, and to recognize symptoms of a problematic (such as belligerent or unsympathetic) potential juror, project the hypothetical consequences, rule each one out and reach a decision. The lawyer has to make a determination as to whether a juror is going to be helpful (to their side) in considering the case, and the attorney must do so in the time of the *voir dire* instantly and semiconsciously assimilating the relevant data, and comparing it with past cases and jurors and come to a decision whether to retain or excuse the juror – if this does not happen speedily and successfully, there is a risk that the case will be lost. I shall discuss this further (in particular with regard to Bishop Donald Ott, the foreman of the first 1996 jury), and consider why jury profiling does not always succeed.

My review of the March 22, 1999 *voir dire* was not intended to be all-encompassing, but rather focused on a particular group of selected social attributes. While inspired by the *Batson* case, race was not a factor that I considered to be an issue of purposeful discrimination by either the prosecution or by Kevorkian. I also note that the jury array was not challenged on appeal, 248 *Mich. App.* 373 (2001). There was no question that the jurors were not representative of the community at large (which was one of two general questions posed by Baldwin and McConville in

1979, the other as relating to socio-economic status) (1979, p. 90). The one potential juror who was, like Kevorkian, Armenian by descent, was excused by the prosecutor. The more likely factor was not nationality or ethnicity, but that her two brothers were doctors (70-81, 134). Conversely, one potential juror (#7) who testified at voir dire that she primarily spoke Spanish primarily, and did not know what the word “euthanasia” meant (157), and could understand perhaps “60% of English” she heard (159) was excused for cause, as agreed by both Kevorkian and the prosecutor, because Judge Cooper said it “will be disruptive for juror translation” (165). Bloomstein (1972, p.75) noted what seemed the obvious necessity of “understanding English,” which I take one step further to note that nuance and idiomatic expressions are necessary tools beyond a dictionary vocabulary. What was interesting to me that the colloquy with this juror continued, as she went on to relay that her sister had died of cancer after two years in Lima, Peru (160), and that her daughter was a prosecutor (163),. Either of these might have been cause for challenge in the prosecution of Kevorkian for terminating the life of Tom Youk.

Attributes that I chose to focus on related to four areas. First were questions or information raised with regard to members or those with a relationship to the medical profession. Second, I considered how potential jurors relayed their religion and related opinions regarding euthanasia and assisted suicide. Third, I examined personal or family issues with regard to long-term chronic or terminal illness;. Last, I regarded how exposure to media representations regarding Kevorkian’s involvement in the death of Tom Youk. This was nationally broadcast and widely reported on, yet astonishingly, only two of the members of the jury pool reported having seen it (27).

Judge Cooper, the Presiding Judge of the 1999 Kevorkian trial (as well as the first 1996 trial) had 80 potential jurors initially brought in for possible jury selection

(13). In addition, Judge Cooper decided to conduct the 1999 *voir dire* herself, rather than to invite or to allow the prosecutor and *pro se* defendant to question and probe the potential jurors (13-14). This meant, by definition, that there were constrictions on, and limitations to, what information the prosecutor and Kevorkian gained from face-to-face interaction with the jury pool before members were either seated or excused.

Further to my notes of the *voir dire*, of approximately 50 potential jurors, 46 potential jurors were questioned before the 12-member jury was selected and sworn. Also sworn were two “alternate” jurors who also sit on the panel to hear evidence, and who were required to be prepared to step permanently into the chair of a juror who potentially had to be dismissed from the jury mid-trial (this “alternate” juror system would be the necessity of a mistrial for lack of a full jury, in the event that a juror was immediately involved in a birth, a death, a hospitalization, or something of an equally dramatic nature or in the event of juror misconduct). The number of 50 potential jurors in this notorious case involving an infamous defendant might have seemed surprisingly small for a *voir dire*. Jury selection proceeded surprisingly quickly and completed in less than one day of court, (or just under five hours, by 3:17 PM, including time out for a midday break). Given the seriousness of the crimes charged and the widespread media attention, it would have been reasonable to expect more awareness and less speed. In a sense, it foretold of a different sort of trial and speed than the lengthy trials, sometimes lasting several weeks, of “the issue trials” of the mid-1990s – and indeed, the 1999 (which I call the “elements”) trial began on Monday and was concluded by the same Friday, with a day out for the judge’s weekly calendar (or general motion) day.

The concept of a jury of one's peers is one of "symbolic, ideological and instrumental significance of juries in the criminal process" related to public opinion, according to Lacey, Wells and Quick (2003, p.94). The purpose of a jury is to "legitimate the criminal process by allowing a say to non-professionals (peers) of the defendant who have no vested interest either in the system itself or in any particular outcome of the case" (Lacy, Wells and Quick 2003, p.94). That said, something that captured my interest was how people involved in different aspects of the medical profession – doctor/dentist, nurses, lower level health care administrators and staff, and a writer of mental health books – were viewed, and that medical information (but not necessarily employment in a medical arena) seemed all but a *per se* exclusion from jury service on this case, as some of the colloquies established. None of these individuals had any expertise in pathology (which I suggest would have made them better equipped to understand the "duelling doctors" as I shall discuss in Chapter 6), the area of medicine under consideration, despite general medical knowledge or specialist knowledge unrelated to that of the defendant Kevorkian or the medical examiner Dragovic. Some potential (and final) jurors did, however, work in nursing homes or health care facilities, which seemed to point to a different sort of medical knowledge – that of day-to-day lives in end-of-life patients. As I shall now argue, these individuals had too much knowledge beyond that of common sense appreciation, yet too little to actually have comprehended the esoteric erudition of Kevorkian and Dragovic.

B. Medical Professionals (doctors and nurses) and medical workers (administrators/technologists)

The *voir dire* transcript, cited by page numbers contained in one volume dated March 22, 1999, (and further cited by revolving potential jurors along with page

numbers, in some instances) yielded much information. The transcript showed that there were 17 references to members of the juror pool either being themselves members of the medical profession or of friends/family who were in the medical profession. Of the 46 jury pool members questioned, one (who was very vigorous in his *voir dire* colloquy, as I shall illustrate in detail) was a cardiologist, three were nurses, one was a dentist, one was a medical student, and one was a respiratory technician, one a surgical technician. In a rare moment of humour, the judge quipped that the surgical technician had missed meeting the previously excused cardiologist (103). Three potential jurors had other medically-related jobs, and three had friends or relations in the medical field.

Almost all were excluded from serving on the actual jury, with excuses for cause (mandate) issued by the judge in some cases, challenges for cause by both sides, and peremptory (permissive) challenges by both sides. The two who were not excused seemed to have had lower level jobs (the surgical technician and someone who “worked in a long term skilled nursing home run by Dominican nuns.” Possible challenges for the latter were for medical-related profession, religious opinions, family members who had been ill and/or exposure to the *60 Minutes* “Death by Doctor” segment that was the central piece of evidence; nonetheless, the minutes indicated that this person remained on the final jury panel.

The medical professionals I chose to focus upon were the cardiologist and the three nurses. The cardiologist (#9, 28-66) indicated that his religion as a member of the Jewish faith and his status as a physician (in that order) would raise issues for him in deciding the Kevorkian case. While he noted that his mother had osteoporosis and

Alzheimer's disease, he told the judge that he had "Jewish opposition"¹³⁰ (49) but would follow the law as provided by the judge to apply to the facts of the case. The judge herself excused the doctor for cause.

At first blush the cardiologist was the most vigorous and outspoken.

However, in reviewing my the digest and the *voir dire* minutes, the ultimate finding of interest was the three nurses (all excused from the jury – one by the prosecutor for cause, one by Kevorkian as a peremptory challenge, and the third by the court for cause – in a curious symmetry of parties and court). Their statements, while not of a large survey, were significant in this small study, which may be considered indicative, though not necessarily numerically conclusive (Pappas 1993, p. 348 n. 6, Smith, Blagg and Derricourt 1988, p. 378).

A conclusion that I draw here is that the attorneys actually intend for the social construction of a jury in a criminal trial – for both sides of the case – to result in a jury favourable to finding for their side (be it conviction or acquittal). Baldwin and McConville, in their 1979 book *Jury Trials*, about the English jury experience, which is designed to be less schematic and provide less information for far fewer attorney

¹³⁰ Because I am limited to the transcribed minutes of the *voir dire* proceedings, I cannot ascertain with certitude what the cardiologist meant by the phrase "Jewish opposition," which was his linguistic choice of phrase. Thus, I am assuming that the cardiologist intended to communicate that assisted suicide and euthanasia were in opposition and subordinate to his religious beliefs, which appears consistent with a plain reading of the transcript. However, among other matters in the Jewish tradition, as a general matter, people who commit suicide cannot receive a religious funeral or be buried on hallowed ground. For a fuller discussion of some of the issues that may emanate from the Jewish faith, Professor Steven H. Resnicoff of De Paul University College of Law published a paper in 1998 entitled, "Physician Assisted Suicide Under Jewish Law," which is available on www.jlaw.com. A later version of this paper was published in an article entitled, "Jewish Law Perspectives on Suicide and Physician-Assisted Dying," 13 *Journal of Law and Religion* 289 (1998-1999). Professor Resnicoff identified five central areas in which assisted suicide is in contradiction of Jewish law:

1. The rules against murder and suicide - and the duty to rescue and to preserve life;
2. A person's lack of a proprietary interest in his life;
3. The general permissibility of medical intervention;
4. The special status of a *goses* (someone expected to die within 72 hours); and
5. The prohibition against giving someone improper advice and enabling someone to violate Jewish law.

challenges, expressed some dismay in this regard. They wrote that “the notion that trial lawyers subscribe to, that the composition of a particular jury is likely to have an important bearing on the verdict it returns might be taken to represent a serious criticism of the institution [of the jury trial]” (1979, p.88). Paul Rock, in personal communication to me, wrote that this was “not [his] experience in research – counsel said that they could not, and would not, attempt to read jury’s minds” (Rock edit e-mail: August 27, 2007). It is equally fair to conclude that with both sides jockeying for the better or more sympathetic or more persuadable jurors, there is a gamble that is equally beneficial or detrimental (as I later argue with regard to the inclusion of Bishop Ott on the first Kevorkian 1996 trial, which proved disastrous for the prosecution).

Nurse #1 (who had been one potential juror #1) told the court that she had “very strong opinions” [about euthanasia] and had “been a nurse for 12 years” which led to the result that “I’ve just seen too much,” and that “it would be very difficult to be fair and impartial” (107). An interesting question, unasked by the judge during *voir dire*, was whether what she had seen led to opinions relating to strong religious belief and sanctity of human life and suffering, or whether she had become in favour of withdrawing treatment or even administering euthanasia to those in terminal suffering. These quotes suggested opinion informed by her observations in her professional nursing life, rather than the likelihood of deeming herself to be a medical expert. The language, if anything, implied (to me) that the juror would use her common sense as informed by her day-to-day experiences, rather than expertise. Nonetheless, given that it was the *prosecutor* successfully challenged this potential member of the jury for cause, the conclusion to be drawn appears to be that the courtroom workgroup itself concluded that in the years she had been a nurse, she had

seen declines in health and that this made her sympathetic to issues of termination of life. This seems to fly in the face of what Glaser and Strauss noted in *Awareness of Dying*, that “nurses may derive genuine gratification from ‘working with’ a patient who allows them to participate in his (*sic*) confrontation of death” (2005, p.104).

Since the prosecution, rather than the defence, challenged Nurse #1, my conclusion (*because* of the challenging party) is that this nurse did not have a pro-life inclination and did not fall within the ambit articulated by Glaser and Strauss.

Nurse #2 (who had been a potential juror #5) spoke more to the medical issues at hand. She told the court during her *voir dire* colloquy that she was an RN (registered nurse) who “dealt with terminal patients [including] ALS and muscular dystrophy” (214). This specialized experience was all the more pertinent, given that Tom Youk, to whom Kevorkian administered euthanasia, had end-stage ALS. Nurse #2 also told the court that she “[did not] want to disregard [her] medical knowledge” (218-219) in considering the evidence adduced and determining the facts of the case, regardless of the law the judge instructed. In this instance, defendant Kevorkian issued a peremptory (permissive) challenge. While peremptory challenges are not required to be explained, I concluded that Kevorkian wanted to supply any medical information himself or be in control of how it was developed in testimony of the Medical Examiner, as a medically trained professional and to do so without anyone else superimposing their medical expertise.

Nurse #3 (potential juror #7) had been a neo-natal intensive care nurse for 11 years, and in addition, took care of her mother when she had cancer. Nurse #3 said that she had “very strong opinions” and had engaged in “heated debates” about end-of-life terminations (150). More troublesome to the court, which ultimately excused her for cause, was the statement that “there are colleagues I will not practice with ...

no, I cannot be fair and impartial”(150-151). Indeed Nurse #3 said that she could not apply the law if it was “against her firm belief” (151). Resolving any ambiguity, the nurse testified that “[she] could make a factual determination [but she did] not believe that [she] could apply the law as [the judge gave it] to [her] if it was against her firm belief” (151).

Thus, this juror invoked her faith as a reason for being unable to follow the law, although there was no discussion about her religious views per se. My conclusion as to Nurse #3, who issued the equivalent of a “conscience clause” which allows an opt out for those who object to performing or assisting in abortions, was that she was devoutly pro-life. I do note that it is also possible that she was in fact voicing an intention to engage in acquittal via jury nullification (which in the United Kingdom is more commonly referred to as a “perverse verdict”), regardless of the facts adduced at trial. The *voir dire* transcript is clear that Nurse #3 did not make medical statements relating to professional expertise. Rather she made personal moral statements that resulted in her being excused from the jury. In either event, the judge excused her, after soliciting possible objections from both the prosecutor and Kevorkian (who both agreed to excuse the potential juror).

Ultimately, there was nearly wholesale rejection of members of the medical profession. In this I include doctors and dentists, as well as nurses, who, similarly to doctors have to go through a systematized technical training along with licensure maintenance and state supervision. Perhaps by these rejections, the presiding judge, prosecution attorney and defendant former physician, all tacitly participated in what Ashworth and Mitchell (2000, p.17) referred to as the jury in its “normative” role, the standards of ordinary decent people. This presented an implied contrast with juror anonymity and abstraction in the United Kingdom, who also are considered to idealise

and represent the ordinary man/woman. In other words, nobody seemed to want to seat a juror who knew too much about medicine, although some with medically related experience seemed to pass muster as ordinary citizens for purpose of the jury. These apparently allowed for service of potential juror #3 (who worked in a long-term skilled nursing home run by Dominican nuns) and potential juror #6 (the surgical technician who scrubbed for open heart surgeries). Excluded from service a potential juror #9 (who wrote marketing books on mental health and for mental health professionals), as well as the cardiologist who was a potential juror #9, who was the cardiologist.

Hence, it seemed that knowledge of the medical profession as an attribute that was peripheral was not in issue, but those with anything that went to the heart of the case (professional doctors and nurses, those with a close connection to issues pertaining to ALS or to mental health, or expressed a strong belief as a result of what they had seen or heard or experienced in the medical field) were excluded. Ironically and as a side matter, Judge Cooper also excluded evidence at trial with regard to Tom Youk's pain and suffering as one with end-stage ALS there was a possible consequence that general everyday experiences of medical pain and suffering that might have tended toward an inclination to acquit, may have been excluded from the jury room, as well as the evidence Kevorkian sought from potential testimony of the Youks¹³¹ Of particular note was that each of the nurses expressed either an unwillingness or inability to subordinate their experience and beliefs to the instructions of law and of the judge. This was in contrast to the cardiologist (who also expressed strong Jewish faith and anti-assisted death sentiments) and the dentist,

¹³¹ While I will be addressing matters arising from Kevorkian families in the next chapter, I think it necessary to comment here that the Youk family did testify – in Dr. Kevorkian's behalf – at the time of sentencing on April 13, 1999, where they objected to not being able to do so at trial.

neither of whom expressed lack of willingness to follow judicial instructions and
neither of whom expressed inability to be socialized into the jury.

Perhaps another way of looking at this is that doctors are trained to be analytical in nature and to be problem solvers, while nurses are trained to follow rules in the absolute.¹³² Alternatively, doctors may not feel the same level of hopelessness or helplessness with the terminally/chronically ill, since they are with the patient for short periods of time (Katz 1999),. This generally offers an element of clinical detachment, whereas nurses are involved in one-on-one day in and day out care may experience patient illness differently (Glaser and Strauss 1970, p.20-32). In addition, nurses go into a “caring” profession, while doctors go into a “curing” profession. Physicians and their more intellectualised form of medical practice are thus further distinguished from nurses, who watch and keep vigil over those in pain and suffering. Last, where nurses testified on *voir dire* to strong religious and personal belief, one might conclude that this belief sustains them throughout the dying process, whereas a more secular nurse might become angry at the pain and suffering in the degenerative dying process. This secular possibility might be viewed as a contrapositive to what Goffman wrote about mental patients, “we can learn about ceremony by studying a contemporary secular situation, that of the individual who has declined to employ the ceremonial idiom of his group in an acceptable manner and has been hospitalized” (1967, p.93). In any event, and in an unanticipated finding, the doctor and dentist seemed more willing to consider analytical evidence, the facts and the law and to apply the law to the facts, whereas the nurses each expressed views of a strength and character to defy the judge and her legal authority in instructing the jury as to the law they must follow. (Perhaps the surprise was that nurses are “subordinate” to doctors,

¹³² I am grateful to Dr. Linda Wasserman, who pointed out this cultural distinction.

and the seeming converse of attitudes toward legal and judicial authority, so powerfully stated, stunned the lawyer in me.) One might wonder what the consequences might have been had certain bodies of experience and competence not systematically been excluded from the stock of knowledge available to the jurors, in what doubtless was a universally well-intentioned effort to contain the jury to members of ordinary good common sense.

C. Jurors Who Self-Reported Strong Religious Belief or Opinion During the 1999 Voir Dire

Since two of the nurses cited their firm beliefs (as opposed to the one who cited not wanting to disregard her medical knowledge), there was a natural *segue* to another topic – that of religion and beliefs. In the transcribed *voir dire* minutes, there were eight people making references to religious belief (as a factor regarding views brought to a euthanasia murder trial) and 13 references to strong opinions/beliefs. In a jury pool of approximately 50, this seemed to be a large proportion of people who were suggesting that religion or firm beliefs would have an impact upon the case at hand.

Ordinarily viewed as a topic as positively demonstrating strong social roots in the community by religion and/or church participation, in this case religion seemed to create a negative impact on the perception about a potential juror's fitness in the eyes of the courtroom workgroup collectively and individually. This was powerfully exemplified by the cardiologist and the nurses, and led me to review the transcript as touching upon other members of the jury pool. My argument in this regard is simple – with the exception of issues pertaining to personal or family/friends' illnesses and end-of-life issues, references to religion and belief seemed to be the strongest indicator of fitness or acceptance of jurors in the 1999 Kevorkian trial. This inference

is based solely on the numbers and the information available in the transcript of the 1999 Kevorkian *voir dire*. The jury in the 1999 case declined to give press or other interviews after its verdict of guilty was pronounced (at 4:59 PM on Friday, March 26, 1999), and so further information is unavailable about this matter. While this is now a methodological limitation, it is imposed on information that was not part of the original research objective, and I include it as a limitation in the tradition of Baldwin and McConville (1979, pp.28-36).

This argument is, however, neither supported nor refuted by interview comments of the Kevorkian prosecutors in the mid-1990s. I conducted in-depth interviews of prosecutor John Skrzynski shortly after the first Kevorkian 1996 acquittal (Skrzynski Interview: March 14, 1996) prosecutor Ray Voet shortly after the Kevorkian 1997 mistrial (Voet Interview: June 13, 1997) and former prosecutor Mike Modelski (who later served as second chair on a volunteer basis for Voet during the Kevorkian 1997 case) shortly after the second 1996 Kevorkian acquittal (Modelski Interview: May 17, 1996). The issue of strong religious affiliation or personal belief of potential or ultimately seated jurors was one that I neither asked about nor was offered in the course of interviews in which I focused upon legalistic matters. Thus, while those interviews were rich in other matters, this is material that was not developed at the time. This may be because I had not been present at the *voir dire* proceedings in those trials, and my questions often developed from what I had seen or heard or noted down in court during the trials, supplemented by areas that the interviewees offered). This was a constructive *esprit d'escalier* in that the ideas would come out of observations before or during meetings, on the way onto the staircase, rather than leaving it – but came with the downside that many questions emerged for me years after the original fieldwork had been done and the stairwell left

behind. In the absence of a field finding, I note that Abramson wrote briefly of religion as a demographic factor in the Harrisburg Seven case, but in terms of what he called “scientific jury selection” or what juror consultants might look for (1994, p.156). Abramson’s commentary about religion was to educate, and pertained to, social scientists who provided profiles of “good jurors” and “bad jurors” to the defence team of the Harrisburg Seven case (1994, p.156). One woman (the “second”) was chosen for “her demography ... especially her lack of religious affiliation,” while the fourth was selected because she was Catholic; not only did the [jury consultant] survey show that Catholics would make better defence jurors than Protestants, it was also believed that the jury needed a Catholic to inhibit expression of anti-Catholic sentiments” (1994, p.157). The social scientists team considered their final jury well chosen in the Harrisburg Seven case. After some 60 hours of jury deliberations, it hung on major conspiracy charges by a vote of 10 to 2 in favour of acquittal, convicting on minor charges only (1994, p.157).

Indeed, of the 37 members of the jury pool who were stricken for either cause or peremptorily, there were 13 transcribed potential juror references to belief systems/strong opinions about euthanasia/assisted suicide, and 9 comments by potential jurors to religion as a factor that would impede potential jurors from acting impartially on the Kevorkian jury. I shall amplify this matter below. Since strikes were simply stated either as for cause (eight by the court, one by the prosecutor and three by Kevorkian) or as peremptory (none by the court, 10 by the prosecutor and 17 by Kevorkian) and there were some overlapping issues (such as medical practice/experience, personal/family health issues, media exposure). One can only hypothesize as to the reason for these permissive peremptory challenges. However, the sheer numbers suggest that experience of church or temple was taken to be

grounds for challenge as to fitness to serve on the jury in this case. This was echoed by some of the specific juror *voir dire* colloquies, and begs the question as to whether this aspect of selection favoured juror apathy over the ignorance and indifference implied by Judge Cooper in her discussions with the prosecutor and the defendant.

Of the eight jurors specifically citing religion as an issue regarding their inability to be impartial jurors, two gave their religion as Catholic. One potential juror (#3) cited the fact that she was Catholic and had strong opinions about euthanasia (82) and she was subsequently excused peremptorily by Kevorkian (89). Another potential juror (#1), who was questioned later in the day, announced that she was a Catholic and a “very strong Christian” with “very strong beliefs” and was summarily excused (198) in less than two pages of transcript of colloquy in total, toward the end of the *voir dire* process. This brevity stood in contrast to the more extensive colloquy of the cardiologist, who was potential juror #9.

Other potential jurors alluded to “strong religious beliefs” (# 4: 114), or were religious and “had opinions that would prevent impartiality – a lot of them” (#4: 128) or stated that they “couldn’t be impartial” (#1: 132) or could not be fair and impartial (#7: 150). Not all strong opinions were necessarily based on religion. Some were phrased in secular medical terms such as one potential juror #3, the nursing home worker who stated that euthanasia and assisted suicide represented “a very strong issue in our nursing home” (94-96). This statement reflected a common consciousness of the issue in a non-acute care service environment. One possible conclusion that these various statements led to was that people were decided on the issue of euthanasia or assisted suicide with a zeal that would prevent calm discourse. They stated this in much the same way that the potential jurors who expressed strong religious or moral or secular beliefs claimed that they could not be impartial. This

conclusion, while perhaps obvious and natural, seemed particularly compelling in the rarefied atmosphere of a courtroom *voir dire*. The information in this regard is derived from the transcript of the *voir dire*, and “no person, other than a member of the jury can state what the reasoning was in a particular case” (Baldwin and McConville 1979, p.32), Because of this, and since the jurors who expressed strong religious beliefs were largely excluded from the jury that convicted, the effects of religion and faith seemed most clearly demonstrated in their *exclusion* from the jury, rather than by any effect upon the jury and its members’ action.

The jury selection in the 1999 Kevorkian trial seemed reminiscent of the *voir dire* that failed to exclude Bishop Donald Ott, of the United Methodist Church who was the foreman of the jury in the first 1996 assisted suicide trial. That trial regarded two distinct allegations. These were Kevorkian’s 1993 (post-legislation assisted suicide ban) aid in the carbon monoxide inhalation suicides of 72-year-old homemaker/ALS patient Merian Frederick and that of 61- year- old Chicago physician/bone cancer patient, Dr. Ali Khalili. Bishop Ott was widely credited as the primary mover of acquitting Kevorkian of assisted suicide in March 1996, and was specifically named to me in Judge Jessica Cooper’s 1996 in-depth interview. Bishop Ott was ultimately a *failed* juror choice on the part of the prosecution. This is because the prosecutors knew of his religious affiliation, but seemingly did not discover that he had written a pro-assisted suicide article in 1993, believed to be around the time of the death of his family member. Writing for *The New York Times* on March 9, 1996 in an article entitled, “Kevorkian Again Not Guilty of Aiding Suicide,” journalist and Kevorkian insider, Jack Lessenbery observed:

Mr. Ott, the jury foreman, *said he viewed the issues in the case as important for society*. Prosecutors and defence lawyers were startled to learn today that he wrote an article defending assisted suicide in 1993. "Choosing a time of one's death in a terminal condition can be an expression of faithful living," Mr.

Ott wrote in a church publication.

Ruth Holmes, president of Pentek, a handwriting analysis firm that helped the defence pick the jury, said Dr. Kevorkian's lawyers had nearly sought to have Mr. Ott excused because of fears that he might oppose their client on religious grounds. (March 9, 1996, p.7)(emphasis added).

Bishop Ott aside, the continuing trend of the general public, from which juror pools are culled (most frequently from voter registration roles or drivers/vehicle registration, both of which are address specific), showed that religious belief was most likely to be inversely related to favouring assisted suicide, euthanasia or withdrawal of life support. Indeed, according to an AP-Ipsos poll published May 29, 2007 on <http://www.msnbc.msn.com/id/18923323/> (just days before Kevorkian was due to be released from prison on parole):

The AP-Ipsos poll showed that religious faith is a significant factor in views on the subject. Only 34 percent of those who attend religious services at least once a week think it should be legal for doctors to help terminally ill patients end their own lives. In contrast, 70 percent of those who never attend religious services thought the practice should be legal. Just 23 percent of those who attend religious services at least weekly would consider ending their own lives if terminally ill, compared to 49 percent of those who never attend religious services. (AP May 29, 2007).

That this survey was conducted nearly a decade after Kevorkian administered euthanasia to Tom Youk seemed to indicate that a defence-favourable jury would continue to have been unlikely to include people with strong religious roots in the community. However, that statement must be tempered. Evidence about jurors such as Bishop Ott (as well as family clergy such as Unitarian Minister Reverend Ken Phifer, who attended Merian Frederick's assisted suicide) are a caution that religious affiliation and strong belief may not necessarily be definitive as a juror predictor. Ultimately, a question for further research may be to conduct a study of jurors in the past Kevorkian trials to learn whether religious beliefs of the actors in the trial may have existed and had an impact upon the jury members, but this was not information that was available at the time of trial or interviews.

D. Potential Jurors With Personal Illness or Disability and Illnesses of Family and Friends

The next set of attributes I considered was the impact of illnesses and end-of-life related experiences of potential jurors, their families and their friends. As discussed in the chapter regarding chief prosecuting attorneys and judges, these profound experiences can shape the personal and professional perceptions and actions of those who are legal elites, an argument I shall shortly extend to jurors. Among other examples was Prosecuting Attorney John O'Hair (after his parent's decline to death), and of the second 1996 Kevorkian trial Judge David Breck (whose wife had a lengthy decline from cancer in the Palliative Care Unit of Harper Hospital)(Breck Interview: May 15, 1996).

In the 1999 *voir dire* minutes of Kevorkian, I counted 18 potential jurors who made references to illnesses or (in two cases) disabilities borne by the jurors personally, or by family or friends, totalling 25 instances of personal experience. Of the attributes I examined, this was the single most frequently and prominently mentioned. In this regard, I segregated the eight references to religion from the 13 references to strong opinions, some of which might also have been secular in nature. Indeed, this pervasive element seemed in keeping with concerns about lengthy declines from degenerative illness to death as a part of life in the 20th century, and of the medicalization of the dying process.¹³³

In an earlier article I wrote during the mid-1990s about what were then "recent historical perspectives about euthanasia and physician assisted suicide" (Pappas 1996), I noted that degenerative illness has become the way by which we die in a

¹³³ This trend continued in the 21st century, as noted by Bloomberg Staff Piece, "Alzheimer's could quadruple by 2050," in Metro New York, June 11, 2007 (p.8).

society that has drugs to cure most acute illnesses (with the result that we live longer, and to an age where degenerative illnesses most commonly take our lives rather than opportunistic infections). I found that I adopted the views of jurors who had personal or “family illness” or who were heavily involved in the day to day care in illnesses of friends, perhaps because of my own family experiences of Huntington’s Disease. In any event, I felt compelled to consider this attribute, and did so from the somewhat safe distance of a transcribed *voir dire* and in the third person. Perhaps because I had been a criminal lawyer at another time, the explanation for this was best expressed in a criminological article about third party (i.e. family and friends) victims of homicide, authored by Rock and Howarth. They wrote that “members of the family would become defined by a crime they had not themselves committed and they would share the opprobrium which is heaped upon the offence and the offender” (Rock and Howarth 2000, p.69). If one were to substitute the words “illness” or “disability” for “crime, and substitute these words again for “offence” and “offender,” this could reach an emotional truth of those who have been ill or cared for the ill – in other words, members of a jury pool. In the next chapter, I shall be discussing family members of those Kevorkian hastened to death, but I note this here, with the comment that jurors have families, and that illness was a huge issue in *voir dire*.

For the most part, the revelations of the potential jurors regarded family members, rather than themselves. However, in terms of personal illness and ability, two potential jurors had survived cancer, only to be dismissed from the jury peremptorily, one each by the prosecutor (203) and Kevorkian (171). This said, the prosecutor might also have excused the 12-year cancer survivor peremptorily because she was a writer of marketing books on mental health and for mental health professionals (205).

Of the potential jurors, only one was currently disabled, though not specifying in what way (#3: 93). In retrospect, I realise that this may – or may not – have been readily observable were I not working from a transcript on printed page. This could have led to either juror empathy for Youk seeking assisted suicide or to juror antipathy toward Kevorkian's assisted suicide crusade turned euthanasia for the profoundly disabled Youk. Diane Coleman, President of Not Dead Yet, a lawyer who is herself disabled, "[i]n recent years, the disability community's opposition to legalization of assisted suicide and euthanasia has become increasingly visible" (2002, p.213). The disabled potential juror was ultimately dismissed, for complicated reasons far more likely to have been relating to the criminal justice system rather than to disability. I shall return to this juror below.

Of the remaining references, 10 had family members who currently had or had died from cancer; one had a close friend with the illness, one had a family member with MS, four had relatives with ALS,, one family member had died from emphysema, one had a family member who had Alzheimer's (though a number of those in the medical fields were also exposed to Alzheimer's on a regular basis), and four family members had "other" or non-named illnesses of degenerative decline. In charting the personal, family and friend illnesses, an unanticipated finding was that not one potential juror from the metro-Detroit area had cited a close relationship with anyone with HIV/AIDS decline; part of this was surprising because of the urban/suburban late 1990s jury pool.

In terms of illness, the first noteworthy matter was that the sole potential member of the jury who reported a disability (potential juror #3: 90) and who was on social security for disability was dismissed from the jury (93). However, that was by the judge for cause because he was a prior felony offender with a conviction for

felony assault with a knife (92-93). The criminal record aside, this potential juror was the only member of the jury pool who reported himself to be currently disabled or handicapped, which in a case involving prosecution for euthanasia murder of a man with end-stage ALS, seemed to exclude from the jury an entire relevant class of the population – the disabled. The only juror remaining who expressed a relationship to matters of disability (# 10: 207-209, who remained on the jury) had a wife whom he described as “handicapped” by chronic fibromyalgia that caused pain every day (this juror also had an aunt with dementia and an uncle with cancer who required 24 hour care

The issue of potential juror #3’s disability seemingly shunted aside (although more likely for the Prior Felony Offender status), a surprising number of potential jurors had personal or familial experiences with cancer (historically the paradigmatic referent for adult voluntary euthanasia in the 20th century). There was a surprising number of potential jurors who had direct involvement with close family and friends with ALS, Alzheimer’s, cancer and other degenerative illnesses, from which one might draw the conclusion that terminal and degenerative illness have become very widespread. Some, such as #2, whose grandmother had had Alzheimer’s Disease, but who had not been involved in day-to-day care were seated on the ultimate jury. More often they were excused, such as potential juror #4 (the dentist), whose father-in-law had died 12 years earlier, after a nine-year observable decline, of ALS/Lou Gehrig’s Disease and whom Kevorkian excused by peremptory challenge.

Of the 14 potential jurors who cited personal/family illnesses, the court excused five for cause, the prosecutor excused one for cause and two peremptorily, and Kevorkian excused two for cause and four peremptorily. Since this represented approximately one-quarter of the 46 jurors who gave information by testimony during

the *voir dire*, this seems to be a very strong statement that how the question of we die has permeated the daily lives of ordinary people, lending support for the debate about end-of-life issues generally, and physician assisted suicide and euthanasia particularly, during the 1990s. With the exception of the man whose uncle had cancer, stricken from the final jury was each of the potential jurors who had either had cancer or had a close family member with cancer or who had participated in day to day care of a family member or friend with cancer.

With respect to some potential jurors, such as a 12 year cancer survivor (writer of mental health books), or disabled person (prior felony offender), or a person who took care of a mother with cancer (cardiologist, the third nurse), there were often other overlapping relevant attributes that may have had an impact on either their fitness to serve or undermined confidence in their partiality as jurors; this is to say that I did not examine attributes as mutually exclusive of one another. That said, the matter of personal illness and end-of-life issues of family and friends was the single most overriding theme developed during the juror questioning in the *voir dire* minutes, one which did not necessarily result in juror disqualification for cause or peremptory challenge. If nothing else, this underscores why end-of-life issues, including termination of life for adults with terminal illnesses, has become so important and pervasive in contemporary Anglo-American society.

Part II The Post-Trial Analysis of the Juries of the 1990s Nullification Acquittals and Mistrial

A. Introduction

The 1999 jury convicted Kevorkian of murder and drug delivery charges, making this the first time in the course of over 130 acknowledged medically-aided deaths by Kevorkian in which he was legally (to use the trial judge's word) "stopped"

(April 13, 1999, sentencing proceedings). The convicting jury pointedly declined to be interviewed by media or academics after the trial. In fact, Judge Cooper instructed the media and civilians in the gallery not to impede or question individual jurors, who chose not to be interviewed and were escorted from the courthouse. This action appeared to be consistent with her ongoing “protection” of jurors from the media, although she did offer the jury an opportunity to speak to the press, stating “and for those who are curious, I wish to speak with the jury and I will let them know that you are obviously very curious and perhaps we can make an orderly arrangement for those people who wish to speak to you” (March 26, 1999, 12-13). This 1999 jury refusal of post-trial interviews, similarly to the fact of the conviction, was a departure from prior cases. Thus, the verdict (and *only* the verdict) spoke for the convicting jury of 1999.

The *voir dire* study regarded the 1999 trial of the Youk euthanasia murder. Considerations of post-trial jury analysis and commentary pertain to trials in 1994-1997. Specifically, I shall now consider matters relating to the juries of the first trial in Detroit (Wayne County) in 1994, the two trials in Pontiac (Oakland County) in 1996 (tried by Judge Cooper and Judge Breck, respectively) and the 1997 mistrial in Ionia County (presided over by Judge Miel). I attended most of each of these trials. I travelled during, and arrived effectively after *voir dire*. This is because a jury selection signified that a trial would actually take place. This was a financial travel decision relating to a student budget); the exception to this is the 1994 trial, which I was unable to attend. These trials (and the 1997 mistrial) all took place earlier in time than the 1999 case in which the *voir dire* minutes were available for study. However, the timing of my access to post-verdict matters such as in-depth interviews with the presiding judges, jury press conferences, and in-depth juror interviewing was after the

end of the cases.. From a thematic approach, this pointed to placing this section after the *voir dire* study of the 1999 trial, notwithstanding the fact that the latter trial occurred earlier in time.

So as to include the 1994 Detroit trial of Kevorkian for the assisted suicide of Tom Hyde (Kevorkian's 17th assisted suicide, and the first to go to trial), I cite the 1994 document and article based book by Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy*. Abramson cited the Kevorkian 1994 jury verdict of acquittal as part of an opening on the history of jury nullification (where a jury acquits a defendant despite sufficient evidence to prove the elements charged, also known as a "perverse" verdict). Law Professor Paul Butler, in his 1995 *Yale Law Journal* essay, observed, that "jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury ignores the facts of the case and/or the judge's instructions regarding the law. Instead the jury votes its conscience" (Butler 1995, pp.677, 700). Introducing the Kevorkian 1994 verdict, Abramson (a former assistant prosecutor in Massachusetts turned college professor) wrote that this was "an illustration of the subterranean life that jury nullification continues to live today" (1994, p.65). While it is possible to disagree with the contention that the Kevorkian juries were in some way "subterranean," I do not disagree with Abramson's general factual rendition, which he culled from newspaper articles:

In 1994, a Detroit jury acquitted Dr. Jack Kevorkian of violating a Michigan law that made it illegal to assist persons to commit suicide. In the few years prior to trial, the infamous "suicide doctor" had by his own count helped twenty persons [the number changes and jumps sharply depending upon the year, and sometimes even month, of any given writing, including my own, as can be seen by Pappas 1996 a and Pappas 1996 b] to end their lives, but this was the first time Dr. Kevorkian had come to trial.

The law that Dr. Kevorkian was accused of breaking contained an exemption for acts that were done with the intent of relieving pain

and suffering, even if the person performing the acts knew they would hasten death. In interviews after trial, several jurors indicated that they believed Dr. Kevorkian acted only to relieve the person's suffering, but this was hard to believe in light of the fact that Dr. Kevorkian had placed a mask over the person's face and released carbon monoxide into his lungs for twenty minutes. The more likely explanation for the jury verdict is that they nullified the law insofar as it prohibited a physician from assisting in suicide. (David Margolick, "Jurors Acquit Dr. Kevorkian in Suicide Case," May 3, 1994, New York Times p. A1; Jack Lessenberry, "Michigan Jury Acquits Kevorkian," Boston Globe, May 3, 1994 p. A1; Richard Knox, "Verdict Touches Off Deliberations," Boston Globe, May 3, 1994) Abramson (1994, pp.65, 268).

Abramson's description of the jury perception of the case recollects Chief Prosecutor John O'Hair's comments previously discussed in the previous chapter. O'Hair expressed concerns and made commentary regarding the potential for jury nullification as early as our interview in August 1993. The case in 1994 appeared to have been proven element by element and should legally have been won, yet was lost once in the hands of the jury. In what might have been a peer review commentary from lawyer to lawyer, line prosecutor John Skrzynski told me in our interview, "Tim Kenney [the line prosecutor who tried the case that Chief Prosecuting Attorney John O'Hair initiated in 1993, that resulted in the 1994 acquittal of charges relating to the assisted suicide of Tom Hyde] tried a nice case." A "nice" case is a colloquial expression for a job well done, notwithstanding the fact that the jury acquitted Kevorkian after Tim Kenney's "nice case" was presented to the jury. While Skrzynski did not use the phrase "jury nullification," that is what his comment implied about the Detroit trial. My fieldwork did not include this 1994 trial nor interviews of any of its participants. However, media accounts and press, as discussed in the Abramson passage, suggested that jury nullification was a serious possibility.

B. Judges Judging the Juries

Jury nullification was generally accepted as the outcome of the 1996 trials. These trials were lengthy lasting up to five weeks. These trials resulted in what I would describe as “issue acquittals” regarding the assisted suicide and medical euthanasia debate in Michigan, as much as jury nullifications of the crimes of which Kevorkian was tried. This Michigan use of “jury nullification,” as a colloquial term of art, was so commonly accepted and taken as a given that lay people bandied it about. One such example was at the sentencing proceeding on April 13, 1999, when Melody Youk was protesting being excluded by the judge from testifying on Kevorkian’s behalf

Of course, I wish I had been able to speak at the trial, feeling that that would have given the jury an opportunity to receive a balanced view of the facts, but understood the prosecution’s concern for a jury nullification based on Tom’s situation of being near death. However, not being able to speak also did not allow us an opportunity to address the questions improperly raised as to [Tom’s] lack of adequate medical care or to correct inaccuracies as mentioned above or to lay to rest misrepresentations such as the suggestion that the tape [of the Kevorkian/Youk euthanasia] was somehow staged or produced for any reason other than to show, again, my husband’s consent and that no one but the doctor was present at the procedure (Sentencing Proceeding, April 13, 1999 at 13).

By use of the phrase “issue acquittal,” I am embracing different characterizations enumerated by Robert F. Schopp in his 1998 book, *Justification: Defenses and Just Convictions*. A jury has the ultimate power to decide the facts, as well as the application of the law to the facts in a criminal trial, but it could also engage in a process through which jurors take a judicial and or legislative role (1998, p. 156). This is what I conclude took place with the two 1996 juries, I shall address. Schopp noted that jury nullification is not a power to invalidate a statute, nor is it to overturn the law as unconstitutional, nor is it to create a new law or as precedent (1998, pp.156-157). In other words, it is a case-by-case, jury-by-jury event, where a

jury “wrongly” acquits a criminal. Commentators have argued nullification (or a perverse verdict of acquittal) may occur on a rare occasion [Zander 1974a, as cited by Baldwin and McConville (1979, p.10)] or as frequently as in one in eight acquittals by a jury, as being “contrary to the law and evidence,” [McCabe and Purves 1972, as cited by Baldwin and McConville (1979, p. 9)]. As I shall develop, the evidence tends to support a theory of jury nullification in the 1997 Kevorkian trials, which were a unique set of political, as well as legal trials.

If we assume that there was no jury nullification in the mid-1990s Kevorkian trials, Kevorkian’s acquittals may have as their social roots the English case prosecuting Dr. John Bodkin Adams. He was acquitted of a medical murder in the 1950s, and whose trial is considered to be the first in which the jury received a charge (or instruction) from the judge regarding “double effect.” Bodkin Adams was acquitted of the alleged murder by morphine of a woman, after less than an hour of deliberations and notwithstanding similar conduct with other patients.

The critical feature in the Bodkin Adams case was believed to be Lord Devlin’s jury instruction originating the legal concept of “double intent.” This doctrine states that if a doctor’s intent was to alleviate pain, but there was a secondary effect of shortening life, an acquittal must result. While Lord Devlin had not been in the jury room deliberating, he had been in the position of having been the trial judge and hearing the evidence, as well as observing the jury he had instructed on the law to be applied in the case. Devlin’s 1985 book, *Easing the Passing: The Trial of Dr. John Bodkin Adams*, went so far as to state that “[t]he trial process is designed to put you, the jury, in the position of the big decision makers, which is what for this case you are” (1985, p.57). Devlin noted that there were, as with Kevorkian, other related alleged murders committed by Bodkin Adams in the 1950s (1985, p.58), presumably

for economic gain. This was rather than Kevorkian's quest for assisted suicide and fame related thereto, a theory that was first relayed to me during my 1993 interview with Chief Prosecutor Richard Thomson, as discussed in the previous chapter and consistent with the arguments advance by Rojeck in *Celebrity* (2001, p.143-181).

The judges also offered judicial reflections regarding the juries post-verdict in the Kevorkian cases. While the focus of the judicial interviews was not specifically upon the jury (and indeed, my focus in questioning regarded issues pertaining to order in the court and to judicial views of end-of-life prosecutions), each of the three judges interviewed offered unique commentary regarding the juries they had observed. They, in a sense, made comments judging the jury that they had participated in selecting. Thematically, these referred primarily to matters of jury protection/management and to the jury's application of the law to the facts of the case,

Lord Devlin commented on the need to keep the jury, composed of members of the general public, segregated from press,¹³⁴ information and innuendo regarding his famous euthanasia case. This applies to any famous case, and indeed to juries generally. What Devlin stated was that "[t]he only safe course, it is felt is to keep a jury in the sort of ignorance which guarded the virtue of Victorian maidens" (1985, pp.58). This approach transports otherwise competent adult members of the jury into a familial setting with the judge as parent, and renders the jurors as children who must be directed and protected. Thus, while jurors must only consider only testimony and exhibits as evidence and as instructed by the judge, the jurors actually become infantilised in a more general way as the children being introduced to, and protected

¹³⁴ During the 1990s Kevorkian trials, this was phrased in terms of "protecting" the jury from the media and from excessive or disorderly questions, by Judge Cooper in our interview in 1996, as well as by the jurors themselves in the course of their Press Conference (Cooper Jury Press Conference, as cited during Cooper Interview: May 17, 1996).

by, court process. The underlying reason for this is that the minds of the jurors should not be contaminated by any untested and extraneous material.

Paternalistic protection was something that the jurors noted in their press conference after the first 1996 trial. In my interview of Judge Cooper, I asked about the jury thanking her profusely during their post-acquittal press conference in March, although that “protection” regarded the media. This protection was from the wall of the media, discussed previously. As to her perception of the media, Cooper stated during our interview, “I have a very good relationship with the press, what bothers me is being manipulated by both sides because [the prosecution and defence] didn’t bother to read.” In other words, one concern expressed was not so much that the jury might have known legal matters or been exposed to Kevorkian, but rather that the press might intrude on to the jurors’ lives and deliberations.

During the 1999 Kevorkian trial, over which Judge Cooper also presided, she was pointed in her protection:

Members of the jury, you’re wondering what you’re doing in this crowded courtroom and you’re wondering perhaps about the space invaders [referring to the media trucks and vans parked at the courthouse] on the front lawn, and you might also be wondering about a lot of things.... I do want you to know that cameras are turned off for purposes of jury selection and I do want you to know that the law in Michigan says that jurors are not photographed, and so you can all heave a sigh of relief (*voir dire transcript*, March 22, 1999: 27).

This introduction for the jurors was only one of a number of media restrictions imposed during the 1999 Kevorkian trial (including keeping the hallways clear of media). It also reflected a desire to protect the integrity of the proceedings and the sanctity, as well as the comfort, of the jury and its potential members. That said, and in a nod by Judge Cooper at the *voir dire* to the level of media interest in the Kevorkian cases, rather than ask the traditional question of whether any of the jurors knew Kevorkian, her question was “is there anybody on this jury panel who has *not*

heard or [sic] Dr. Kevorkian?" (Kevorkian 1999, 27).. Indeed, during a pre-trial conference and hearing with the parties on March 19, 1999, Judge Cooper told the prosecutor and Kevorkian's advisors, "You never know. I mean we could get 14 jurors who say they never heard of him. I doubt that. We did – what was interesting the last time [i.e., 1996] there were jurors who – I think we discussed this in Chambers – are out of the loop. I don't know that you necessarily want those people on your jury, but there are those people who are without any opinions whatsoever in their whole lives about any subject whatsoever and who don't watch the news and who don't read the media (sic) and we don't know what they do with their free time. You never know." (Hearing March 19, 1999, 25-26).

Judge Cooper's "protection" came with parental limitations, as well. Jurors were not permitted to take notes, in contrast in Judge Breck's Kevorkian case a month later (Personal Observations, March–May 1996; Breck interview: May 17, 1996). Judge Breck expressed a concern that "three weeks [after hearing testimony or reviewing evidence] jurors would not remember." Judge Breck in interview prided himself on being "one of the first" judges in Michigan who had allowed jurors to take and use written notes, which he deemed "helpful." It could be argued¹³⁵ that juror note-taking could distract the juror's attention, or could result in conflict between juror notes and the actual court proceedings (either by recollection or by a re-reading "read-back" of the actual court minutes), possibly usurping the court's role in supervising evidence and because jurors could rely more on their notes than upon actual evidence adduced and transcribed by the official court reporter. Bloomstein (1972, p. 94) argued that "the industrious juror does not take full notes of all the evidence and, the human mind being what it is, he will tend to stress the points during

¹³⁵ I actually did once argue this successfully on appeal.

deliberation that he wrote down, to the detriment of equally important facts that he failed to note because they did not penetrate his awareness at the time or even because his nose itched at just that moment [so] in general, note taking is not allowed.” I observed that neither Judge Cooper (1996, 1999) nor Judge Miel (1997) allowed jurors to take notes. This invites the conclusion that they would have required jurors to rely upon court records, physical evidence and minutes read-backs, rather than upon juror notes that could have been subjective or incorrect.

In the Kevorkian cases, one questionable matter regarding juror notes and note-taking in the trial supervised in 1996 by Judge Breck is that the jurors “wanted to keep the notes” and have the parties and judge “autograph” them” at a “Saturday night out to dinner” for the jury sponsored by the Kevorkian defence team, after the jury’s May 14, 1996 acquittal (Breck Interview: May 15, 1996). Such a memento was arguably unseemly as disturbing the role of the jury as sitting in judgment (famous parties and lawyers aside), and suggests cause for concern where a famous or infamous defendant is tried by a jury of the general public (Rojeck 2001). I suggest that the potential for a spatter effect¹³⁶ of fame seemed possible in what Judge Breck in our interview called “a trial of the century because of the importance of the issues” pertaining to end-of-life matters generally, and assisted suicide/euthanasia specifically.

In another difference between jury management styles expressed by the judges in supervising or “protecting” jurors, Judge Breck allowed jurors to question witnesses *via* notes to the court (trial observations April – May 1996, Breck Interview: May 15, 1996), while Judge Cooper did not permit jurors to ask questions of the witnesses (Cooper Interview: May 17, 1996). Judge Cooper, who during our

¹³⁶ The spatter effect is literally a reference to the effect that paint has when it spills or spatter.

1996 interview was very focused upon preserving the integrity of the proceedings, stated that jurors were “not allowed because it could make an unruly court [and it] puts the juror in the position of being an advocate if they can ask questions.” Though I am mindful of the legal adage that reasonable minds may differ, I conclude that Cooper and Miel had the more correct approach in this regard.

To members of the jury, perhaps the most “unruly” aspect of the proceedings was that introduced by the defendant Kevorkian and members of his legal team. During the juror press conference held after Judge Breck’s jury acquitted Kevorkian of the simultaneous Wantz/Miller homicides, more than one commented to the effect that while in Judge Breck’s courtroom, they found Kevorkian “entertaining” (Breck Jury Press Conference: May 14, 1996). This unusual characterization of a murder defendant by a jury is mirrored in opposite by a comment made in interview after the Kevorkian mistrial by Judge Miel in June 1997, regarding Kevorkian’s absence from the abbreviated proceedings prior to the post-opening mistrial – Miel said in interview that he thought the proceedings and trial would be “smoother” if Kevorkian were not there [in court during the assisted suicide trial of Loretta Peabody]” (Pappas trial notes: June 12, 1997, Miel Interview: June 13, 1997). I shall comment further on Kevorkian and his celebrity status in Chapter 6.

In Ionia, the judge took an approach that was perhaps preferable to having Kevorkian the defendant present for trial, and engaging in antics such as those in the 1996 trials. One such antic was when Kevorkian assisted in a suicide during the night between his direct examination and cross-examination. Comments in the second 1996 jury press conference post-acquittal, to the effect that some four of the 12 deliberating jurors knew of the Bastable assisted suicide and Kevorkian’s attendance thereto, could not have been other than distracting, notwithstanding the fact that the jurors claimed

that they did not take this into account during deliberations (Breck Jury Press Conference: May 14, 1996).

The jury in fact did not seem to take Kevorkian's mid-testimony involvement at the Austin Barnstable assisted suicide (during the Wantz/Miller trial before Judge Breck) into account. This may be inferred by the following: had the jury considered this evidence of seemingly unregenerate and recidivist conduct, they would have been more likely to convict the defendant than less likely to convict him. Further, the mid-trial assisted suicide attendance of 53 year-old Austin Bastable on May 7, 1996¹³⁷ flew in the face of the fundamental principles of bail and liberty *pendente lite* in that this posed a similar threat to the community (similar conduct was noted in a different context and most negatively by Judge Cooper in her sentencing on April 13, 1999). Finally, this mid-trial (indeed, mid-testimony) conduct flouted the authority of the court generally. One inference that can be drawn is that Kevorkian was a serial killer in search of fame (Rojek 2001). Taken together with another, more seemingly benign event during the same trial, that was nearly certitude. In the latter event, at a group lunch during jury deliberations, Kevorkian lost his temper over a bad cup of coffee, complaining of its 35 cent cost – a micromanaging detail that was unseemly to a criminal defendant on trial for homicide). While the first of these events was technically not before the jury, and the latter was in the courthouse cafeteria while the jury toiled at its task separately upstairs, to someone aware of both events, it was surprising that the jury sitting on the case acquitted Kevorkian. Under no instruction as to the former, and without awareness of the latter, it was for courthouse speculators to juxtapose these events and draw their own conclusions.

¹³⁷ For a full discussion of the post-direct and pre-cross examination evening of assisted suicide of Austin Bastable, news accounts are available, such as the staff article on May 8, 1996, in Section A, p. 20 of *The New York Times*, entitled "Despite Trial, Kevorkian Is At a Suicide."

C. Juror Perceptions of the Kevorkian Trials (1996 and 1997)

The jurors' perceptions ranged from their involvement in trial as an institutional matter to their involvement in Kevorkian's trial as a personal and social matter. One juxtaposition that I made regarded the jury's role as the judges of facts. This harkened to a comment by Lord Devlin in his book about the Bodkin Adams euthanasia trial, "[w]hat they [i.e., jurors] resent is not the work nor the sacrifice of time but the tedium of hanging about with nothing to do" (1985, p.27). While Lord Devlin was referring to the "downtime" of a trial (time in which neither evidence nor legal argument or instructions are being presented to the jury), Judge Miel of Ionia County voiced a similar sentiment 40 years after the Bodkin Adams trial, regarding the Kevorkian mistrial (1997).

As explained in Chapter 3, the 1997 mistrial was the rare post-opening statement mistrial – prompted by then-Kevorkian lawyer Geoffrey Fieger's opening statement. I was present at this opening statement, made in front of the all-white, rural and conservative jury, uttered quite possibly in the hopes of a mistrial in place of a trial before a potentially unfriendly jury that would be likely convict Kevorkian. This was underscored by Ionia County Prosecutor Ray Voet in our June 13, 1997 interview in which he told me that he "came out of jury selection feeling pretty good, [so] Fieger had to commit jury arson" (Voet Interview: June 13, 1997). Had the 1997 jury in Ionia heard the evidence and deliberated to verdict, I wonder what they would have made of the death certificate that stated "death by IV injection" (Death Certificate of Loretta Peabody: September 3, 1996). This, which Voet referred to in our interview as "the needle mark", was a conclusion to be drawn from the 1996 death certificate of Loretta Peabody. The form had a box for "how injury occurred," in which the cause

was listed as “physician assisted suicide,” though in fact the inference is actually medical euthanasia.

A rhetorical question loomed before me a decade later, writing after the Kevorkian 1999 conviction of euthanasia murder relating to the 1998 Tom Youk hastened death. What would the jury have decided to do with the information? An inference to be drawn – 10 years after that jury was dismissed upon mistrial – is that in actuality, Ionia County had a viable case for common law homicide, but chose only to bring a statutory assisted suicide trial after the 1996 Oakland County acquittals, with the hopes of securing a guilty verdict. Following the 1997 mistrial, it seemed to invite Kevorkian to more openly engage in euthanasia (such as that of Tom Youk on September 17, 1998, which was sent to *60 Minutes*). That is, in fact, what he was tried for in 1999 – only after statutory assisted suicide charges brought simultaneously were dropped further to a pre-trial motion.

The 1997 mistrial in Ionia led to the inevitable result that the jury did not hear the case (or evidence at all, given that the mistrial was immediately after opening statements were concluded). Judge Miel’s comment in our interview was, “I am sorry for the people on the jury – they spent a long time for nothing to happen. They gave up their time. I’d have had them come in at 1:00 PM instead of 9:00 AM. They’re disappointed” (Miel Interview: June 12, 1997). During our interview, Cameron Beedle, who had been a juror in the second 1996 trial, gave the vehement and prescient comment that “we [jurors] all said if we were alternates, we would be very upset – not to be there for the final decision” (Beedle Interview: May 19, 1996).

For the 1996 juries that did sit on Kevorkian trials to conclusion the result was acquittal in both trials (each of which actually represented two cases). As I have already discussed, the acquittals were widely viewed as having been by jury

nullification in both cases.¹³⁸ Involving prosecutorial theories of the case or legal presentations of the facts and the law, this was a particularly stunning development. The March 1996 trial presided over by Judge Cooper, regarding Merian Frederick and Dr. Ali Khalili, was tried under the 1993 statute banning assisted suicide. The April/May 1996 trial presided over by Judge Breck regarding Sherry Miller and Marjorie Wantz was charged and tried under a theory of common law, pre-dating the first statutory assisted suicide ban. Both resulted in acquittal. Each of the 1996 juries held press conferences in the courthouse after they rendered their verdict (in contrast to the 1999 jury that convicted Kevorkian and exited the courthouse forthwith). Nearly a decade later in May 2007, I reviewed a tape I had made of one of these, on May 14, 1996 (after a not guilty verdict in Judge Breck's courtroom), as well as an in-depth interview I conducted with deliberating juror Cameron Beedle on May 19, 1996.

If the jurors in the Kevorkian 1997 mistrial felt disappointment at not hearing the evidence and not going to a verdict, the Pontiac (Oakland County) trial presided over by Judge Breck was a five week period described by a male juror during the press conference as "five weeks – we have been hostage since April 1" (Breck Jury

¹³⁸ Laurie Asseo, of the Associated Press, wrote, "some believe it happened when Michigan juries repeatedly acquitted Dr. Kevorkian of assisted suicide charges. Laurie Asseo, "Free Speech or Jury Tampering? Group Telling Jurors The Can Nullify the Law Fights Courthouse Ban," July 22, 1996, *The Daily Record*, July 22, 1996, p. 13. While Kalven and Zeisel (1966) found in a pioneering study of the American jury system that juries acquitted in cases that judges would have convicted occurred in 19 % of cases, and of those 21% of acquittals were attributable to jury nullification (a statistic that Kevorkian easily surpassed), my information from judges came just short of commenting on nullification. Judges preferred to instead to comment in ways such as that of Judge Breck to the effect that had the jury convicted Kevorkian, "it would have been tough to fashion a sentence. I'd give a year of probation ... no penalty whatsoever." (Breck Interview: May 15, 1996). In other words, even though Judge Breck knew that Kevorkian had repeatedly been tried, and had, in fact assisted in a suicide during Judge Breck's trial (which Judge Breck, in our interview, interpreted as Kevorkian showing "his disdain for courts," so as to make probation sentence that he might not comply with the conditions of," he expressed himself politically, rather than legally. In addition to this, notwithstanding the jury conviction of Kevorkian in 1999, the bail hearing made clear that Judge Cooper was not originally going to sentence him to jail, a sentence she imposed only after Kevorkian told the Probation Department in his pre-sentencing statement that the courts could not stop him as long as he was out of prison.

Conference: May 14, 1999). During those weeks, the jurors felt “a lot of stress” (Cameron Beedle, Breck Jury Conference: May 14, 1996). Furthermore, one male juror, during the second part of the press conference (which was moved from a press room to a hallway), told that watching the interviews of the decedents was “gut wrenching,” adding to an already high stress level in which he “would go home, be in tears, was emotionally strung out, and would just lie on the couch and recover.” (Breck Jury Press Conference: May 14, 1996). Cameron Beedle, commented in interview that during deliberations, “we were burnt out, and talked about Yatzee game and Monopoly game, that kept us going” (Beedle Interview: May 19, 1996). The stress level in these multi-week Kevorkian cases seemed to be almost universal (except, perhaps, for Kevorkian himself, as noted above), and Judge Cooper candidly commented in our interview “it was deeply stressful [for her, as a judge, and that she was] constantly in [her] office researching on the weekend” (Cooper Interview: May 17, 1996).

During the 1996 Beedle interview, a matter came up that did not, until review of the 1999 *voir dire* minutes, register with me completely. Cameron Beedle’s “father was epileptic, tried to commit suicide a number of times [but] they [Judge Breck, prosecutor Larry Bunting and defence attorney Fieger] didn’t ask me [about suicidal matters in jury selection], [although] they did ask about her brother who had died of muscular dystrophy, with the prosecutor Larry Bunting asking one or two questions and Fieger asking a lot of questions” (Beedle Interview: May 19, 1996). This comment highlights another difference between the mid-1990’s jury selection and that of the 1999 jury, to which I alluded earlier. Lawyers vigorously participated in questioning jurors in *voir dire* during the mid-1990s. In the final Kevorkian trial in 1999, Judge Cooper solely conducted *voir dire* question and answer, and then offered

the prosecutor and Kevorkian an opportunity to challenge for cause of peremptorily challenge potential jurors.

My review of the Breck jury press conference was intended to focus upon how the jury decided the case. Overwhelmingly, the jurors indicated that their decision to acquit was because the 1994 case of *Hobbins/Kevorkian* seemed to retroactively criminalize Kevorkian's 1991 assisted deaths of the two non-terminally ill women, Marjorie Wantz (who had chronic pelvic pain) and Sherry Miller (who had multiple sclerosis). However, when I listened to the press conference again during 2007, one voice in questions was overwhelmingly present. That voice belonged to Ruth Holmes, who had volunteered her services as a Kevorkian jury consultant throughout the decade. In later years Holmes, along with her daughter, was among the five people escorting Kevorkian from prison on June 1, 2007 when he was paroled (ABC Eyewitness News, viewed June 1, 2007). I did not realize this at the time of the original press conference, because I did not yet recognise her voice (or the voices of a number of participants in the cases). However, hearing her pepper the jury with questions about how they came to their conclusions pointed to later *voir dire* focal points (which she did not disclose to me), which is something I wish I had had an additional opportunity to probe.

Facts that the members of the jury did divulge after Judge Breck's Kevorkian trial included that their deliberations were for a total of 12.5 hours (which seems short for a five week trial), and that there were three votes, according to juror "Vince." The first and immediate vote was 7 Not Guilty, 4 Guilty, 1 Undecided. The second vote was 9 Not Guilty, 2 Guilty and 1 Undecided. The final unanimous verdict was Not Guilty (Breck Jury Press Conference: May 14, 1996). The jurors pointedly, repeatedly and variously stated that what had swayed their opinion. First

was the lack of a definition of the “common law” regarding euthanasia and assisted suicide. Second, the cases for which Kevorkian was being tried happened in 1991, with the Supreme Court (of Michigan) issuing a definition for criminal conduct of assisted suicide in 1994; the jury was clearly offended by what it viewed as an *ex post facto* law that had no explanatory back-story. One juror, “Jennifer,” enumerated it simply as “1. the prosecutor didn’t make an attempt to explain the common law and 2. how should a decision in 1994 affect Dr. Kevorkian in 1991?” (Breck Jury Press Conference: May 14, 1996).

Thus, the jury did not seem to accept that while they were the judges of the facts, the judge was required to provide instructions regarding the law, but not required to provide a “written law” that was in effect when the Wantz/Miller assisted suicides took place in 1991. What the jurors apparently wanted was black letter law, literally in the printed form in front of them. The law was not provided because the case was tried under a theory of common law of homicide (as upheld and required by the combined cases of *People v. Kevorkian/Hobbins v. State*, 447 Mich.App. 436, 482-495 (1994). That case reversed and remanded an earlier dismissal by Judge Breck for Kevorkian to be tried), as predating the first statutory ban on assisted suicide in Michigan. The statutory ban was passed in 1993, and the jury perceived the case as an assisted suicide “common law” passed in 1993 reaching back to 1991. Indeed, it also seemed that the jury imposed a burden on the prosecution to provide and explain the law, while it would have been reversible prosecutorial and fair trial error to usurp the judge’s province, had the prosecutor so done. Because, as the jurors stated in their press conference, “of course” they knew about Dr. Kevorkian before his trial, and it would appear that the jury, in effect, deputized him as an expert witness, as well as a defendant. Since the jury felt Kevorkian did actually make an affirmative showing

during his testimony in the second 1996 case, they acquitted him (Breck Jury Press Conference: May 14, 1996). This stood in stark contrast to the 1999 Kevorkian trial, where he acted as his own counsel, opened and closed the case, but did not testify.

The other factor, while not identified by the jury until the end of their press conference, was that what really touched them and had an impact upon their decision making process was the testimony of the families of the decedents who had been served by Dr. Kevorkian – Sherry Miller’s mother and her best friend, and Marjorie Wantz’ husband. This, along with the videotapes of the women, the jurors found compelling. Indeed, they were so compelling that during deliberations, one male juror “Vince” asked Cameron Beedle to “please turn around those pictures of those dead women” (Beedle Interview: May 19, 1996).

Thus, for the acquitting jury in the second Kevorkian trial in 1996,, the factors that were most prominent were first, a lack of clarity on a non-statutory “common” law. Second was the appearance of a judicial or prosecutorial vendetta by criminalization of the conduct after the fact. Third was the impact of the families and friends of the women who had died, despite their non-terminal illnesses. However, this acquittal occurred less than two months after the acquittal in the Frederick/Khalili assisted suicides (by carbon monoxide inhalation) that took place in 1993, when the temporary statutory ban (now permanent) was in place. Thus, the prosecutor’s office was faced with two separate jury verdicts acquitting Kevorkian. First was the acquittal of statutory assisted suicide (Judge Copper’s 1996 Kevorkian trial, regarding two statutory 1993 cases under the first assisted suicide ban, based on a successful defence theory of double effect of alleviating suffering by use of the carbon monoxide inhalation. Second was the acquittal under a theory of common law murder (Judge Breck’s Kevorkian trial, regarding two 1991 cases common law murder cases that

occurred and were first prosecuted prior to the statutory scheme. These seemed to have been lessons learned by the prosecutor's offices by 1999. This argument is supported by the fact that Kevorkian was charged with both the assisted suicide and euthanasia murder of Tom Youk only after a new law permanently banning assisted suicide was passed, and the vigorous and successful opposition to Kevorkian being allowed to call Tom Youk's wife Melody and brother Terry to testify to Yom Youk's pain and suffering.

Conclusion

In this chapter, I have shown how the jury was a select – and selected – audience in the theatre that staged the Kevorkian trials of the 1990s, demonstrating how a criminal trial may effectively be won or lost in the United States by the time the jury is selected and sworn. However, the audiences of these plays became characters in the theatre of the legal arena and the political forces in the assisted suicide and euthanasia debate in the 1990s. Individual members of the juries variously ignored the media, embraced the media, and shunned the media over time and at different times. Viewed from the relative distance of a decade later, perhaps it was no surprise that the juries in the debate-focused “issues trials” of statutory assisted suicide (March 1996) and common law murder (April-May 1996) held press conferences and gave statements to the media. These were politicised trials that tried the issue (of assisted death), rather than the man (Dr. Death). Recollected from nearly the same distance in time and space, perhaps the surprise in the 1999 “elements” and “just the facts” trial (convicting) jury was that its members and body specifically did not want to hold interviews or press conferences. This seemed nearly unthinkable at the time of the trial that the members of the jury would speak only by their verdict of

guilty as to both euthanasia murder and drug delivery charges. Both of these are consistent with Pakes (2004. p.115), who said, “juries normally do not explain their decision.”

In this chapter, I have had an opportunity to analyse the *voir dire* minutes of the Kevorkian 1999 convicting jury. While the last chapter examined how elites came to the Kevorkian proceedings, the *voir dire* minutes offered an opportunity to glean how ordinary people were drawn in and went from being actors to being a factor in the case via lay participation. In that jury selection exercise, jurors who were previously not involved in the cases were initiated and educated by a ritualistic process. Some jurors in the trial passed through this process successfully, others either did not do so or chose not to do so. A number of social attributes (such as medical education, knowledge and exposure; personal and family illnesses involving end-of-life care; and strength of opinion or belief) contributing to the jury arrangements were examined fully. Others, such as the impact religion actually had upon subsequent deliberation of selected jurors in the 1999 trial, could not be so completely analysed, due to methodological limitations imposed by a lack of jury selection transcript of a jury deliberation information. In any event, studying the *voir dire* was a rare opportunity to take a pure construction of law, and assess it in actuality, rather than simply hypothesize it in the potential application and vacuum of a mock trial or jury consultation, assess it in actuality

Unlike earlier Kevorkian cases, where the lawyers and judge all issued questions to potential jurors, solely the judge conducted question and answer during the 1999 *voir dire*. The jury’s verdict of conviction spoke for the jury, whose members declined to do so, in what is a methodological limitation on direct evidence of deliberation. The potential jurors in the mid-1990s were more actively interrogated

by judge and lawyers, which created a participatory atmosphere in the eyes of some jurors. This was enhanced in the second 1996 trial in which jurors were permitted to take notes and issue questions of witnesses, so that the jurors were closer to actors on stage. Jurors who were previously not legal activists found themselves politicising their jury. One example of this politicalization was developed during the Breck jury conference in which jurors cited the after-the-fact criminalization and trial of Kevorkian's 1991 conduct as a significant factor in their decision to acquit.

I conclude that the mid-1990s Kevorkian prosecutions resulted in jury nullification. This conclusion may be supported by the first 1996 verdict of acquittal, which was in accord with a defence that inhalation of carbon monoxide was actually done with the intention of alleviating pain and suffering, although causing death. I also draw the conclusion that the jury in the second trial in 1996 nullified, based upon its objection to the Michigan legislature's responses to prior conduct. Thus the verdict of not guilty reflected a decision to set aside murky and arguably retroactive law, rather than the facts of the case.

In addition, the fieldwork supports a finding that the 1997 jury in Ionia was viewed with such trepidation by the defence ideologically that the lawyer had to devise an elaborate opening statement strategy to provoke a mistrial. Jurors and juries showed a commitment to the rigors of hearing and deliberating, and the citizenry of the Ionia jury took offence to the fact of a mistrial more than they might have to the facts of the case.

Ultimately, having access to various aspects of jury selection, jury dynamics and jury deliberation allowed for development of new facts about this thesis project and dissertation, employing a unique comparative approach spanning different trials of the same defendant, over different years. This important feature advanced the

study of the Kevorkian trials, and of criminal trial juries and their members – ordinary people drawn into an extraordinary piece of theatre – and who became like a family.

If the jurors became a family (as they indicated in their press conferences) and the jury became a factor, the next step of consideration is how the family member witnesses were actors and factors in the Kevorkian cases and the politics of medically hastened death in Michigan. In the next chapter, I shall consider how this other section of ordinary people – family members – became legally, politically and ideologically active in the course of, and as a result of, the Kevorkian cases.

Chapter Five: Families of the Kevorkian Trial Cases

Introduction

In the last chapter, I examined how “ordinary people” were chosen for the Kevorkian (1999) jury. I also compared the juries and their members from the perspective of individuals with nothing initially or obviously in common other than their jury summons dates in Kevorkian 1994, 1996, 1997 and 1999. I also examined the roles and perspectives of “ordinary people” who were chosen as jurors in various Kevorkian trials, by examining how and why *potential* jurors got excluded. In this chapter, I shall examine the roles of the family members of the decedents for whose deaths Kevorkian was on trial. These were in the Kevorkian first 1996 assisted suicide acquittal and the second 1996 open murder acquittal. I shall compare these to the roles of the Youk family in the Kevorkian 1999 euthanasia murder conviction and sentence. Further, I shall give several families’ perspectives on the consensual, if not legal, hastening of death of several competent and terminally ill patients.

Families (or lack thereof) affect a person’s interactions when they become actors in the social world of the criminal justice system, particularly families of the victim (Rock 2004, Doak, 2008, Rock forthcoming 2009) and, albeit differently, the families of the defendant (Condry 2007). This is a universal regardless of whether the family members are drawn from the ordinary citizenry or from the elites of society.

Families of the decedents (whether due to euthanasia, assisted suicide, homicide, or manslaughter) do not generally “enjoy” (or possess or share) the same privileged status as jurors, however. Generally, I am using the legal wording “decedent” here (alternating occasionally with the word “client”), rather than the

politically charged “victim” or “patient” to avoid siding with prosecution or defence or taking a certain (any certain) political stand. In this regard, I hold to the neutrality of legal language (albeit of probate, rather than of criminal, law. My use of the word “decendent” is intended to be read with neither positive nor negative connotation of the decendent, or imputing a pejorative nature to the relationship between the decendent and Kevorkian. Additionally, I am using “decendent,” as a reference to person or noun, whereas “deceased” might be used as either a noun or a verb; this perhaps reflects a political nature insofar as the Youk euthanasia goes, in which Youk was acted upon by Kevorkian as the actor (unlike assisted suicides, in which the decendent is presumably the final actor, rather than a doctor).

Paul Rock observed in his 1998 book, *After Homicide: Practical and Political Responses to Bereavement*,

[i]n law, it should be remembered, there are defendants, witnesses and, until conviction, alleged victims, but there are no secondary victims, indirect victims or survivors: those are roles which are still contested [at the end of the 20th century, contemporaneously with the Kevorkian prosecutions and conviction] on the outer fringes of the criminal justice system. Secondary victims of homicide are not a legal entity, they have no rights of audience, and disputes about their legitimacy [were] made a part of [the *After Homicide*] book (Rock 1998, p. 26).

The focus of this chapter is upon the secondary victims (family and close friends), who I shall argue were also subject to secondary victimisation (or revictimisation) during the criminal trials. I note that subsequent to the Kevorkian cases, a *federal* Crime Victims Act was passed in April 2004, to “guarantee” crime victims of *federal* (i.e., not state, such as the Kevorkian matters were) crimes substantial rights to observe and participate in portions of the trials of those accused of victimizing them. However, these victims’ “rights” did not come with a guarantee to testify at trial (a central issue in the 1999 Kevorkian case, regarding the Youk

family efforts to be permitted to testify *for* the defendant). (See, for example, David Fontana, “The New Crime Victims’ Rights Act: Empowering Victims without Harming Defendants’ Rights, *findlaw.com*, Thursday, May 20, 2004).

The federal Crime Victims’ Rights Act, 18 *U.S.C.* Section 3771 (a)(3) and (a)(4), provides for the “right to be reasonably heard at any public proceeding in the district court involving release, pleas, sentencing or any parole proceeding,” but does not specify trial participation. Applying the principle of “*expressio unis, exclusio alturis*” or that which is not expressly included is otherwise excluded; trial testimony was not within the ambit of any such victim or victim “survivor’s” rights. I note that legislative intent of the 2004 federal enactment was to allow families of crime victims to have a voice and to confer with *prosecutors*, rather than to address the situations considered by this dissertation. In the Kevorkian, family members and friends commented in trial testimony (and the Youks in sentencing statements) that their decedents and they, themselves, were not victims. Further, they repeatedly stated that their sympathies were overwhelmingly aligned with defence, not prosecution – hardly the scenario envisaged by legislators.

In this chapter, I shall train the lens upon the family surviving the Kevorkian decedents. My focus in Part I is on the Youk family, and Part II is focused upon interviews of surviving family members in the mid-1990s trials, an organizational structure similar to the Chapter 4. This is because Mike Wallace’s interview of Tom Youk’s family was included in the *60 Minutes* “Death by Doctor” segment in the November 1998 broadcast, with the family as Kevorkian supporters, but excised from the prosecutor’s cuts of the video presented at trial; likewise, the prosecutor successfully moved to exclude from evidence any potential testimony by the Youk family, who then later spoke on behalf of Kevorkian at his April 13, 1999 sentencing.

Tom Youk's wife, Melody, Youk and his brother, Terry, were present and prepared to testify on behalf of defendant Kevorkian at trial as to Youk's pain and suffering, but were prohibited from doing so during the Kevorkian (1999) trial by Judge Cooper; this evidentiary exclusion was upheld on appeal in *People v. Kevorkian*, 248 Mich.App. 373, 439-443 (2001). As with the preceding chapter, I had the opportunity to engage in in-depth interviews. Family members of two of Kevorkian's assisted death clients – the daughter of Merian Frederick (Carol Poenisch), and the parents of Sherry Miller – from the first 1996 trial for statutory assisted suicide, and second 1996 trial for open common law murder trials, respectively granted me interviews in 1996. Because the Youk family declined to be interviewed immediately after the Kevorkian 1999 conviction, I am relying on the CBS broadcast of the original *60 Minutes* programme and the sentencing minutes.¹³⁹

During my fieldwork, my focus was upon legal elements of cases, substantive law, procedural law and application by (and to) the parties. Since the family and the bereaved of the decedents are not parties to the case, my original focus was not on families as a factor. Civilian friends and some family members were viewed as witnesses in court, to be compelled and controlled by the lawyers, and ultimately, the judges. This bias almost certainly derived from the fact that I was a criminal lawyer by origin, and I inadvertently took as fundamental the very premise that Rock (1998:

¹³⁹ This is not to say that the Youks never spoke of the matter of Tom Youk's death ever again, and in fact wife Melody and I had breakfast in the Pancake House outside Detroit within two weeks after the verdict and we also went to the movies in New York that same summer. However, she made a request not to make additional statements for the record, which I am herewith honoring. Reasons for this request may have included the potential implications of a reversal on appeal, in which case the Youk family may have been able to testify on retrial; alternatively, the Youks may have decided to rest on their prior statements. While this at first blush is a methodological limitation, I note that the Youk family did not give additional statements to CBS and to Mike Wallace for *60 Minutes* for the June 3, 2007 broadcast 48 hours after Kevorkian was released on parole – this said, and in what I considered to be rather misleading, in the June 3, 2007 broadcast of updated versions of what Wallace called "My Favorite Stories," the Youk family statements – from 1998 – were included, without contextualization that the statements were from nearly a decade earlier, and a pre-trial, rather than post-parole, commentary.

26) quite rightly was critical of (and which was echoed by wife Melody Youk and brother Terry Youk in their statements to the sentencing court on April 13, 1999).

Rock articulated it thusly:

In law, it should be remembered, there are defendants, witnesses and, until conviction, alleged victims, but there are no secondary victims, indirect victims, or survivors: those are roles which are being contested on the outer fringes of the criminal justice system. Secondary victims of homicide are not a legal entity, they have no rights of audience and disputes about their legitimacy are part of the theme of this book [entitled, *After Homicide: Practical and Political Responses to Bereavement*] (Rock 1998. p.26).

Since this rich area regarding the families in the Kevorkian trials emerged in data analysis and in seeking new mechanisms by which to examine the trials in a social and legal context, the emerging information was a find in both senses of the word. Nearly a decade later, I had the methodological limitation of working from information and interviews previously developed and of not being able to go back and gather further material. This invites further research in the future, and an opportunity to develop a new vein.

This was a sense of *spirit d'escalier* for me. If in the last chapter, I attempted to be a wordsmith by saying that what I saw or heard in court or in the literal halls of justice or even in the course of an interview had me climbing up the stairs on the spot, in this chapter, I continuously experienced the desire to turn back to the stairway and ask questions that had previously not revealed themselves to me. I now offer a few such examples. First, had their feelings about Kevorkian changed as a result of their (or subsequent) trials and, if so, how? Second, how do they now feel, 10 years later, about assisted suicide, and separately, about medical euthanasia? Third, would they describe themselves as pro-choice, pro-life, and had this view changed?

Fourth, although I did have an opportunity to interview Rev. Ken Phifer (Merian Frederick's minister), I generally made it a point not to ask about religion,

because I wanted family members to feel comfortable in interviews. I now wish that I *could* ask about religious affiliation and participation, because one of the conclusions I drew ultimately was that those who sought and received assisted suicide (and I extend this to Tom Youk's euthanasia) were *not* typical of the profile of Durkheim's suicidants (Durkheim 1951). Although I shall spend much of this chapter aging this, at this time I do want to say that on the whole, the profile of those who were decedents in the Kevorkian trials were in strong family settings and had social roots in the community. One reflection I wish to make is that I considered it somehow politically incorrect or rude to ask about religion, as being deeply personal (like money or wealth), yet so many people involved in the Kevorkian cases in so many ways had become habituated to openly discussing illness and death. As I reflect back, this was a finding of itself, that within the culture of the courtroom and of the lunchroom (as well as information volunteered in interviews of a nature that I would not have dared to ask) everyone had a story. People wanted to talk, they *needed* to talk (Merian Frederick's daughter and minister went on the lecture circuit). They became enraged when they could not talk (like the Youks) or were curtailed in testimony (like the mid-1990s cases). This became widespread, as can be seen by Judge Breck's comments in Chapter 3 and juror Cameron Beedle's comments in Chapter 4, and as shall be seen in this chapter and Chapter 6. And so, while people spoke of intimate issues of death and dying, I now regret not inquiring further about religion, which pales in personal nature to what people freely, indeed eagerly discussed.

Fifth, while I was focused upon how interviewees perceived the criminal justice system and the Kevorkian cases, I think an additional area of inquiry would have been further inquiry regarding the medical profession. I shall raise this further

with regard to Rev. Phifer seeking assistance from other doctors, prior to Kevorkian.

I shall also touch upon this with regard to the Youks, but I note that after the Kevorkian trial, Terry Youk took training in hospice. This begs the question of how family members may have changed their opinions of doctors, nurses and health care (in this last regard, the Youks spoke compellingly at the 1999 Kevorkian sentencing).

I have chosen to refer to the family members by their first names in this chapter. This is for two reasons. The first of these is to look at the so-called “other” instead as another human being, a neighbour, a friend, the person who might work next to you, or live down the road. In other words, I sought to destigmatise the “other” in contrast to the families of offenders, studied and interviewed by Condry (2007, p. 92, citing Goffman 1963, p.164). I wanted to put a human face on the universal themes of these people whose private family experiences were placed in a public world of court. This might be juxtaposed with the family members who survived (factually non-consensual) homicide considered by Rock (1998, p.278-279) who felt that:

Only those who had passed through the same experience could have any conception of the devastation inflicted by homicide, and they became experts *faute de mieux*, the only ones who ‘know what murder is really like’ (footnote omitted).

Second, I also noted that in the course of multi-week trials and proceedings, the courtroom gallery became a small town and a social world unto itself, where everyone became a neighbour and first names were (or quickly and naturally evolved into) the custom among people with different purposes for being in court. In a sense, it was the mirror image to the formal proceedings on the other side of the rail, where the actual trial was unfolding before the jury. Even with formal taped interviews (which invariably took place after the trials) with formal consent colloquies consistent with Institutional Review Board procedures, first names were used (or invited by

interviewees) in interviews more likely to take place in interviewees' homes or a nearby restaurant as would be a formal office or coffee/meal meeting for elites who gave interviews. A reasonable conclusion might be that these relaxed settings eased conversation, or at the very least a free flow of information in an unfettered way with regard to experiences and decisions.

People have free will to make their own decisions, but I also acknowledge that there are forces that shape their options in making those decisions. This is consistent with Karl Marx's 1853 "The Eighteenth Brumaire of Louis Bonaparte." Marx argued, "Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past" (www.marxists.org/archive/marx/work/1852/18th-brumaire ch.01). This Cook's tour may show that families and their members may be subject to recipe knowledge within the courthouse, but the actors may themselves change the recipe on the way to, and after departing from, the halls of justice. I shall argue that for them, the experience was inconsistent with the Thomas theorem that if men define situations as real, they are real in their consequences. In large measure, members of what I sometimes call "the Kevorkian families," felt that their situations were being *redefined* by the criminal justice system, in ways and with consequences that they eschewed, as I shall amplify. The manner in which the family members viewed events was an example of the ability of people to consider and distance themselves from what might be regarded as constraints, a reflexivity that could be applied to the social world of the judicial system or of the medical system.

Part I Social and Legal Representations of the Family in a Euthanasia Trial and Sentencing Proceeding in People v. Kevorkian 1999

In the previous chapter, I commented at length on the unique opportunity to analyse a certified court transcript that included jury selection. For this chapter, I also had a transcribed court proceeding of ordinary people (as opposed to elites) who became involved in the Kevorkian trial and conviction. In particular was the transcript of the sentencing statements by the bereaved relatives of the decedent of the Kevorkian 1999 euthanasia murder case (i.e., Tom Youk's widow and brother). Labelling those on the receiving end of Kevorkian administered-euthanasia or assisted suicide has presented me with the ongoing question of whether they were patients (medical/defence), clients (business/civil), decedents (clinical) or victims (prosecutorial). Each possible role comes with different implications – a client may be a consumer, a victim may be a subjugated other, a decedent may be a distant abstraction, and a patient may be a combination of these (or not). This sense of dissonance was also present when I considered describing the bereaved families and friends of Kevorkian decedents (in both mid-1990s cases of acquittal and the 1999 conviction), who had shifting roles, as I shall discuss in this chapter.

Judge Cooper granted a motion by the prosecutor, that summarily deprived members of the Youk family of the opportunity to testify in Kevorkian's defence at trial. Thus, the Youk family perspective was not a factor in jury deliberations. A synopsis of this unusual exclusion of the "victim's" family as willing defence witnesses may be found in *People v. Kevorkian*, 248 Mich. App. 373, 438-443 (2001). Excluded by judicial fiat from offering testimony of pain and suffering, as well as competency to consent (a technically mitigating factor used by Kevorkian juries to nullify), the Youks were thus totally shunted aside at the trial. However, statements

by Youk's widow and brother were compelling at Kevorkian's sentencing, iconic in this historical case.

These survivors were bereaved in the dictionary sense of the word bereft,¹⁴⁰ but did not necessarily appear to be acutely or chronically bereaved in the senses of the family and friends of homicide victims described by Rock (1998, p. 27-30). Warranted is a brief disclaimer that I ultimately found myself talking about the "Kevorkian Families" to avoid assigning a label to family members and friends who may have presented themselves to court and in interviews differently than "bereft" or "victims." I found myself in the company of Rock (1998, p.x), in this regard. insofar as bereaved and their self-descriptions and labels as to social identity went. By this, I do not in any way seek to diminish the profound losses of the Kevorkian families. Instead, I am seeking to be consistent with how family members and friends defined and identified themselves in court and in interviews.

The Youks at the 1999 sentencing and June Miller in our 1996 in-depth interview took particular offence to either themselves or their Kevorkian decedent as being described by the criminal justice system as victims, as quotes in Part I (Youks) and Part II (Millers) will show. This was but one paradox distinguishing the Kevorkian Families from some of those studied by Rock (1998, p.279) who considered themselves "survivors who had endured and victims who were oppressed." To use the term "survivors" would imply that would-be assisted suicide Kevorkian patients or clients either changed their mind or did not achieve the death they sought, although "survivor" is also sometimes taken to refer to the bereaved and the Kevorkian Families support group chose to call itself "Survivors." I have sought and

¹⁴⁰ The definition of "bereft" contained in *The American Heritage College dic-tion-ary (sic) 4th ed.* is "deprived of something" or "lacking something needed or expected," with a second definition of "suffering the death of one bereaved," which in turn is defined as "to leave desolate or alone, esp. by death" (2002/2004, p.133).

adopted words to be consistent with the narratives and statements of the original family members I interviewed.

The Youk family had no opportunity to testify during the trial, and since they were judicially banned by Judge Cooper from being called as witnesses by the defence (Kevorkian 1999 trial and sentencing: Pappas observations of court and sentencing proceedings). This was a departure from the prior 1990s cases, in which family members were called as witnesses in unsuccessful prosecutions. The mid-1990s Kevorkian cases that resulted in acquittal or mistrial were sealed after trial. Accordingly, transcripts were not available to me. Since the Youk family members were not allowed to testify at trial in 1999, they were thus excised from participating in the murder trial.¹⁴¹ Prosecutor John Skrzynski underscored this by arguing that,

“[t]his court (i.e., Judge Cooper) ruled that the evidence of [Tom Youk’s] pain and suffering, Tom Youk’s medical condition, his activities of daily living and his quality of life were not relevant to the murder count. The court did say they were relevant to the assisted suicide count. So we came to the Court on Friday and we dismissed the assisted suicide count” (Hearing, Tuesday, March 16, 1999: 6).

Judge Cooper finally permitted wife Melody and brother Terry to make statements at the April 13, 1999 sentencing. The Youks did not give the usual, and ordinarily prosecutorial victim impact statement (Doak 2009, pp.150-152; Rock 2004, pp.173-194), but rather argued in favour of mitigating any sentencing that would deprive Kevorkian of complete liberty. These statements had the “hallmarks of credibility”¹⁴² traditionally associated with witness testimony in terms of demeanour

¹⁴¹ An explanation in this regard was provided by Pam Bellock, in an article in *The New York Times* on March 27, 1999 in “Dr. Kevorkian Is a Murderer, The Jury Finds,” retrieved from *nytimes.com* on July 30, 2007. Although the Oakland County prosecutor originally charged both murder and assisted suicide, the prosecutor’s office dropped the assisted suicide charges specifically in order to prevent Melody and Terry Youk from testifying about pain and suffering. Trial prosecutor John Skrzynski identified keeping the Youks from testifying as the pivotal factor in so doing, after Judge Cooper ruled that evidence of pain and suffering could be introduced by the defense regarding the assisted suicide, but not euthanasia murder, charges.

¹⁴² *Hallmarks of credibility* is a commonly used phrase in hearing and trial practice in the United States, referring to a way of saying that within testimony, there are many signs of truthfulness and

and consistency, and ultimately, veracity. Although the Youks considered their sentencing statements to be testimony (as was noted in one of Terry's comments), because the Youks were not required to take an oath or swear or affirm prior to their statements, I am pointedly not calling it testimony. However, this is a technical parsing of legal terms as compared to the social experience of the Youks at the sentencing proceeding. Indeed, I would argue that a fair reading of the transcribed minutes suggests that it would be reasonable to conclude that the Youks in fact believed that their statements were testimony to the court. Melody and Terry Youk may well have believed that it was relevant to the truth-finding work of the court, whereas courts in the Anglo-American tradition are as occupied by procedural fairness as substantive truth-finding.

As with Chapter 4, I had the opportunity to work from a court transcript. These were the sentencing minutes dated April 13, 1999, the day that Kevorkian was sentenced in the concluding portion of the conviction relating to the Youk euthanasia murder and related drug delivery charges. My attendance at the sentencing offered a supplement to the "cold bare record" of transcript.¹⁴³ For a reader who is not from the United States or who is not familiar with criminal trials and sentencing processes, something that may be taken as a given by an American criminal lawyer should be

reliability, pointing to a witnesses' veracity or lack thereof. *State v. Pedro S.*, 87 Conn.App. 183 (Conn. App. 2005).

¹⁴³ This is evocative of the case of *People v. Norton*, 164 A.D. 2d 563 (1st Dept. 1990), in which Justice John Carro, writing for the majority, opined, "It is said that a reviewing court, facing a cold, bare record cannot see, hear or have a real feel for the witness, but can only read the words typed on the pages of the record. However, *this* reviewing court was *not* without benefit of examining the demeanor of the victim Roldos. We have listened to his tape recorded recantation, and find Roldos to have sounded calm, and fairly articulate, not fearful or confused" (emphasis in original). As a matter of disclosure, I was the judicial clerk for Justice Carro at that time, and this portion of the writing was inspired by earlier years of appellate advocacy and transcription analysis. Subsequent to the fieldwork considered in this thesis, but in a related matter to be discussed in the Chapter 6, I engaged in a Faculty Innovation Grant, which was entitled, "Uses of Demeanor as a Socio-Legal Research Tool and Instructional Device," funded by the Teaching and Learning Technology Center at Seton Hall during Spring 2006, in which both the Kevorkian *60 Minutes* (Youk) tape and the *Norton* case were considered in the course of a grant study on demeanour and juxtaposed for different aspects of tapes, videos, trial/hearing transcripts and appellate decisions/opinions, with a focus upon credibility and demeanour of witnesses, defendants, attorneys and judiciary.

spelled out. The Kevorkian sentencing proceeding took place approximately two and one-half weeks after the original trial to a guilty verdict rendered March 26, 1999. I further note that March 26, 1999 was a Friday, and that the jury came back at nearly 5PM (i.e., at the literal end of the week). In American criminal law, it is commonplace for a break between trial and sentencing for the probation service to gather information from which to prepare a pre-sentencing recommendation for the court, and that occurred in this case (although pre-sentence reports are not generally considered as part of, or released along with, the transcribed sentencing minutes).¹⁴⁴

The time between the jury's verdict of guilty and the sentencing proceeding was a time which was put to use by the legal team Kevorkian allowed to represent him after the summations of the 1999 trial. Tom Youk's wife, Melody, and his younger brother, Terry, made detailed and eloquent statements at the sentencing (Sentencing Minutes April 13, 1999: 8-17, and 17-27, respectively).

It is crucial to note that, in two ways, these oral remarks were not viewed as victim impact statements (cf. Doak 2009, Rock 2004). First, victim impact statements made to the probation department are generally reduced to a written synopsis available only to the court (with the parties permitted to view at sentencing). Second, the Youks were offering testimonials in favour of Kevorkian, rather than issuing statements in which they perceived themselves to be victims of criminal conduct by

¹⁴⁴ Ashworth (2005, pp.348-349) offered a somewhat different comment as to English pre-sentence procedures, "[i]n *some* cases a court may adjourn the case before sentence to allow for the preparation of a pre-sentence report, for example where the defendant had pleaded guilty and no pre-sentence report had been prepared. The principle is that, if the court adjourns the case specifically in order to have the offender's suitability for a certain sentence assessed, and the report confirms suitability, it is wrong for the court to impose a custodial sentence.... The principle applies wherever a sentencer's remarks present a reasonable expectation of a non-custodial sentence, even if only over a lunchtime adjournment. If the court appears to go back on what it has stated, the ensuing case of injustice will lead to the quashing of the subsequent custodial sentence." One must wonder (rhetorically) whether Judge Cooper's comments during the March 26, 1999 bail proceeding would invoke the specter Ashworth describes; however, Kevorkian's intervening comments to the Probation Department, which Judge Cooper focused upon at the sentencing, would appear to support the departure from likely non-custodial sentence to that of 10-25 years.

Kevorkian. While the Youks' oral statements may perhaps have been prepared, or at least outlined, in advance,¹⁴⁵ the demeanour of the Youks during the sentencing proceeding was respectfully conversational in their narrative to the court, even when chiding the judge. As I shall discuss, the Youks were critical of the judge and of the criminal justice system, yet treated the office of the judiciary and the public space of court with due respect. These dignified, respectful objections stood in sharp contrast to the antics of both Fieger and Kevorkian in previous trial. I conclude that these literal outsiders (an homage to Becker's classic 1966 book) actually gave more proper critique of the flaws in the criminal justice system than did Fieger and Kevorkian (the first of whom was a litigation insider, and the second of whom became so during the course of the 1990s cases).

In several ways, Melody and Terry Youk's statements contain more than their mere words. At first blush, the statements are important as the first formal family statements on the record in a conviction of Kevorkian, rather than a trial to acquittal. Second, this was the first American conviction of a doctor, after trial, regarding

¹⁴⁵ On the whole, both wife Melody Youk and brother Terry Youk spoke passionately and seemingly from the heart. This said, there were passages in both their statements that were remarkably similar – not about Tom Youk, but rather about how Youk “initiated contact” with Kevorkian (Melody: 11; Terrence: 23), about the Medical Examiner's statements at the February 22, 1999 Michigan Law School/Michigan Journalism Fellows Conference regarding “Covering Assisted Death: the Press, the Law and Public Policy” (Melody: 15, Terrence: 24). I note from both attendance at the trial and trial transcript review that a central contested issue before the jury was whether Youk was pressured, and a central legal issue – which was explored on cross-examination, but not on Kevorkian's summation – was a colorable causation issue, in which the Medical Examiner, a long-time Kevorkian adversary, was the central witness (I now refer the reader to the next chapter for amplification of these). These portions of the Melody and Terry Youk statements had the sense of what in Fourth Amendment search and seizure law is called “ritualistic incantation” or tailored testimony; that said, both wife and brother spoke with individualized passion about their decedent family member, and perhaps the former and relatively brief portions were “canned” or prepared by or with counsel. This may be underscored by the fact that Morgenroth (Kevorkian's lawyer at sentencing and on appeal) introduced and called both Melody Youk (April 13, 1999: 8) and Terrence Youk (April 13, 1999: 17), whereas it might be more common for the court or bailiff to invite family members to testify at a post-conviction sentencing proceeding. These observations do not undermine the statements the Youks made about either decedent Tom Youk, or their view of medical care, or their experience of the criminal justice system. Noteworthy as having had shape to certain issues of a legal nature unlikely to be had from non-legal professionals or from witnesses generally at a court proceeding, this later would be prominent in this case on appeal. That is to say, both their personal statements and the statements of potential benefit to Kevorkian for mitigation of sentence or for appeal were made and preserved for the official record.

euthanasia, so that Youk family statements will stand as a historic case of first impression.¹⁴⁶ Last, both wife Melody and brother Terrence (or Terry, as he is known) made comments that I shall examine in three thematic areas.

The first area touched on the family and Tom Youk's life, illness and decisions. The second theme was critical of the courtroom processes that had excluded the Youks from testifying at trial. The third target for the Youks' comments was the medical profession and its failures in the treatment of Youk (as contrasted by the Youks with Kevorkian's care). The Youks did not believe the medical profession had failed to care for Tom Youk in the course of his efforts to fight and manage the path of his biological deterioration, but was rather had a belief that the medical profession could not offer end of life (or ending life) options. Strikingly absent were statements about bereavement or grief after Tom's death during statements that instead celebrated Tom Youk's life and lifetime.

I shall now juxtapose this with another jurisdiction, the Netherlands -- where there was a sufficient number of openly conducted medical euthanasias to allow Swarte, van der Lee, van der Bom, van den Bout and Heintz to produce a quantitative study published in 2003. This study was of 189 bereaved families and close friends of terminally-ill cancer patients who died by euthanasia versus 316 bereaved family members and friends of comparable cancer patients who died a "natural death" between 1992 and 1999 in the Netherlands (Swarte *et al.* 2003, p.189).¹⁴⁷ The study concluded that, among other things, "the grief experienced by family members in suicide cases differs from grief after euthanasia, mainly because relatives have had the

¹⁴⁶ Traditionally, a case of first impression refers to a case in which either a novel (or new) legal issue is presented, or in which a factual scenario requires a new application of an existing common law or statutory scheme, or in which a new statute is being applied to a case or challenged.

¹⁴⁷ An e-version of this article downloaded from BMJ.com is 7 pages in length, but not paginated. Hence, references to this article will either refer to the text or, in a style similar to American law review citation, as footnotes and accompanying text where applicable.

opportunity to say goodbye, which is seldom the case in suicides [and it posited that] physician assisted suicide should be expected to resemble euthanasia on this point, because it will also usually be announced” (Swarte *et al.* 2003, p. 189 n.4 and accompanying text).¹⁴⁸ The question regarding families of those who were assisted in suicide will be amplified in Part II of this chapter, but it is interesting that the Dutch chose not to include assisted suicide cases in their parameters. This invites questions for further research and development in jurisdictions where assisting in a suicide is lawful. Such research is not limited to the Netherlands, but includes Oregon and Washington State, which in 2009 became the second of the United States to allow for limited physician-assisted suicide. One matter of note is that assisted suicides do not generally regard suicidants such as those examined by Durkheim, but on the whole regard terminally ill patients with social support systems.

This 2003 conclusion regarding families of Dutch euthanasia decedents implicitly invited two questions about the various Kevorkian cases. First, as to the 1998 Youk euthanasia, what can be gleaned from the statements of the Youk family at the 1999 sentencing, and how do they compare to the findings of Swarte *et al.*? Second, as to Kevorkian’s physician-assisted suicide trials in the mid-1990s how did the family members/close friends shed light on the hypothesis of Swarte *et al.*?

A. *The Family’s Social Construction of Tom Youk’s Euthanasia Event*

Turning to the first question, the Youks had lengthy opportunities not only to say goodbye to Tom Youk, but also were present during the ongoing decision-making process as his health declined for two-and-one-half years following his ALS diagnosis. Brother Terry Youk told the court that he “witnessed Tom’s decision and

¹⁴⁸ The question regarding families of those who were assisted in suicide will be amplified in Part II of this chapter, but it is interesting that the Dutch chose not to include assisted suicide cases in their parameters. This invites questions for further research and development.

was in dialogue with him throughout the entire process [and] can testify that he made his choice from a stable, well-informed point of strength” (Sentencing Proceeding, April 13, 1999: Terrence Youk 23). Wife Melody likened Tom’s decision to have euthanasia administered as consistent with his general analytical approach in life, noting that “he approached his illness as he approached everything else in his life—with curiosity, determination, and a problem-solving response” (Sentencing Proceeding, April 13, 1999: Melody Youk 9-10).¹⁴⁹

These matters were consistent with other characteristics and social attributes she had described lovingly with regard to her husband – he was hardworking from childhood onwards, with a paper route as a child, later he was variously a chef’s assistant, a hospital orderly, an Air Force serviceman with a high security clearance, and a college educated accountant who later formed his own auto restoration business as an extension of a lifelong passion that had included racing cars well into his illness (4-9). Terry Youk (who later trained as a hospice volunteer and has since made several documentaries regarding end-of-life care and hospice treatment), and who had remained favourable to Kevorkian.¹⁵⁰ Terry added that Tom had been eight years older, and had effectively raised him as a “father, mentor, and playmate who gave playful, loving attention” while their parents worked (19). He also reaffirmed that his brother was “diligent, methodical, accountable” (19). Terry further noted that he was with his brother when he first went to meet with Kevorkian (24) and that it was Tom’s own choice to have euthanasia, rather than assisted suicide (25),¹⁵¹ echoing Melody’s

¹⁴⁹ As a short form, citations to statements made at the Sentencing Proceeding shall hereinafter simply be designated by page numbers (xx).

¹⁵⁰ This was noted in the Staff Article, “Kevorkian Release Stirs Grief, Gratitude: Famous Pathologist To Be Freed From Prison This Week After Serving 8 Years for Second-Degree Murder,” May 31, 2007, visited on cbsnews.com (August 3, 2007).

¹⁵¹ In Chapter 6, I shall argue that Kevorkian’s own rendition included a statement – by Kevorkian – that Youk had some ambivalence about euthanasia and had actually wanted assistance in suicide, rather than to have euthanasia administered.

comment that Tom chose “to bring a peaceful transition” (13), although his decision left her “heartbroken” before his death (10), and “grateful” afterward (11).

B. Social Constructions and Criticisms of the Criminal Justice System by the Youk Family

In phrasing strikingly similar to that by Glaser and Strauss in *Time For Dying* (1968: 179), regarding a patient’s “own calculus based on a different weighing of values, such as worthwhile living time versus worthless living time,” Terry Youk described to the sentencing judge Tom’s choice to die as one that was consistent with Tom’s own “equation for life, with work through the limitations [of Tom’s illness],” (22) and steep decline from ALS. After describing the diligence and accountability of his brother, Terry Youk pointedly stated “it therefore rankles me to have endured this disingenuous characterization by the prosecution about [Tom’s] fortitude and projected mental inability throughout the course of this trial with no forum available to address the inaccuracies and the misconceptions” (20).

In effect, physician-assisted death can be viewed from different standpoints – legal, medical, familial, from the standpoint of the sick person – that is contested and the Kevorkian cases constituted an arena in a court where only one version of this could be given a voice and make an impact. To quote what Goffman wrote in *The Presentation of Self in Everyday Life*, “criminal trials have institutionalized [a] kind of open discord” (Goffman 1959:, p.11). The difference between Goffman’s writing and the confrontation the Youks had in court at the sentencing was that Goffman was discussing a “murder mystery” in which the defendant was confronted at the end – here, it was the *judge* and the one version wrought by *the criminal justice system* that the Youks were confronting and critiquing.

This first open critique of the judicial proceedings by Terry Youk, to the officiating judge herself, would be quite unthinkable to a lawyer in practice, and would approach contempt of court.¹⁵² Ironically, the open narrative of a sentencing proceeding afforded both wife and brother freedom to speak to topics they would have been prohibited from addressing at trial, under the traditional structure of direct and cross-examination. This is because at the sentencing proceeding, they were not constrained by the direct examination of a lawyer seeking to elicit favourable information (or curtail any unfavourable facts in testimony), or by cross-examination seeking to impeach factual testimony or witness credibility and what they said was not material in front of the jury for deliberation in its decision to convict. Indeed, in practice, there is no purpose for cross-examination of family members (or friends or clergy) addressing the court after a conviction, but before the sentence is imposed in cases where the judge imposes sentence.

In this, they were unfettered in comparison to witnesses, who Rock argued “had laced themselves, their relations, and their narratives together in ways that made the public and personal one, staked valued identities and reputations; engaged in what Goffman once called aggressive [f]ace-work; launched images of self and action against one another in a clash of vituperation and disbelief that elicited pain, bewilderment, and anger; and became, in consequence, like the inhabitants of Babel who could no longer ‘understand one another’s speech’ (Genesis 11:7)” Rock (1993, p. 92, footnotes omitted). Even as they protested their systematic exclusion from testifying at trial, the Youks were able to step out of the ritualistically stylised role of witnesses, and into the role of ordinary plainspoken people who were exempt from

¹⁵² While the family members of a victim or decedent are generally given latitude in issuing pre-sentence statements in court on the day of a sentencing, these are usually pro-prosecution and in castigation of a defendant. That on sentencing day the Youks were chastising the court and prosecutor, while extolling the virtues of Kevorkian, was yet another example of the unusual nature of the Kevorkian proceedings.

some of the dramaturgical limitations of trial. Thus, they were allowed to introduce the personal narrative in the public space of court, because they were *not* witnesses.

Both Melody and Terry Youk had much to say in their criticisms of the court, the criminal justice system and its participants and what they said is instructive. Both were critical of Tom Youk being listed as the complainant – Melody pointedly commented that Tom was “not a victim,” (11) and she referred to her husband as a “client” of Dr. Kevorkian (8).¹⁵³ As discussed earlier (and as I shall discuss as to the families of Kevorkian clients Merian Frederick and Sherry Miller in Part II of this chapter), this is a significant point of family self-identification and of labelling of their decedents. Both commented positively to the effect that Youk had initiated contact with Kevorkian (Melody: 11; Terry: 23) via Kevorkian’s “address on the internet” (Melody: 11). Terry, who was then a documentary film producer living in Vermont, stated, with regard to the legal status of Tom as a “victim” and the role of the Youk family:

One can’t ignore that the statement I am about to present on behalf of my brother, Tom Youk, and my family is unique among criminal cases. How unusual is it that the so-called victim and family members unflinchingly supports (*sic*) the alleged perpetrator of the purported crime. ... As I have witnessed the unfolding of this trial and the surrounding hyper media glitz, it is clear to me that the most important story and facts pertinent to this case are simply absent. It mystifies me to consider that the complainant/victim and his story have been systematically excluded from consideration in this trial (Terry: 17-18).

Thus, once again, there was a theme of contestation about the meaning and framing of the event and its principals, a contestation that was doomed in the eyes of the legal tribunal (cf. Goffman 1959, p.211). In a sense, Terry was describing the

¹⁵³ The Youk family depictions, like those of the Kevorkian Families I shall discuss in Part II of this chapter, were remarkably different in their use of linguistic self-identifying language than families in SAMM (Support After Murder and Manslaughter) considered by Rock in the 1990s; Rock noted the 32 June 1995 letter of Frank Green, to a member of SAMM who had resigned in protest of its use of the word ‘victim’ instead of ‘survivor.’ “I fully understand the concept of establishing the survivor in the client, but I believe we can be victims too” (Rock 1998, p. 279).

criminal trial of Kevorkian as a reverse example of the Thomas theorem that “if men define situations as real, they are real in their consequences,” by adamantly holding to that the definition of the situation was *unreal* and that the consequences being imposed by the conviction and potential sentence were surreal.

Melody described Kevorkian’s demeanour with them in the days preceding the euthanasia of Tom Youk, as “quiet, calm, interested, understanding ... thorough, warm, extremely compassionate, caring towards [her] husband” (11). In sharp contrast, the Youks commented negatively on the prosecution and its witnesses -- particularly Medical Examiner Dragovic. Both Melody (15) and Terry (24) were critical of Dragovic’s medico-legal taxonomy of “only three categories as relates to death cause: natural, by your own hand, and homicide.” Melody went on to argue that “[c]learly, there needs to be another category as in Tom’s situation” (Melody: 15).

Thus, the Youks did not view themselves as homicide survivors with the traditional array of issues described by Thompson (2007, pp. 109-123) or Rock (1998). In this way, the Youks more were similar to the families of the Kevorkian acquittals that I shall discuss later in this chapter. The Youks were critical of the Medical Examiner, but neither of them specifically raised the possibility that Tom Youk had died of his underlying illness. This had actually been raised by Dragovic’s own autopsy which listed “end-stage ALS” as a second possible cause of death, a matter to which Kevorkian devoted much of his cross-examination. This last may legally have assisted Kevorkian more (at least on appeal), than the judicial decision of Judge Cooper to prohibit the Youks from testifying in Kevorkian’s defence as to Tom’s pain and suffering. However, theoretical law was not the concern of the family; the family was emotionally invested in testifying as to a husband, a brother, a

decision to end his pain and suffering from a fatal illness in a steep trajectory, and the implementation of that decision by a doctor (notwithstanding the fact that Kevorkian had been administratively stripped of his licenses), whom they experienced as a medical provider, rather than a murderer. Their efforts to seek mitigation of sentence were, as the record showed, unavailing. That the Youk family statements were consistently in harmonious accord with Kevorkian's position may be compared to Glaser and Strauss' (1968, p.176) argument regarding terminally ill patients in hospitals in *A Time for Dying* that "family members sometimes have a major share in shaping the last phase of the patient's trajectory.... Occasionally there may be a conflict between the physician and the family over the family's desire to shorten the ordeal."

Legal categorization of medical death was but one of the issues the Youks had with the criminal justice system and its proceedings in the Kevorkian (1999) case.

A particular focus for both Youks was that, as Terry told the court during the sentencing proceeding, "my wish is to convey the deep disappointment my family feels at having been prevented from testifying to the real facts and the intentions of my brother and Dr. Kevorkian" (18). Their frustration implicitly had as much to do with the socialization process of lawyers and to the way legal facts are edited and elicited at a hearing or trial (Vago 2006, pp.398-401) and how the police and prosecution authorities edit the facts necessary to secure a conviction, rather than to engage with the full facts of a case (McConville *et al.* 1991, pp. 11-13, 36, 65-75).¹⁵⁴ In fact, the prosecutor and trial judge excluded testimony by the family members

¹⁵⁴ One popular film version that may be used as a vehicle explaining this to lay people is the 1992 movie of Aaron Sorkin's acclaimed play, *A Few Good Men*. The fact-based drama of a military court martial for the accidental homicide of a young recruit who was being hazed has an exchange between two co-counsel in which one asks the primary legal character, Lt. Kaffee, if he believes the story of their clients; the answer to this was "it doesn't matter what I believe, it only matters what I can prove."

specifically *because* their testimony as to pain and suffering was at best immaterial to, and at worst nullifying, Kevorkian's legal guilt. Melody Youk went further still:

Of course, I wish I had been able to speak at the trial, feeling that that would have given the jury an opportunity to receive a balanced view of the facts, but understood the prosecution's concern for a jury nullification based on Tom's situation of being near death. However, not being able to speak also did not allow us an opportunity to address the questions improperly raised as to his lack of adequate medical care or to correct inaccuracies as mentioned above or to lay to rest misrepresentations such as the suggestion that the tape [of the Kevorkian/Youk euthanasia] was somehow staged or produced for any reason other than to show, again, my husband's consent and that no one but the doctor was present at the procedure (Melody: 13).

In this short passage, Tom Youk's wife covered a good deal of legal territory.

Examination on direct and cross-examination would have been ritualistically elicited, rather than providing for an open, spoken narrative. Thus, for the Youks, being banned from testifying at all was worse than having to provide evidence and information in the form and under the constraints of what Rock called "recipe knowledge" (1993), although this also provided the Youks with the opportunity for an unfettered open narrative of wide range at sentencing. Melody also publicly and directly, although briefly, attacked the prosecutor's reaction to prior jury nullifications, citing that as a reason that the prosecution objected to the Youks testifying.

The Youks knew at the sentencing that their statements to the court would be historically important. Terry Youk pointedly stated that his "intent [was] to provide the court and the world watching with a portrait of [his] brother from those who knew him most intimately—his family. In so doing, it [was his] most sincere desire to appeal to the courts (*sic*) and the world's wisdom, common sense and mercy in the sentencing today in this most unusual of trials" (17-18).

He thus invoked both the family status and the unique trial proceedings resulting in this first conviction of Kevorkian, after some 130+ hastened deaths. In

short, the Youks knew they would be in a defining moment in legal history of euthanasia and one that would be literally published to the world.

I conclude that this was what the Youks surely did when they were interviewed for the original *60 Minutes* programme “Death by Doctor” segment in November 1998. Terry Youk explicitly acknowledged this and said that “the doctor [Kevorkian] has videotaped most of the procedures he has performed, the intent of which is to protect the family members from being criminally culpable.”¹⁵⁵ Further, Dr. Kevorkian consulted with us previous to the release of the videotape to 60 minutes (*sic*) and sought our permission before its release, which we gave” (26-27).

A rhetorical question emerged as to whether Terry Youk, a documentary producer, in fact appreciated in advance matters that other families may not have. While the Youks correctly questioned why, as family they were not charged (indicted and/or tried) as co-conspirators (Terry: 26), they were not unaware of their prominence and importance in this first Kevorkian trial and conviction for euthanasia. I support this conclusion with Melody’s comment that she “assured [Tom Youk], prior to his death [by euthanasia] that he was just casting his absentee ballot on Proposition B [the 1998 ballot initiative originating with Merian’s Friends, to allow assisted suicide, though not medical euthanasia] early” (Melody: 13).¹⁵⁶

As a transition from the Youks’ various criticisms of the legal process, proceedings and criminal justice system, to their comments about how the medical system treats (in both senses) the terminally ill, the iconic nature of their statements

¹⁵⁵ This rendition by Terry Youk and the question of family culpability and presence is one that I shall return to in Part II of this chapter, when I consider the “kitchen table” interviews I conducted with other families from the Kevorkian cases. While Kevorkian may have been asserting control as much as seeking to protect the family members from culpability (if not more so), the fact remains that this was what Terry Youk was told by Kevorkian and what the Youks believed.

¹⁵⁶ The Youk euthanasia was September 17, 1998, the ballot vote defeating Proposition B was on Election Day held the first Tuesday of November 1998, the Youk euthanasia was broadcast by CBS later that month, the Ann Arbor conference regarding assisted suicide, the press and public policy was in February 1999, the Kevorkian trial was in March 1999, and the sentencing was in April 1999. This was an extraordinarily fast set of events in legal time.

should be underscored here, as well.¹⁵⁷ As recently as 2007, Howarth, in *Death and Dying: A Sociological Introduction*, observed that “many research studies have demonstrated that dying people frequently consider ways to end their suffering, and that some terminally ill people and their families would welcome euthanasia” (2007, p.151).

The situation Howarth described in her argument, and which I am examining here is exactly that which affected such families – after the fact of assisted death. I note that in researching medical sociology, such families were not included. Considered in medical sociology instead was the decade long and highly litigated Schiavo family feud. This famed post-millennium American version of Dickens’ *Jarndyce v. Jarndyce* had, on one side, a husband who sought to discontinue the use of a feeding tube in the treatment of his persistently vegetative (and thus non-competent and non-consenting) wife, Terri, (now deceased). On the other side were Terri’s parents, who opposed the withdrawal of nutrition and medical care of their daughter, who had been in a persistent vegetative state for over 10 years (Weiss and Lonnquist 2006, p. 341).

In stark contrast, the Youks offered a paradigmatic portrait of unity and the consenting American family after the fact of voluntary and consensual active euthanasia.¹⁵⁸ I underscore that I am considering this as the social unit of the family

¹⁵⁷ Deliberately omitted as beyond the scope of this discussion are non-Kevorkian cases, whether preceding the period of study, regarding withdrawal of life support with family agreement, as in *Quinlan* (1973) and *Cruzan* (1991), or with family disagreement and litigation, as in 2005 with *Schiavo*. The reason for this decision is that I am herewith examining patient and family participation contemporaneous to the life shortening measures (i.e., competent patients), rather than those of patients whose families’ judgment is substituted for that of the patient, in hopes of being in the patient’s best interests. Stated differently, I am examining criminal cases with family and patient consent, notwithstanding the fact that one cannot consent to one’s own homicide as a matter of Anglo-American law; and I am further restricting myself to a particular geographical jurisdiction over a particular period of time. Hence, the earlier cases would be excluded as non-binding jurisdictionally, and the later case as inapposite.

¹⁵⁸ Consent to euthanasia is not allowed under Anglo-American law as either a justification to, or mitigation of, homicide (Fletcher 2000, p. 236).

and its interaction with the criminal justice system. If anything, the Youks felt they were experiencing secondary victimization not as a result of the medical community or as a consequence of any of Kevorkian's actions, but rather of their exclusion as witnesses during trial by the prosecutor and the court. The prosecutor dismissed assisted suicide charges relating to Tom Youk's death specifically to prevent the Youks from testifying as to his pain and suffering and to excise the family's story.¹⁵⁹ Terry Youk summarised the family reaction to this with the claim that the family "endured the disingenuous characterization by the prosecution about [Tom's] fortitude and projected mental instability throughout the course of this trial with no forum available to address the inaccuracies and the misconceptions" (20).

C. Family Perceptions of the Medical Profession and Medical Care of Tom Youk

Seemingly incongruously, it was in the arena of the criminal justice system that the Youks had the opportunity to be complimentary about the health care that the terminally ill, "end-stage"¹⁶⁰ ALS patient Tom Youk received prior to this change of status to Kevorkian client and "victim." Melody made these comments almost immediately in her statements at sentencing, following on her loving description of her husband and his lifelong activities and achievements. Indeed, her transition to this topic was *via* her comment that Tom was of an analytical frame of mind in college and as an accountant, and "he approached his illness as he approached everything else in life – with curiosity, determination, and a problem-solving response" (9).

As to Tom's care, Melody gave a litany of positive comments about the medical care that he had received from the U.S. health system, and clearly

¹⁵⁹ One reason for this was that in this criminal trial, the prosecution was required to prove the intent of the defendant, and not the decedent.

¹⁶⁰ *End-stage* is a phrase taken from the autopsy and the Medical Examiner's testimony, and arguably pointed to a reasonable doubt as to cause of death; this phrase was hence a time factor suggesting imminence and used a term of art in a more specific way than the generic phrase "terminally ill."

communicated that she did not feel that he was marginalized by his progressive illness and disability. She directly told Judge Cooper, the courtroom, and the media reporting on the sentencing:

There exists for your review volumes of verifiable information to show that he was, in fact, well cared for, from the day of diagnosis of Lou Gehrig's disease (*sic*) [the alternate name for ALS in the US] in June of '96 and throughout his illness, by the esteemed University of Michigan Neurology Clinic and had been under the care of the Angela Hospice prior to his passing. Additionally, he met every challenge of his illness with the same analytical, determined approach he used throughout his life by seeking alternative treatments, researching new information, as well as participating in the experimental drug therapies through the University (Melody: 9-10).

Thus, Tom Youk's widow described outstanding access to health care, excellent treatment by traditional and alternative medicine. She simultaneously described her husband as a patient with a positive outlook and diligent effort in availing himself of all the medical system had to offer, including research and development opportunities. It was a portrait of the best of the medical system with a patient who was a sophisticated consumer of health care and its products, as compared to some patients unaware of their terminal status and options, depicted by Glaser and Strauss in *Awareness of Dying* (2007, pp. 122-126).

As Melody explained at the sentencing proceeding, this was ultimately not enough:

However, as [Tom] had come to the situation where in addition to being able to control only his thumb and first two forefingers of his right hand, he was losing his ability to speak, and in spite of receiving specific medications for problems of swallowing and choking. He'd had a food tube inserted directly into his stomach wall in August [i.e. approximately one month prior to his euthanasia], but was not metabolising food as his bodily functions were apparently shutting down. We discovered at that time that his lung capacity had dropped to 25 percent of normal.

But Tom had long ago determined for himself that he did not wish to be on a ventilator nor completely dependent on others in a totally paralyzed body. I was heartbroken to realize that in spite of our efforts we had come to the end. I was crushed and I resisted, but came to understand that it was selfish for me not to support him in his decision.

For these reasons and more to follow, I wish to submit to you that my husband had come to the end of his life as he chose to live it. He was not depressed, he was not a victim (Melody 10-11).¹⁶¹

Widow Melody thus described in detail the process and progression from what Charmaz would call *disability as an interruption* to an *intrusion* to an *immersion* for Tom Youk (Weitz 2007, pp. 168-169, citing Charmaz 1991, pp.11-40, 41-72, 73-104). However, Youk's social relationship with his family did not wither during this time; if anything, the family unit became stronger and was continuously unified and positive in its dealings with the medical system. Additionally, his internet contacts kept him connected to a community of people dealing with the same illness. This mitigated Youk's potential social isolation, in ways that were perhaps unimaginable in 1968, when Glaser and Strauss wrote in *Time for Dying* of "a patient's increasing isolation, whether or not he perceives it" (1968, pp.168-169). I conclude that his family was concerned not with social death, but with biological death and the physiological death process of Tom, whom the hospice and Medical Examiner had characterized as "end-stage ALS" and whom Kevorkian described as "terrified of choking" in the November 1998 *60 Minutes* "Death by Doctor" segment.¹⁶²

Terry Youk underscored Melody's statements regarding medical science at the Kevorkian sentencing. This seemed also to be part of an effort by the family to educate Judge Cooper prior to sentencing, since they were not permitted to offer this

¹⁶¹ I conclude that the portion of the Youks' statements attesting that Tom Youk was not a victim hearken of Holstein and Miller (1990, pp.103-122), and that the statement that he was not depressed would be contested by the arguments Stan Cohen made in *States of Denial: Knowing about Atrocities and Suffering* (2001: 54-57, making the point as to AIDS, but equally reasonable as to MS, ALS, and Huntington's Disease) that unless one is "psychotically cut off from reality"(54) so as to be completely in denial, a deadly degenerative illness inevitably leads to a reality of depression. Whereas Cohen argues convincingly that depressives are actually accepting reality (2001, pp. 57), I would conclude that the Youks were essentially making the argument that Tom Youk was not unduly depressed, in a political choice of wording. I suggest that in an updated version of *Mirrors and Masks: The Search for Identity*, Strauss (1959) would likely have made an argument that the language of both testimony and narrative would need to be revised, so as to include "the open-ended, tentative, exploratory, hypothetical, problematical, devious, changeable and only partly-unified character of human courses of action" (1959, p.91).

¹⁶² I shall discuss this more fully in the next chapter/

information to the jury to consider during its verdict deliberations. The brother observed:

Tom learned of his illness in early 1996 and continued on with hopefulness to live as best he could within the limitations presented to him. ALS is a terminal disease. There is no treatment. Very little is understood about its mechanisms. There is ultimately no escape. What is ALS? Simplified, in a healthy body the brain sends a signal to the neurons which then activate the muscles. In ALS, the neurons fail to deliver the message and the muscles slowly atrophy, leaving you a prisoner in your own body.

This, of course, doesn't really give you a glimpse of what the actual experience is like. It started slowly for him, affecting first his left leg until he needed a brace, then the right leg, and soon another brace, then with canes to aid in walking. Soon he was confined to a wheelchair, but he responded with characteristic acceptance and inquisitiveness, like scoring (*sic*) various options, both medical and mechanical. He began injection treatment with the experimental drug, Mytrophin, he purchased a handicap equipped van to increase his mobility, as well as investing, toward the end of his life, in a specially designed race car he could operate without the use of his legs (Terry: 20-21).

The conclusion was that Tom Youk did not simply take on a sick role, but rather initially viewed the sickness as an interruption of his normal life that became an intrusion in his ability to live normally. Terry Youk continued, effectively presenting to the judge how the intrusion became an immersion in the experience of illness, notwithstanding excellent care and social support:

Unfortunately, [Tom's] symptoms continued to accelerate and soon his arms were weakened and succumbed and became all but useless. Even then he embraced and adapted his limitations. He used his computer to reach out and research his condition. He engaged in dialogue with a community of courageous human beings afflicted with ALS. He had a stomach tube inserted to aid in the taking of medication. Whatever he tried, the disease always seemed to be two steps ahead.

Soon, a mere two and one half years after his diagnosis, Tom was confronted with having no control over his body and was quickly losing his ability to communicate. He was in great discomfort and needed to be moved via (*sic*) sling, a complicated and unpleasant procedure, every 10 to 15 minutes or so. He was experiencing intermittent pain that would come in flashes and with great intensity, pain that even morphine could not touch.

His body was shutting down and was not metabolising food, and the little food that did digest became an ordeal to eliminate. He had a catheter inserted and there it remained for the last three weeks of his life. His lung capacity dwindled to a miniscule 25 percent. He would, with increasing frequency; experience spasms of choking on his own saliva, despite the

medication he was using designed to alleviate this condition. He was caught in hell, a hell with accelerating conditions, off the charts and on a dead run to one eventuality (22).

Ironically, some of the information relayed in this narrative, and its description of Youk's progression to "the certainty stage of dying" (Glaser and Strauss 2007, p.230) would probably *not* have been developed in the question and answer format of witness examination – either on direct examination (had Kevorkian prevailed in his effort to call the Youks as witnesses) or on cross-examination, which is constructed to be limiting, rather than expansive, in nature.¹⁶³ This bird's eye of the medical and social world of Tom Youk hence was important. He continued:

Everyone has his or her own equation for life – everyone, with no exceptions. When our equation is not being fulfilled in the positive, we mobilize, we take action, we improve our lives, and we evaluate and transform to balance our equation. Tom fought the courageous and inspired fight to the very end of his life and embraced with dignity and grit each choice along the way in an attempt to balance his equation. It wasn't easy, and it wasn't always pleasant, as he struggled with accepting new challenges.

Yet, through it all, he always chose to work with the limitations. Ultimately, he chose to be released from his needless suffering. Tom arrived at this realization on his own terms...

Why then, suddenly at the end of our lives as we arrive at one of the most important and sacred moments of our entire human experience, does our right to self-determination end abruptly? (Terry: 22-23).

Although consent is not a justification or excuse for euthanasia in American law, Terry Youk, noted, "only Melody and myself can really testify to Tom's intent, not the prosecution" (24). He argued vigorously that euthanasia as a medical matter at the end of life was his brother's choice, and actually a common everyday occurrence in the shadows of the medical profession, as shown by the following pair

¹⁶³ It is impossible to say with any certainty what, if any, cross-examination of Melody and Terry Youk would have been conducted by the trial prosecutor, since he was successful in his motion to exclude their testimony at trial. Notwithstanding this limitation, I would posit that one possible forensic purpose might have been to show that Youk and his family had actually been contemplating physician assisted suicide, rather than euthanasia. As I shall show in Part II of Chapter 6, this was something of moment both in the original *60 Minute* programme and in trial evidence (as well as opening and closing arguments of Kevorkian and the prosecutor).

of Terry's quotes. What these quotes offer is an educated layperson's commentary on the medical profession, and on the criminal justice system's interaction with members of the medical profession, to the extent that it affects patients and families simultaneously, Terry Youk sought to mitigate any incarceratory sentence that might have been (and, in fact, ultimately was) imposed upon Kevorkian (whom he believed should not have been convicted, let alone punished):

Tom not only made this decision to be released from his suffering, but he initiated contact with Dr. Kevorkian. He wilfully, and as a willing participant, sought out a release from his suffering. *He knew full well that he, alone, would receive the benefit of the procedure he initiated—to be relieved from his abject suffering.*

I witnessed Tom's decision and was in dialogue with him throughout the entire process. I can testify that he made his choice from a stable, well-informed point of strength....

The first time we met with Dr. Kevorkian, I was quite astonished to discover a radically different man from what the media portrayed. The doctor was extremely thorough and questioned Tom extensively concerning his condition. We had provided the doctor with all of Tom's medical records upon his [i.e., Kevorkian's] request. He explained the various options available to Tom and stressed repeatedly that there was no rush and in fact suggested we wait for Tom to reconsider his decision.

After consideration of the various options, including assisted suicide and euthanasia, Tom made his own choice of euthanasia, based on wanting to have more control in the actual mechanics of his death. Throughout, the doctor's manner was kind, direct and compassionate (Terry: 23-24, emphasis added).

Terry said of the medical profession generally (and without detracting from the health care Tom had received from the time of diagnosis until his death):

There are thousands of doctors performing these procedures for terminally ill patients every day in this country illegally. They don't dare disclose their actions for fear of losing their license (*sic*) or risking prosecution. There is only one man that I know about in America who has the moral conviction and fortitude to defy those inadequate, unjust laws (Terry: 24).

I conclude that family members were frustrated by hidden medical practices in the US (or in the UK, as the family response to the English *Cox* case showed). The study of Swarte *et al.* (2003) suggests that an open practice could well be helpful to

the family in terms of saying goodbye in advance of death, and recovering from bereavement thereafter. That can occur only where there are decriminalized or legalized protocols.

I am not herewith suggesting that euthanasia should be permitted as a decriminalized course of conduct. However, one might reasonably conclude that “good” doctors have long been operating within the shadows of the law to hasten death (other than in Oregon, and there only as to assisted suicide by pills). Although not cited by the Youks at the sentencing, this argument was supported by a 1998 article appearing in *The New England Journal of Medicine*, entitled “National Survey of Physician-Assisted Suicide and Euthanasia in the United States.” This article came up with the astonishing findings and admissions (under guaranteed anonymity) that 11% of 1902 physicians surveyed said that under then-current (1998) circumstances, there would still be circumstances in which they would be willing to hasten a patient’s death by prescription drugs, and a whopping 7% said that they would provide a lethal injection to a patient; numbers jumped to 36% and 24% if the practices were legal (Meier *et al.* 1998, p.1193). One-third of Michigan doctors surveyed in a 1996 study, also published in *The New England Journal of Medicine*, responded favourably to the less risky question, in terms of criminal culpability and civil liability, as to whether “they might participate in assisted suicide if the practice were legalized” (Bachman *et al.* 1996, p.303).

The corollary is that “good” families are experiencing a dissonance with a technologically (as well as legally) sophisticated medical profession. I conclude that not only are voices competing to more or less effectively give public definition to the events at the core of this thesis (and thus to reject having the Thomas theorem thrust upon them), but also that a range of more covert or voiceless practices which shape

the reality of death (Howarth 2007) or the definition and role of “victims” generally (cf. Zedner 2002) in certain circumstances. Also of moment with regard to Terry Youk’s critique of the medical profession and its restraints on doctors is the observation that the prosecution of Kevorkian was after the fact,¹⁶⁴ and not in the category of civil cases and declarations sought in advance in the *Quinlan* (1973), *Cruzan* (1991) [and, in the UK, *Bland* (1993)] cases.

Terry Youk asked a rhetorical question at the sentencing proceeding that applied to the family experience, the criminal justice system, and the social world of medicine. “Can we not find a way as individuals, as a nation, to embrace compassionate support for those choosing to live as well as compassion and mercy for those who choose to be released from life in dignity?” (23). I note that Terry went on to study and to be trained in hospice after Kevorkian administered euthanasia to his brother Tom, and after he spoke on behalf of Kevorkian at the sentencing proceeding on April 13, 1999 (cf. Putnam 2002). Were one to set aside the answer Terry Youk seemingly required and went on to academically and technically explore by his own further education, this question hearkened back to Parsons and Lidz (1967: 170). They wrote in a footnote to an article entitled, “Death in American Society:”

[s]ome recent studies have demonstrated much ‘denial’ of death to exist in at least one social situation, namely the relation of medical personnel to terminally ill patients in readying themselves and their personal relationships for debility and death, and a tendency for doctors to continue ‘treating’ their patients in ways that involve great discomfort and cost for both patients and their families, well after there can be any realistic hope for significant recovery of faculties (Parsons and Lidz 1967. p.170)

I note that Parsons and Lidz were writing in 1967, some 30 years prior to the events studied in this thesis. Thus, what appeared to be a significant minority who fell outside the Parsons and Lidz paradigm, the reality is that medical practice,

¹⁶⁴ I would, and indeed do in the Chapter 6, make the argument that Kevorkian was actually prosecuted months later, and only subsequent to the broadcast of the Youk euthanasia on the original *60 Minutes* programme.

technology, and indeed the entire debate had shifted during these decades. Whether one answers Terry Youk's question in the affirmative or the negative, the next part of this chapter will consider families who sought "release" in two cases of which Kevorkian was acquitted in the mid-1990s

Part II Social and Legal Consequences of Two Families in the 1996 Kevorkian Acquittals

This portion of my argument regards people who were actually forced to testify as witnesses in the 1996 trials. Mechanisms for this included prosecutorial immunity and mandated testimony as a result. However, these mutated and became favourable factors in a larger context supportive of Kevorkian and the patients. I shall return to Swarte *et al.* (2003) to consider the second question begged by the Dutch study regarding families of euthanasia patients in the Netherlands. A question revealed itself to me. Did the Kevorkian family members and close friends shed light -- years in advance of the Dutch study -- on the hypothesis of Swarte *et al.*?

Interviews with members of two families allowed me to explore whether "the grief experienced by family members in suicide cases differs from grief after euthanasia, mainly because relatives have had the opportunity to say goodbye, which is seldom the case in suicides [and posited that] physician assisted suicide should be expected to resemble euthanasia on this point, because it will also usually be announced." (Swarte *et al.* 2003:, p.189). I did this in order to take up an argument advanced by Glaser and Strauss, in *Time for Dying* (1968, p. 152), in which they considered the (non-hastened) dying trajectory in the hospital setting, noting that an "unexpected death can cause the family to act drastically [whereas i]f a family is to be prepared for a patient's death, it must be forewarned."

I shall now explain seeming incongruity as to my in-depth 1996 American interviews and the 2003 Dutch article. I had the opportunity to interview members of families immediately after the two 1996 cases – the parents of Sherry Miller (Ron and June Miller Interview: May 15, 1996) and the youngest daughter of Merian Frederick (Carol Poenisch Interview: March 15, 1996). Parents and adult “child” offered different perspectives on, and of, family experiences. Both interviews took place within one week subsequent to the respective trials to acquittal regarding Kevorkian’s assisted death of their respective family member. Additionally, both involved cases in which transcripts were not available due to acquittal, and in which prosecutors asserted that there was no daily copy (day by day minutes of trial) (Skrzynski Interview: March 14, 1996; Richard Browne Interview: May 16, 1996). Moreover, both the Millers and Poenisch were the primary caregivers for their family member prior to Kevorkian’s intercession. Similarly to the Youks, the patient resided with family caregivers during their lengthy declines – Miller from multiple sclerosis (“MS”) and Frederick from ALS (the same illness as Tom Youk).

There are differences between the family experiences of the various Kevorkian matters as demonstrated by the Millers and Poenisch, as well as the Youks. These experiences may not be as publicly and indelibly etched as were the 1998 Youk *60 Minutes* experience and 1999 sentencing statements. This may be exemplified by the fact that when Kevorkian was released on June 1, 2007, and CBS had a *60 Minutes* segment on his parole on June 3, 2007, the Youks’ original 1998 statements were used in the piece). Nonetheless, the 1996 interviews do offer perspective on matters of differences in time, and on public versus private space that are worthy of exploration. Whereas Tom Youk was the last Kevorkian hastened death in 1998, Sherry Miller was a very early Kevorkian case (client #3 with death by carbon monoxide inhalation,

on October 23, 1991) before *any* assisted suicide laws had been enacted in Michigan).

Kevorkian assisted in Merian Frederick's suicide (client #19, October 22, 1993)¹⁶⁵ after a "temporary" assisted suicide ban was passed by the Michigan legislature in 1993. Thus, these decedents and their families reflected different methodologies employed by Kevorkian, who was tried under different legal theories or statutory schemes, during the 1990s.

In this part of the chapter, I shall again focus on the families' relationship with the decedent, and their comments on the criminal justice system as they flowed from their experience of the case. The Kevorkian/Frederick assisted suicide case was the first trial in March 1996, and tried along with the Kevorkian/Khalili case, though they were different events on different days. The Miller/Kevorkian homicide case, although occurring first in time (1991) was the second tried, in April/May 1996, along with the Marjorie Wantz case, that took place contemporaneously. I shall amplify further the distinctions between assisted suicide and homicide in some cases, and also amplify how some cases that might medically fall more suitably within one or another legal category were actually tried differently for reasons of political expediency.¹⁶⁶

Both the Millers and Poenisch spoke less about the medical system than did the Youks. That said, it is worth reciting a quote from Merian Frederick's minister, Rev. Kenneth Phifer, who was in the room with Frederick as she died, holding her son's hand. My original intention when seeking to interview Phifer, who was a witness at the 1996 (1) Kevorkian trial, was to learn about the social aspects of religion in assisted suicide cases. While Phifer did make comments relating to religion, such as with regard to Michigan Right to Life, "I'm as right to life as they

¹⁶⁵ A full list of Kevorkian's known patients/clients/victims may be found, with date and number of death, easily, as I did on August 9, 2007, at <http://www.internationaltaskforce.org/jk.htm>.

¹⁶⁶ One such example, which I discussed in Chapter 3 was the case of Loretta Peabody that Ionia's Chief (and trial) Prosecuting Attorney, Ray Voet prosecuted under an anti-assisted suicide law, although the "needle mark" indicated euthanasia murder.

are [we just have] different meanings,” (Phifer Interview: March 11, 1996), and making some observations regarding juror and foreman Bishop Ott, the heart of Phifer’s interview was guided by him toward Merian Frederick, and his experiences of the criminal justice system, which issued an “order of immunity” (from prosecution for his attendance and possible role) so that the prosecution could call him as a witness. The Unitarian minister represented himself as a friend as well as a minister, and told me in our in-depth interview that he had told her, “whatever your choice ... I will be with you. I am your minister, I will be with you. (Phifer Interview: March 11, 1996).

Commenting about the availability of medical options, Phifer told me for the very first time in interview, only after the trial and acquittal:

I went to doctors Merian Frederick knew and asked “would you help her? I’m coming on her behalf.” Doctors said “we wish her well, wouldn’t want her to suffer, but can’t help her.” One doctor said he could hospitalize her and give her a morphine drip, but she didn’t want to be hospitalized.... Jack was 14 of the 20 options, One to 13 were worthless – she wouldn’t have chosen him [Kevorkian]. She knew him only through the media, inflections (*sic*), and there would be publication of her death (Phifer Interview: March 11, 1996).

According to Phifer, Frederick was very clear that “she chose as she chose because she felt the hospital wouldn’t honor her wish. [She had a] healthy suspicion of the medical profession.” This was to the point because she told Phifer “I will *never* allow them to take me to a hospital” (Phifer Interview: March 11, 1996, emphasis in original interview). Similarly to Terry Youk’s commentary about his brother, Frederick’s statement reflected a need to break from the traditional medical system seems to have been predicted by Parsons and Lidz (1967: 170). The latter suggested “that the element of denial is evidence of a well localized, if severe, structural strain regarding the boundaries between the orientation toward controlling the adventitious aspects of death and the orientation toward the inevitable aspects of death, as they are

specified to the norms of medical practice” (Parsons and Lidz 1956, p. 170). In the language of litigation 30 years later penned by 9th Circuit Judge Stephen Reinhardt, in *Compassion in Dying v. Washington*, 79 F.3d 790, 800 (1996), patients who were terminally ill with an inevitable death had an interest in choosing the “time and manner of one’s death.”¹⁶⁷ The conclusion to be drawn seems to be that some who cannot control the fact of their impending biological death turn to controlling the surrounding circumstances of time, process, and decision as a way of managing the medically unmanageable – whether or not that option lies within the ambit of the law. A reasonable inference is that this legal debate was anticipated by Glaser and Strauss in *Awareness in Dying* (2007, p.21), who discussed discussing the hospital nursing staff and the distinction between physical cues, and temporal cues, in the dying trajectory. As I shall now argue, the Kevorkian families showed an almost thematic approach to the temporal, as a medically manageable, aspect of the death process for themselves, and for the patients.

A. The Families: Parents of Sherry Miller, (Adult) Child of Merian Frederick

Ultimately, when Frederick went to Kevorkian for her assisted suicide, it was with her son and his wife, along with Phifer, but not with Carol the caregiver. Phifer posited, “she wanted Carol to have a pure memory” with which to recall her mother (Phifer Interview: March 11, 1996). As with Carol Poenisch, Ron and June Miller were not in attendance at the death of their daughter, which occurred on what June Miller called “the longest day of my life, when we hadn’t eaten all day, there were five or seven of us ... it was 7:30 or so in the evening when we got the call – - they [Kevorkian] called us before they called the police” (June Miller Interview: May 15,

¹⁶⁷ The United States Supreme Court subsequently reversed the case in 1997; however, the language correctly reflects the spirit of the debate, and the legal system’s continuing struggle during the 1990s.

1996).¹⁶⁸ One might conclude that this is consistent with the arguments of Swarte *et al.* (2003) that a family will have less regret when they are given notice and an opportunity to say goodbye to family members who have euthanasia or assisted suicide. This might arguably be the family equivalent or patient controlled mechanism of temporal cues of what Glaser and Strauss described as a nurses' "death watch" (2007/1965: 246-258), as much as what they described as "the division of labour in American hospitals [which] allows close kin to carry out routine comfort care while the nursing staff gives the more difficult or professionalized care" (Glaser and Strauss 1968, p.157).

Moving on, I now wish to address three areas. First is the family experience of the patient illness and decision to obtain assisted suicide that was illegal. Second, I shall examine support systems assisting the Kevorkian Families. Third I shall consider the families' experience of the criminal justice system.

For each of these, I must emphasise that the two literal kitchen table interviews were of dissimilar people, in their own space and time, rather than in a courtroom subject to the rituals of another social organization. The Millers were intensely private, Poenisch an activist who went on to speak at national conferences.¹⁶⁹ Poenisch also became one of the co-founders of a group (that also

¹⁶⁸ Ron and June Miller graciously gave me an in-depth interview together, in their kitchen, on May 15, 1996, the day after the verdict acquitting Kevorkian of the Wantz/Miller cases. For most of the interview, both were present, but at one point Ron excused himself to the ladies, after which June and I continued. Looking at this, and other, interviews from a safe distance of a decade, it amazes me that so many people so graciously took time out of busy lives and trying times to interview with me in the weeks after the various trials. In reviewing the tape of the Millers' interview, I noted that they said that the night after the acquittal, they did not celebrate, they "just relaxed that it was all settled up" (Millers Interview: May 15, 1996). One possible conclusion regarding the generosity of interviewees, some of whom, like the Millers were previously very private – in Mrs. Miller's case, until a Frontline interview the night after the verdict – is that the retelling of narrative, especially an open narrative unrestricted by direct or cross examination, provided closure without requiring a ritualistic incantation of evidentiary testimony.

¹⁶⁹ One such example, a talk given at a conference "Families on the Frontier of Dying," held in May 1998 under the auspices of the Center for Bioethics of the Pennsylvania Health Systems, was published on October 1, 1998 in *The New England Journal of Medicine*, under the title, "Merian Frederick's Story" (Poenisch 1998, p. 996). This was published approximately one month before Proposition B

included Wayne County Chief Prosecutor John O’Hair), Merian’s Friends. This group unsuccessfully sought the decriminalisation of assisted suicide by a voter initiative, which was defeated in November 1998). While both the Millers and Poenisch were caregivers, the experience of parents was historically different from that of a daughter. This seemingly obvious fact nevertheless repeatedly revealed itself in the interviews, and provided insights for juxtaposition of family perspectives.

The Millers spent a good deal of time introducing me to Sherry and her attributes, and a review of the taped in-depth interview¹⁷⁰ demonstrated that they were parents who were loving, involved with, and proud of their deceased daughter – as reflected by their affectionate tone and quiet demeanour, as well as by their words. Sherry Miller was a daughter, a sister (with an older and younger brother, and a younger sister), a mother of two, an ex-wife (divorced shortly after her multiple sclerosis was diagnosed, though June Miller was unsure if that was the reason for the end of the marriage), and a Lutheran. Her parents described her as athletic, with a mind of her own since she was little, a woman who liked nice clothes and earned enough money to buy a [Ford] Mustang when she was in high school (a teenager), a graduate of high school (if not a good student), and “the greatest Chinese checker player there ever was” (Millers Interview: May 15, 1996).

Five years after the MS diagnosis, and after her divorce, Sherry moved in with her parents (June Miller Interview: May 15, 1996). The move was intended to be

was defeated on the ballot and less than two months before the Youk euthanasia was broadcast on national television. As to the latter, on May 29, 2007, three days before Kevorkian’s parole, Poenisch told L.L.Brasser of the *Detroit Free Press*, “I think definitely [the Youk euthanasia] went too far ... I don’t believe the physician should be injecting the patient.”

¹⁷⁰ Interviews were taped with consent, and in March 1996, I underwent an IRB review at the University of Minnesota prior to commencing the interview portions of my fieldwork. During that process, I developed a specific consent form, which was deployed effective March 1996 and thereafter. Interviews conducted prior to 1996 were done under the sole auspices of the London School of Economics, which did not have such a requirement for research subject interviews at that time; those earlier interviews, solely of elites, was deemed by the University of Minnesota to be retroactively approved.

temporary, until she “got her own place,” but her deterioration put an end to that plan. She, like Tom Youk, continued to drive after her illness, but she stopped driving after she crashed her car into the garage by accident. The Millers held onto that car until September 1995, although Sherry died in 1991 (June Miller Interview: May 15, 1996).

The Millers were the primary caregivers, with a succession of part-time home health workers who were unsatisfactory and “did not take an interest in Sherry, they came, hurried and left,” until a woman named Diane came twice a week, and cared so greatly for Sherry that she would call on her days off. June Miller told me in our in-depth interview that she “never heard from [Diane] from the time Sherry died.” (Millers Interview: May 15, 1996) While this seems surprising at first blush, given that the parents saw that Diane obviously was affectionate to her patient, a possible conclusion, along the same lines as which I argued in the last chapter regarding the potential jurors who were nurses, was that Diane had strong feelings or religious belief as to what transpired.

For parents who were, at their youngest, in late middle age, caring for a progressively more disabled daughter was difficult. (For example, June told me that Sherry was “a tiny little girl – 4’10” 90 lbs, but became dead weight for her dad to pick up”). Nonetheless, the Millers described a daughter who had pluck and perseverance, who would say “I’ll never use ...” whether it was a cane, wheelchair or otherwise; the parents would get these items and just set them in a place where she could see them, “then first thing, you know, she’s using it all the time” (Millers Interview: May 15, 1996).

Sherry first told her parents about her wish for assisted suicide in 1989. “We told her we were against this – we went to [visit] our [other] daughter in Texas and

she sprung this on us” (Millers Interview: May 15, 1996). Sherry’s seemingly gentle, yet difficult to hear, disclosure of an already harsh disclosure (cf. Glaser and Strauss 1965, pp 148-153) was her way of making the family “aware, rather than unaware of her planned suicide. The Millers told me that they had told her “no one can do this” (Millers Interview: May 15, 1996). Sherry spent a good deal of time seeking to persuade her parents, showing them an article Kevorkian had written for the Sunday papers about his suicide machine, writing to Kevorkian and asking her mother to mail the letter. She expressed upset to her parents that Kevorkian would not let her be his first case because he felt “[Sherry did not] need it [yet], Janet Adkins need[ed] it more”¹⁷¹ (Millers Interview: May 15, 1996). Sherry went to court to testify at a preliminary hearing in support of Kevorkian, at then counsel Geoffrey Fieger’s request, and expressed her intentions to the court and to the public months before her death in 1991, in an effort to support him in return.

Carol Poenisch, Merian Frederick’s youngest child, also spoke compellingly of her mother’s character and how her illness, ALS, had affected her. Merian was diagnosed with a “terrible disease” in 1992, for which “we were always looking for cures” (Poenisch Interview: March 15, 1996). When Frederick told her friends, and not her daughter, of her decision to seek assisted suicide, Poenisch “took it [Kevorkian] personally – I wanted her to have a future, and [Merian] said “why are you trying to problem-solve when I am trying to stop problem-solving” (Poenisch Interview: March 15, 1996). Carol said she “wanted to have my mother as much as possible,” yet they were in court a month later, and “she would have loved it [had she

¹⁷¹ Taking this statement as accurate and at face value, one might reasonably conclude that it was predictive of both Kevorkian’s arguments regarding doctors providing for better medical control and trial prosecutor John Skrzynski’s 1999 arguments that Kevorkian, rather than patients, was the focus of control. Both conclusions are reasonable, and not necessarily mutually exclusive (although I am not attributing a deliberate line of thought or of planning in this way to either Kevorkian or the trial prosecutor).

still been alive]” (Poenisch Interview: March 15, 1996). She told me there was “no doubt she wanted to die ... [it was] also an indication of the point to which her disease had progressed and that it was time” (Poenisch Interview: March 15, 1996).

The reaction of Carol Poenisch after her mother’s death was at the other end of the spectrum from the private response of the Millers. Carol told me that since her mother’s death in 1993, she was “totally ... involved in the cause and would continue volunteer work with Michigan at the Hemlock board” to promote assisted suicide and gave speeches nationally (Poenisch Interview: March 15, 1996).

Carol went even further, saying that she could give instruction about interaction and “hoarding meds – do you have any seconal? Phenobarbital? When I go to the dentist, I’ll ask for three – Have you heard this before?” (Poenisch Interview: March 15, 1996). Such pill hoarding and stockpiling received such open treatment as a post-mortem investigatory matter in a suicide in the case of a terminally ill woman in Glaser and Strauss’ *Anguish* (1970, pp.62-65). However, I had not heard this before with such candour, other than an initially off the record conversation during my in-depth interview in August 1993 with Janet Good, who later and repeatedly went on the record. Indeed Good who was the President of Hemlock at the time I interviewed her, later became a named a co-defendant of Kevorkian’s in the June 1997 Ionia Loretta Peabody case. The case against Good was dropped in view of her failing health due to fatal pancreatic cancer. The 73-year-old Good went on to become the 57th of Kevorkian’s assisted suicides on August 26, 1997; this was her final act of activism,

Regarding Carol and her involvement with Good,, she commented in the May 1996 interview that “living with someone who is going to die is very private, you try to share their feelings and I’m getting close to Janet Good” (Poenisch Interview:

March 15, 1996). From this comment was sown the seed for the next section, regarding how family members of decedents developed social support. However, as a parenthetical (that I currently have no way of confirming or refuting), it appears that there was a widespread underground movement to obtain and use medications to hasten death. One such example is an article by Abigail Goldman, in the May 22, 2009 *Las Vegas Sun*, “Las Vegas Man Allegedly Brought Assisted Suicide Drugs into The U.S.” According to the article, the man (a non-physician), Jeff Osfteld brought depressants back from a trip to Mexico to assist a friend, in a case treated thus far moiré as a border patrol drug case, rather than as a potential murder or assisted suicide of the 32-year-old decedent.

This said, I shall now proceed with the next aspect of the interviews regarding social support structures for families, though I note that the interviews were conversational in nature, rather than necessarily divided into neat sections.

B. Family Support Systems

The interviews with the Millers and Poenisch showed a glimpse of support systems that were developed for (and furthered by) the Kevorkian Families. This may be compared to other family groups (such as those studied by Rock 1998; Rock and Howarth 2000; Condry 2007). There was a support group, called “Survivors” (Poenisch Interview: March 15, 1996). Neither family (nor other members of the support group) viewed their loved ones or themselves as crime victims, and by the time of the assisted suicides, they were favourable to the Kevorkian procedures. (Kevorkian in fact wanted family support and unity to be given to the patients before he assisted in the suicides). Poenisch pointedly commented that the support group, organized by Sharon Welsh (a childhood family friend of Sherry Miller) and Sheryl

Gale (wife of Hugh Gale, who was the 13th of Kevorkian's assisted suicides on February 15, 1993), contacted her only *after* her mother's death, which I conclude could be the result either of ensuring commitment to the act or of socializing the surviving family members to a new set of roles:

Both [Welsh and Gale] were involved in court cases. They contact families after a suicide is done. I got a letter after her death inviting me to the next social function. *I needed it before* [my mother's death] (Poenisch Interview: March 15, 1996, emphasis in original).

Indeed, this statement opens a new potential vein of research beyond the work of Swarte *et. al* (2003). That is, what advance support is there for Dutch euthanasia patients and their families and does it make a difference to the experience of bereavement after euthanasia? This could not be introduced in the United States at this time (only Oregon, and, as of 2009, Washington State, allow for limited assisted suicide, and no state allows for euthanasia). June Miller, who knew Sharon Welsh most of her life, commented that there were events and get-togethers, though she was matter of fact and welcoming about this, in contrast to the criticism by Carol Poenisch that pre-assisted death support was needed. June Miller told me:

I see Sharon quite a lot. [Also,] there was a picnic with Fieger, Kevorkian and the families. A support group. We didn't go the first year, but we went to a few other things – a memorial at a church on the West Side, a dinner and Margo [referring to Margo Janus, Kevorkian's sister and his assistant until her death] would see us (June Miller Interview: May 15, 1996).

Mrs. Miller took particular comfort in events with "Margo [Janus, Kevorkian's sister and assistant until her death] and the girls. We'd go out and just get dinner, just us girls and Margo" (June Miller Interview: May 15, 1996).

There was another aspect of the Kevorkian families and their support that was revealed in the course of the Millers' interview – Fieger would call families and tell them "it looks good [at Kevorkian's trials] if family and friends are there. It shows

the families are really interested” (June Miller Interview: May 15, 1996). This may be analogised to Finch’s argument and examples in “Displaying Families,” where she noted that:

[t]he ways in which interaction worked directly between participants is an important source of pride. By their collective engagement in family-like activities, the participants confirm to each other that they are indeed a ‘family which works’ however eccentrically composed to an external observer (Finch: 2007, p.75).

For some of the Kevorkian families, attending the trials was a show of support as one would give a family member, albeit that this was constructed by Fieger. During one such phone call from Fieger to families, the Millers told him they could not attend court. They were on their way to see their surviving children in Texas, and June Miller told me that Fieger’s response was “you’re not going to Texas” (Miller Interview: May 15, 1996). In other words, Fieger was instructing the Millers to cancel their trip, since they were to come to show moral support for Kevorkian in court.

From my own observations during the mid-1990s trials, the presence of the Kevorkian Families in court was impressive in the gallery. Although the judges and prosecutors did not comment in court upon this support, I conclude that the daily presence of family members was at least a subtle communication to the jury that these families were there to benefit and support Kevorkian, the *defendant*. Carol Poenisch would come and at verdict, would do so with balloons (representing the release of the ill by assisted suicide),¹⁷² and Heidi Fernandez (the fiancé of Tom Hyde, Kevorkian’s 17th assisted suicide and first trial in 1994) was often in court. Others did not attend

¹⁷² My recollection is that the first time Poenisch did so, she was directed by court officers to wait outside the door to the courtroom with the balloons; however, the gallery was fraught with activity at the time that the verdicts were delivered, so this recollection as to whether she actually stepped inside the courtroom with the balloons might equally relate to courtroom chatter at the time. Whether on the cusp of the courtroom door or inside of it, her gesture (which was repeated) stands in its intention to bring balloons to symbolize the freedom from, and release of, the decedents.

court – for example, the Millers did not attend the Frederick/Khalili trial that was held in March (a few weeks) before the Wantz/Miller trial. Although she watched the trial on television, Mrs. Miller said that the family “should have gone to support Dr. Kevorkian” (Millers Interview: May 15, 1996) She also observed in our May 15, 1996 interview that, during the Wantz/Miller Kevorkian trial 1996 (2), “Mr. Wantz couldn’t come a lot. He lives on the West Side and has a four-hour drive. They couldn’t stay at a motel. I told them they could stay here one night, but I didn’t really know them. I got to know Bill [Wantz]. He said he’d love to come visit us.”

Thus, an interesting finding was that support of Kevorkian Families fell into two categories – support *of* a family post-death, and support *by* the families of Kevorkian in court. This leads me to the next section of this part – how the Kevorkian Families in the mid-1990s perceived the criminal justice system.

C. Social and Legal Consequences of the Kevorkian Families in Court in the Mid-1990s

A number of family members testified at the mid-1990s Kevorkian trials, unlike the Youks’ experience of exclusion from the trial process in 1999. Indeed, during the mid-1990s, some family members were granted immunity by the prosecutor and compelled to testify for the prosecution (since there is no Fifth Amendment privilege against self-incrimination once immunity is granted). The Millers testified in the second 1996 trial. They told me that Fieger had talked to them (before their testimony), but “didn’t prepare [them, rather he simply] just told [them] to tell the truth, tell what [they] knew” which was fine, since they had not been at the time and place of their daughter’s assisted suicide (Ron and June Miller Interview: May 15, 1996). The Millers contrasted this with their experience of the prosecutor’s

office, which was then under the direction of Chief Prosecuting Attorney Richard Thompson. This was after the case was revived further to the 1994 Kevorkian appellate decision *People v. Kevorkian*, 447 Mich. 435, 482-497(1994). That case, reinstated the open murder charges and remanded to Judge Breck, who sat on the case that Thompson brought to trial in 1996. June told me during our in-depth interview:

The Prosecutor's office writes me that I am a victim of a murder and if we need help counselling ... all we have to do is call the prosecutor's office and they will help us in any way they can, they will counsel us.. We got a letter from the prosecutor two or three months before April [1996, before the Kevorkian trial for the 1991 assisted suicide of Miller]. They said to notify them if we want seats. I never bothered calling back. (June Miller Interview: May 15, 1996).

One might reasonably come to a number of conclusions from this. One possible conclusion was that the prosecutors were seeking to establish family presence on their own side, although they had reason to know that the Millers would be supportive of Kevorkian. Based upon our interview, I conclude that June Miller perceived this latter day attempt of the prosecutors to seek the family as an ally in 1996 to be an affront to the preceding years since Sherry's 1991 death. A second possible conclusion might be that the prosecutors were trying to elicit information, and possible family witnesses for the prosecution. A third possibility was to test the waters of the defence case and strength. A fourth possibility is that the prosecutors were engaged in an effort to change the Miller family self-identification to that of victim (a word and social role change of status that June Miller found objectionable in the prosecutor's letter, particularly since it was nearly five years after the death of her daughter Sherry). This would have fit into the 1990 model of Holstein and Miller, "the group most frequently engaged in victimization – *that is, assignment of victim status – are in one way or another, interested in social control.* (1990: 103-122 internet version non-paginated, emphasis added). I note that all of these might be

true, and none of these possible conclusions are mutually inconsistent. However, with the exception of the third possibility I have just enumerated, it is arguable that almost any interpretation would involve status forcing (see Rock 1998: 278-279; Condry 2007: 174). Equally, members of the Kevorkian Families at trial eschewed the forcible and paternalistic protective cloak of the criminal justice system, perhaps because they instinctively “recognize[ed] the tremendous complexity of interaction” (Strauss 1959, p.54) that taking on such a title or label would impose.¹⁷³

Testifying at the second Kevorkian in 1996 was apparently the first time the Millers were seen and heard in public discussing their daughter and her death. This was unlike the Youks 1998 television interviews for the original *60 Minutes* programme, which I shall discuss at length in the next chapter. Ron Miller told me that “even when Sherry was doing interviews [about her wishes and reasons for assisted suicide before her actual death], [he] didn’t want to say anything” (Ron Miller Interview: May 15, 1996). June concurred, and said:

I didn’t give interviews. I hid. I didn’t want any... nothing.. I got mad at “Pete”. I didn’t want to talk to anyone ... taking pictures. Well a trial gives a different perspective. Everyone knows everything. ... well, it’s all an open book, now (June Miller Interview: May 15, 1996).

The Millers had been intensely private, although Sherry Miller had done many interviews in advance of her death, had explained her plans, and repeatedly communicated with Kevorkian and Fieger. Indeed, the latter had her testify at a hearing on Kevorkian’s behalf in June 1990. Sherry had literally announced her decision in a public space and in the international media. Once the trial began, the Millers were no longer able to be private. One reason is that they “sat there [in the hall outside the courtroom] waiting to be called [as witnesses]. He [Fieger] wants to

¹⁷³ Holstein and Miller (1990), in “Rethinking Victimization: An Interactional Approach to Victimology,” quite fairly noted that this is essentially the mirror image of Becker (1963) consideration of how persons are given the label of deviant.

have somebody there to not be caught short without witnesses” (June Miller Interview: May 15, 1996). I have an alternate conclusion and hypothesis about this – by having the Millers sitting outside the courtroom, and being in the public space of the halls, ladies and men’s rooms, phone booths, and eating areas, Fieger had an opportunity to implicitly introduce them to the press and others, and to get them comfortable in the public space of the courthouse. I conclude that this would have been important to Fieger both for his client and for the trial as portrayed in the media – the same media the Millers had assiduously avoided having contact with for interviews and photographs (June Miller Interview: May 15, 1996).

Similarly to the Millers, Merian Frederick’s family was a presence -- on behalf of the defence, even when called by the prosecution to testify. Family members thus testified in the first Kevorkian 1996 assisted suicide trial on behalf of the defence and Kevorkian, as well as attended in the gallery. The Rev. Ken Phifer commented that Fieger “didn’t set up their seating in the court,” but that the seating in the gallery showed “the [Kevorkian] supporters were front and center” (Phifer Interview: March 11, 1996). This was in accord with my own recollections of the mid-1990s trials, which was evocative of Howarth’s description (1996: 180) of the deliberately orchestrated seating by funeral directors, “[l]eading the bereaved from home, the funeral director was aware that, like the flowers, he must rank them according to their relationship to the deceased; next of kin and immediate family seated in the first mourning car, more distant relatives positioned behind, those with the most remote ties relegated to the rear of the procession”. As to his own attendance of the trial, Phifer said that:

I wanted to say by my presence that I supported this man [Kevorkian], I wanted the jury to know that he’s not a killer roaming and looking for people. I wanted it known that this man was performing a public service (Phifer Interview: March 11, 1996).

In other words, it was not only by Fieger's dramaturgical construction that friends and family were in the court gallery (Goffman 1959, p.211).

I interviewed Carol Poenisch on March 15, 1996, one week after Kevorkian's acquittal of the Merian Frederick and Ali Khalili assisted suicides. The central defence claim on that occasion was that Kevorkian was seeking to relieve suffering. The jury acquitted in this Kevorkian trial (which lasted from February 12, 1996 – March 6, 1996, approximately the second half of which I attended). The jurors found him not guilty, accepting the defence's claim of a statutory exemption in the original 1993 assisted suicide law for doctors using medications to relieve pain as its basis for acquittal. In essence, the jury embraced Fieger's assertion that Kevorkian was only relieving suffering, not trying to cause death, by having Merian Frederick inhale carbon monoxide (although I continue to offer the conclusion that this was in fact nullification by a distorted application of the double effect clause, given that carbon monoxide is not a painkiller in the medical sense).

A week after the trial regarding her mother's and Ali Khalili's assisted suicides, Carol Poenisch had harsh words to say about both the lawyers representing the prosecution and defence, who might have been called extreme adversaries in the criminal justice system. Carol told me that "Skrzynski examined [her] first, then cross-examination by Fieger" (Poenisch Interview: March 16, 1996). Specifically, in response to a general question about the lawyers, she said that "there was evil in [Skrzynski's] eyes." Almost immediately thereafter, she told me that "I don't like [Fieger's] whininess, although it's effective and wins cases – it's theatrical. I like someone calm and collected, he didn't get my mother's name right and he got the name of Khalili's illness wrong with extra syllables" (Poensich Interview: March 15, 1996).

As to Judge Cooper, Poenisch remarked that she “felt so sorry for her, because she stood up two years ago and said [the statute banning assisted suicide] was unconstitutional¹⁷⁴ ... she’s trying to be impartial and keep her job ... walk a thin wire and did it well” (Poenisch Interview: March 15, 1996). One reasonable conclusion is that she reacted favourably to Judge Cooper herself, or to a judge as a neutral and impartial arbiter, and unfavourably to adversaries whom Carol perhaps perceived as taking on the *persona* of their positions in court. Ultimately, her take on the matter in 1996 was “whether it should be in court, legislature or medical profession, it’s three circuses at the same time” (Poenisch Interview: March 15, 1996).

Carol’s 1996 comments during our in-depth interview were prophetic in two ways. First, they anticipated the sort of balancing act that Judge Cooper would have to engage in three years later – demonstrated most prominently when sentencing Kevorkian to prison, rather than continuing Kevorkian’s liberty, as implied at length in the bail hearing on March 26, 1999. I shall discuss the options under sentencing guidelines in Chapter 6, and Judge Cooper’s preliminary decision to depart from them, which she subsequently altered, to the extent of adhering to the guidelines; matter which I also touched upon this in Chapter 3.

Second, Carol’s comments served to foretell her own involvement in the Proposition B assisted suicide ballot initiative. That legislative effort was officially begun in 1997 by a group that called itself “Merian’s Friends” in honour of her mother, and was defeated in 1998 by a 3-1 margin shortly after the Tom Youk

¹⁷⁴ This appears to be a veiled reference to the 1994 *Hobbins/Kevorkian* decision.

euthanasia (although prior to its broadcast into the collective awareness in November 1998).¹⁷⁵

Conclusion

In this chapter, I have shown how some of the Kevorkian Families experienced the medically hastened death of their family member. I have also examined family and friends' reactions to the criminal justice system and to the state that brought Kevorkian to trial relating to their family member decedent. In addition, I have explored their perceptions of the medical system and care provided to their family member. The family units, such a factor in the patients' lives, were socialized into ritualistic roles in court – even where those roles departed from the normal court experience. Acquittals were secured in cases where there was testimony regarding consent and family approval, while conviction was the result in the case where evidence of consent and family testimony was judicially barred. These seemed to be implicit approval where there was consent and family approval in the assisted suicide and homicide trials of 1996, and disapproval of the defendant legally standing alone in the euthanasia trial of 1999 (as evidenced by the conviction). Individual family members were treated as bit actors in the trials, and some, like the Youks, found their role left on the cutting room floor during the production that was the criminal trial and the sentencing that followed a few short weeks later.

The Kevorkian decedents, and their survivors, were the mirror image of those considered by Rock (1998). Rock noted, “having been willed and intentional,

¹⁷⁵ A study of Merian's Friends and the beginning through end of the efforts to pass Proposition B, officially known as the Merian's Friends Physician Assisted Suicide Initiative, could itself become a full length work, taking as its point of departure the intersection of Rock's 1998 book, *After Homicide: Practical and Political Responses to Bereavement* and the Dutch study of considering families after euthanasia, published in the *British Medical Journal* by Swarte *et al.* (2003); however, that is beyond the scope of the current chapter.

homicide could have been otherwise, and the existential reality of the survivor is certainly bound up with pressing questions about how it could have been permitted, whether it could have been prevented and what it signifies about the workings of the moral and social order” (Rock 1998, p.54, footnotes omitted). These particular families were involved in units where their beloved family members made decisions over time, and included the families in the decision making process, though not the ultimate decisions. As something of an irony, rather than perceiving the grief associated with loss as overpowering, their experience with the criminal justice system would fill in the blank for the “it” signifying “grief” where Rock wrote “it is a confusing experience for which there are only meagre scripts, an experience which swamps the etiquette of everyday life and social estrangement can follow” (Rock 1998, p.54).

A further irony is that the Dutch experience has yielded quantitative data suggesting that families were emotionally better prepared and their grief was either lessened, or there was less incidence of what Swarte *et al.* referred to as clinical traumatic grief,¹⁷⁶ in cases where cancer patients availed themselves of euthanasia rather than experiencing a “natural” death (Swarte *et al.* 2003). Moreover, I conclude that the Glaser and Strauss trilogy on death and dying predicted this as early as the 1960s. While I do not anticipate that each family of each person whom Kevorkian hastened (or assisted hastening) would feel this way,¹⁷⁷ the Youks, the Millers and the

¹⁷⁶ Swarte *et al.* cite Jacobs *et al.*, “Diagnostic Criteria for Traumatic Grief,” in *Death Studies* 2000:24, pp.185-199.

¹⁷⁷ For example, a staff article by ctv.ca, “Smiling Jack Kevorkian released from prison,” updated Friday June 1, 2007, on the occasion of Kevorkian’s release from prison, quoted Tina Allerellie, sister of ms patient Karen Allerellie, who was found dead in a Michigan hotel room in August 1997, after contacting Kevorkian for assistance; “Allerellie told CTV’s Canada AM that it’s been 10 years since her sister’s death, but hearing of Kevorkian’s release opened up old wounds She blames Kevorkian for her sister’s death. Tina Allerellie said that if Karen wouldn’t have learned about him through newspapers, she may have worked to manage her illness instead of looking for a way out.” While the Allerellie case was not prosecuted during the Gorceyca era (the new Chief Prosecuting Attorney declined to prosecute Kevorkian for assisted suicides, consistent with his election platform that it

relatives and friends of Merian Frederick clearly had structural support for themselves and their family members.

One surprising finding was that some of this structural support may have actually emanated from Fieger, acting and directing on Kevorkian's behalf, and was beneficial to both sides of the equation i.e., both the families and the defendant were supported. Families benefited from social support, but as Carol observed, this was only *after* the death occurred. I conclude that some of this support was organized for Kevorkian's benefit, as June Miller's interview comments suggest. It was implicit in the interviews and statements that Kevorkian dealt with families before a death, while Fieger and Kevorkian's assistants (including his sister Margo) mobilised them afterward. This seemed to be so until the final trial of Kevorkian for the Youk euthanasia, when Kevorkian sought to mobilise the Youks for court and the prosecutor mobilised the judge to exclude the family from testifying.

Some Kevorkian Family members expressed a clear wish that the support systems had been there *in advance* of the deaths – for them, for the families, not just to look good for the media or the courts after the death has already been hastened. While this gap may have been part of what sparked Carol Poenisch as a physician assisted suicide advocate, it is interesting to note that her efforts went toward establishing a (failed) voter initiative to allow for assisted suicide. Another

wasted resources to prosecute someone seemingly unconvictable), a mid-1990s juxtaposition is that Robert Mattner, one of Marjorie Wantz' two sons testified on April 19, 1996 that he regretted writing a letter saying that he approved of his mother's intention to commit suicide, which he said that he did only because his mother told him Kevorkian would not perform the assisted suicide without being released from civil liability. An article published on April 20, 1996 by the *Chicago Tribune*, "Coroner: Kevorkian Pulled the 'Trigger'," compiled by David Elsner did not focus on the legal liability issue, but rather on the family issue, quoting Wantz's son as saying, "I just wish there was a way she was here to see her grandchildren." Conversely to the Kevorkian consent forms and releases from civil liability is the case of Dr. Anna M. Pou, a New Orleans doctor whom a grand jury declined to indict regarding four alleged euthanasias by lethal injection of elderly patients in the wake of Hurricane Katrina in 2005; Dr. Pou is, however, facing civil liability suits by three of their families. Adam Nossiter, "Grand Jury Won't Indict Doctor in Hurricane Deaths," *The New York Times*, July 25, 2007, p. A10 c. 5-6.

unanticipated conclusion is that for these families, the advances in medical technology had not progressed enough to save their loved ones. These (although not necessarily all of Kevorkian's) families and patients expressed this as frustration with degeneration of failing bodies, *not* marginalisation by the medical system. In a sense, these families had the opportunity during the lives of the patients to seek to prevent the deaths. Once that was not possible, then the next recourse was to manage the deaths with a "professional" and to control the temporal aspect of the dying trajectory.

Perhaps their sense of the workings of moral and social order was undermined most by the workings of the criminal justice system, though as I shall argue in the next chapter, the media had a role as well. Perhaps the underlying issue is as much in the struggle over constructing the framework and assigning roles in criminal court sphere pertaining to cases of medically hastened death. As I shall underscore in the next chapter (pertaining to the media in the Kevorkian cases), perhaps a preliminary conclusion is that the vocabulary is imprecise as to whether hastening death is a medical intervention, or a crime, or by a curious turn of the law, both simultaneously. Family members may be victims (in a prosecutorial stance) or supporters (as with the Millers, Youks and Frederick/Poenisch families) or both, with the differentiation being one of linguistic construction or professional labelling. In the next chapter, I shall delve further into how the criminal court dealt with such decisions, and how the law and the facts of the cases were conceived, as further framed by the media.

Chapter Six: Media and the Kevorkian Case

Introduction

In this chapter, I shall turn my attention to the very factor that focused local, national and international attention on Kevorkian in the first place – the media. I began this doctoral study and fieldwork under the assumption that the media reported the news. By the end of the fieldwork, that assumption had been challenged and refuted¹⁷⁸ with respect to this issue generally, and Kevorkian specifically. A conclusion emerged that the media in fact precipitated and sometimes created the news of Kevorkian, and with it, the politics of euthanasia and assisted suicide. This harkened to Daniel J. Boorstin's essay in *The Image or What Happened to the American Dream*, entitled, "From News Gathering to News Making: A Flood of Pseudo Events," (1962, p.7-45). Boorstin argued that a "pseudo-event ... is a happening that possesses [four] characteristics," which in short are that "it is not spontaneous," that "it is planted primarily (not always exclusively) for the immediate purpose of being reported or reproduced," that "its relation to the underlying reality of the situation is ambiguous," and that "usually, it is intended to be a self-fulfilling prophecy" (1962, pp. 11-12).

I shall argue that the media reached beyond the frequently – and correctly – held belief that Kevorkian used and manipulated the press. In this chapter, symbiotic relationships between Kevorkian and members of the media during a short period of

¹⁷⁸ In this regard, I note the comment and experience of Villanova Assistant Professor Matthew Robert Kerbel, a former television news writer, who in his book *Edited for Television: CNN, ABC and the 1992 Presidential Campaign*, wrote of a personal experience in which he was invited by random lot to a White House event reception (in which 2,000 members of the general public – which was his role at this event -- were issued invitations after they sent in postcards for lottery drawing) and of the related press coverage (where he was on the other side of the camera), "The impact of television is such that it has grown beyond simply covering the story, beyond shaping the story, to the point where it *is* the story" (Kerbel 1994, p. xiv)(emphasis in original). I would argue that Kerrbel's commentary, while unrelated to the coverage of assisted suicide, shows that the sort of assumption challenge I experienced may also surprise media members.

time, between November 1998 and March 1999 are my focus, as I shall amplify. For purposes of this thesis and unless otherwise specified, “media” will collectively refer in general to radio, television and newspapers. Some of these will be utilized as sources, and also critically examined (particularly the 1998 *60 Minutes* segment, “Death by Doctor”, in varying formats).

In some interviews, transcripts, tapes (such as talks given by speakers at the February 22 1999 University of Michigan Law School/Journalism Fellows Ann Arbor conference) people have used the phrases to refer to “the media,” or collectively to “the press,” but actually refer to a specific medium. Interviewees sometimes also did so. I am deliberately keeping the colloquial language of such statements and interviewees intact. This is so as to reflect their statements with as much accuracy as possible, rather than to superimpose my own interpretation or to alter the reader’s interpretation (although in some areas, I am using footnotes as a vehicle to offer my analytical commentary as a parallel text without interrupting the flow of the speaker).

One factor in my decision to do this was that many interviewees over the course of the project – from family members to judges – pointedly told me that the media either misquoted them or misrepresented their quotes, as was discussed in other fieldwork-based chapters. Thus, I chose to let the actors’ own words speak unfettered. One such ongoing thematic example was the actual words spoken in court during the 1999 Kevorkian/Youk euthanasia trial. The actual words spoken in court and played on videotape are bounded in by the transcribed minutes of the court proceedings. However, the jury found facts by way of its verdict, whereas the media and the appellate court interpreted “facts” elicited. Because there are some discrepancies, which I am pointing to in an analytical and political way, I think this is an important effort. In addition, in some places, I shall use lengthy quotes –

particularly as to arguments of the prosecutor and Kevorkian relating to their interpretations of the evidence that present opportunities for contextual analysis.

By way of an explanation of the latter point, it is best to state at the outset that Part I will focus on *how* the original *60 Minutes* programme segment,¹⁷⁹ “Death by Doctor” was created, along with statements and new facts regarding key actors in that process of development. First, there was a taped segment broadcast nationally in the United States by the CBS television network on November 22, 1998, which I am calling “the original *60 Minutes* programme.” Second, and the focus of Part II of this chapter, there was a redacted (as to the pain and suffering of Tom Youk, and as to the family support of Kevorkian) version of the tape introduced at the 1999 trial by the prosecution, which I am calling “the prosecution’s clips of the *60 Minutes*” programme or transcript, as appropriate.¹⁸⁰ I shall juxtapose the prosecutor’s clips, along with the prosecutor’s and Kevorkian’s constructions of these during their opening and closing arguments, so as to show the character of the kaleidoscope presented to the jury. Thus, the focus of this chapter is on the social and legal constructions of one specific media event, which literally proved to be a critical factor at the Kevorkian (1999) trial, as the statements of crucial actors indicated.

¹⁷⁹ On network television programmes, there are standard intermittent breaks for commercials from sponsors who pay for the time, and in effect, the programme production costs. In *60 Minutes*, which is a one hour (60 minute) long show, there are generally three segments of 17-18 minutes each, surrounded or separated by commercials (advertisements), as well as a brief programme introduction, conclusion, and occasional editorial spot of four to five minutes. These add up to 60 minutes (time, not title) and in general parlance, the portions of network programmes between commercial breaks are called “segments.” I would note that in a cable television show, there is generally uninterrupted broadcast (because the consumer or viewer pays a premium each month for access to these shows), and when there is a shortfall of time between programmes, the cable stations generally advertise their own upcoming shows, rather than other commercial products such as soda, cleaning products, bath products, store sales, and the like. Indeed, in selling the “Death by Doctor” tape, CBS sells only the segment (and charges additionally for each segment broadcast during the same hour), although the commercials are not included in the for-sale tapes. I would also note that in creating programme clips or clips for my Faculty Innovation Grant in 2005-2006, the instructional technologist referred to “clips,” rather than segments – however, some of the clips were portions of shows or movies, rather than unique whole segments or entire programmes. As a further note, my “Death by Doctor” and “Choosing Life (A.L.S.)” clips I posted for my students did include the entire segments as sold to me by CBS in 2006.

¹⁸⁰ The prosecutor used both edited clips of the videotapes and a transcribed version of the edited clips, as I shall discuss and amplify in Part II.

*Part I: Media Constructions of the 1998 60 Minutes Kevorkian/Youk "Death by Doctor" Segment*¹⁸¹

In his book *After Homicide: Practical and Political Responses to*

Bereavement, Paul Rock (1998, p.225) argued:

Crime is central to the project of the mass media, and its stories about violence and killings that are at its very core. Murder and manslaughter are assumed to be objects of abiding public interest. They have a pathos, immediacy, urgency, and horror that lend themselves to ready dramatisation, and they are continuously being translated into news, entertainment and 'human interest' stories for public edification. They are, moreover, thought to exemplify truths about the condition of society, and the exceptional homicide will be pored over incessantly for the moral, personal and political lessons it is thought to impart about the way we live (Rock 1998, p.225, footnotes omitted).

I conclude that the Kevorkian/Youk euthanasia fell squarely within this ambit, which I shall amend to the extent of adding to Rock's statement that the Kevorkian/Youk case has been offered as an opportunity to pore over the way we live and the way we die. Indeed, the process began immediately after the *60 Minutes* broadcast. It also spurred a conference, Michigan Journalism Fellows/University of Michigan Law School¹⁸² conference on "Covering Assisted Death: the Press, the Law and Public Policy," on February 22, 1999, which I attended.¹⁸³ In my 1999 conference report, I observed that:

¹⁸¹ I delivered a related paper, "Representing Reality? The Socio-Legal Implications of *60 Minutes* of 'Dr. Death'," at the annual conference of the British Society of Criminology, London, England (2007).

¹⁸² My visual styling of this co-sponsored conference is two-fold. First and with regard to the styling of punctuation, the use of "/" is to show that the Michigan Journalism Fellows and the University of Michigan Law School were two entities within the University sponsoring the conference (rather than use of "-" which would place one in a subordinate position to the other. Second, I chose this as a visual representation of separateness of the Journalism Fellows and the Law School (I shall discuss visual representations and the work of Hulme later in this chapter, regarding visual representations of transcripts and videotapes), to signify separateness of the professions.

¹⁸³ In addition, I prepared a conference report for publication, "Covering Assisted Death, The Press, The Law and Public Policy," University of Michigan (Ann Arbor) (1999); in 4(3) *Mortality*, pp.334-335 (1999). Also related to some of the discussion in this section was "Euthanasia and Assisted Suicide: Is 'All the News That's Fit to Print' Really?" Social Contexts of Death, Dying and Disposal, Sussex University (1995).

Paradoxically, this conference examining and calling the media to account might well not have been held if Charles Eisendrath, the erudite Director of the Michigan Journalism Fellows Program, had not acted as the conduit by which Kevorkian delivered the Youk tape (via Kevorkian friend and former *New York Times* contributor Jack Lessenberry) to the American programme, CBS News magazine “60 Minutes.” Eisendrath was thereafter prompted to create this extraordinary and balanced conference exploring whether the media “offers fresh solutions.” Experts of various disciplines and views regarding euthanasia and assisted suicide had a unique opportunity to comment upon the quality and quantity of media reporting, and precipitation, of the assisted death cases and controversy (Pappas 1999, pp. 334-225).

What I did *not* note in the brief conference review, but which I shall examine in this chapter, is the role played factor in the process by two actors in the Kevorkian/Youk media foray – the roles of Michigan Fellows benefactor and CBS moderator Mike Wallace and former Michigan Fellow and journalist Jack Lessenberry, as highlighted in the conference and the 1999 trial.

A. *The Ann Arbor Conference Regarding Media Coverage of Assisted Death*

The Ann Arbor conference was held a bare three months after the original November 1998 *60 Minutes* “Death by Doctor” segment was aired, and the conference preceded the Kevorkian (1999) trial by a month almost to the day.¹⁸⁴ The keynote speaker was Professor Arthur Caplan, Director of Bioethics at the University of Pennsylvania, though his remarks were given as a critique of the failure to address the bioethical aspects of the Youk euthanasia case by the media and a missed opportunity to distinguish between physician-assisted suicide, euthanasia, and end of life care. Timing is everything here. Caplan said that he had conducted a content analysis of 1400 “stories” between the airing of the original *60 Minutes* programme in November 1998 and February 1999 (including print and television, but not including

¹⁸⁴ I have also reviewed portions of a tape of the conference subsequent to attending the conference.

radio), subsequent to the airing of “Death by Doctor.”¹⁸⁵ He argued persuasively that “Kevorkian hijacked the media with his own agenda” and particularly by Kevorkian’s claim that “we have to help people to die or they suffer and remain in pain” (Arthur Caplan, Ann Arbor Conference: February 22, 1999). Caplan held that “framing the issue[’s] presentation as a crime story overlooked the pros and cons of the issues and merits of the case” from a medical ethics standpoint, with very little discussion of end of life issues, or the difference between active and passive euthanasia¹⁸⁶ safeguards in jurisdictions allowing physician-assisted suicide (such as Oregon) and pain control issues (Arthur Caplan, Ann Arbor Conference: February 22, 1999). Although there may have been other ways to phrase the various issues and problems, Caplan and his

¹⁸⁵ When Caplan, along with co-authors Joseph Turow and John S. Bracken, wrote up their findings, as assisted by some eight graduate students, in “Domestic ‘zealotry’ and press discourse: Kevorkian’s euthanasia incident,” in 1 (2) *Journalism* 197-216 (2000), they focused their examination on print media coverage (197) and expanded their study to 1756 “pieces” or articles (202). Turow, Caplan and Bracken, identified their methodology as follows:

We investigated whether and how Jack Kevorkian’s 22 November 1998 appearance on *60 Minutes* affected mainstream US newspapers’ discussion of euthanasia and assisted suicide. We examined newspaper coverage of these topics from 15 October 1998 through 14 January 1999. To take into account any disclosure of the tape’s contents to the press before 22 November, we considered that the month of the broadcast began on 15 November. (As it turned out, there was no such prior disclosure.) For article sampling purposes, we divided our time span into three months – 15 October – 14 November; 15 November – 14 December; 15 December – 14 January.

Using the Lexis-Nexis full text database of large and medium circulation US newspapers, we retrieved all articles that mentioned *euthanasia* or *assisted suicide* in the headline or body during that period; the number totaled 1756 in 129 papers. Because we noted that most of the articles clustered around the period of the broadcast, we were concerned that choosing a random sample directly from the population of 1756 pieces would not yield enough from the four weeks before and after that time. Consequently, we decided to randomly choose the same number of articles – 200 – from each of the four weeks. In the end, 14 had to be discarded and we exceeded our sample for the second period by 10 articles. In total 586 randomly selected articles comprised our sample (Turow, Caplan and Bracken (pp.201-202).

As an aside, in the article, the authors noted that “the research was funded through a grant from the Robert Wood Johnson Foundation,” (214), though at the conference, Caplan identified Pew as the source of research funding.

¹⁸⁶ In terms of this dissertation, active euthanasia is considered as including affirmative causation such as in the Kevorkian/Youk intravenous lethal injection, whereas passive euthanasia is considered to involve cases of omission or of withdrawal of life support with the subsequent natural death of a patient.

colleagues developed their findings for Caplan's talk and the subsequent article in this way.

However, I would argue that Caplan's studied remarks actually proved Rock's 1998 argument. Caplan's criticisms about the original "Death by Doctor" broadcast and the subsequent content analysis may be true, but a logical conclusion is that the 1,400 stories targeted an audience. This conclusion is reasonable whether the media are reporting or precipitating the news, and whether the target audience is reading newspapers or watching television stories.¹⁸⁷ Kevorkian was seen as a "personality," so the crime story eclipsed those of medical ethics, religion, and disability rights (Turow, Caplan and Bracken 2000, pp.204, 206, 211-212). I note here that this was despite the fact that a personality and crime story could also have been used to exemplify medical ethics issues and there was no apparent reason why the media did not do so.

At the Ann Arbor conference, Caplan remarked at length about "*who*" the media chose to talk to – the CBS executive producer (also at the Ann Arbor conference), prosecuting and defence attorneys (40%), law professors (20%), and he observed that Kevorkian himself "had a lot to say," all with "less than 5% of comments from bioethicists, religious [leaders], disability groups [or anyone else]." (Arthur Caplan, Ann Arbor Conference: February 22, 1999). Although Youk had been under hospice care, hospice (as well as spiritual, financial burdens, and abandonment in psychological and social support) was included in a category that Caplan contended was "widely overlooked," as was pain control. Notwithstanding the fact the Kevorkian had been a doctor (albeit stripped of his licenses), the subject of trust in doctors and caregivers received little attention in the stories Caplan reviewed, a

¹⁸⁷ In a post-millennium environment, this could extend to Internet broadcasts and podcasts, and to online news, although these were not available at the time of the Kevorkian/Youk euthanasia reporting.

finding Caplan commented was repeated in the lack of discussion of the possible slippery slope after the original *60 Minutes* programme.¹⁸⁸

However, the Ann Arbor conference provided a number of insights as to the role the media¹⁸⁹ play in creating the news. Chief among these were remarks made by Mike Wallace and by Jack Lessenberry. Lessenberry's involvement in the Kevorkian cases began with working as a "stringer" for *The New York Times* when he lived in Tennessee and increased substantially over time, with him sometimes seated at counsel table with Fieger's team and Kevorkian during the mid-1990s trials, and attending private meals and meetings with them. I interviewed Lessenberry on March 15, 1996 (after Kevorkian's first 1996 trial), and he told me that he "focused on Kevorkian's quirks and Fieger's flamboyance" (Lessenberry Interview: March 15, 1996). As an initial matter, the focus was on personality and dramatization and during the time that "Fieger control[led] access to Kevorkian," and that Lessenberry "cultivated Kevorkian and Fieger, you bet you." (Lessenberry Interview: March 15, 1996). That early access worked both ways, according to Lessenberry, "if not for Geoff Fieger, no one would have heard of Kevorkian, he'd just be some crazy guy who killed 9 (sic) women" (Lessenberry Interview: March 15, 1996).

Wallace, who was (and remains) a benefactor of the University of Michigan Journalism Fellows¹⁹⁰ and Wallace House,¹⁹¹ stated, "our business is to cover news, to

¹⁸⁸ Ironically, and later at the same conference, journalist and Wallace/Kevorkian intermediary Jack Lessenberry commented in his remarks that Kevorkian had tried to raise this issue. I shall discuss Lessenberry's progressively escalating involvement in the Kevorkian cases more fully in the course of this chapter.

¹⁸⁹ This seemingly colloquial usage, embraced by members of the press and numerous interviewees, seemed to treat any single medium as plural, as a grammatical, but not colloquial, anomaly. As I mentioned earlier, and in keeping with the speakers and writers, I am doing so as well, although with the acknowledgment that it is not grammatically proper.

¹⁹⁰ Mike Wallace and his wife, Mary, a former CBS producer, fund the Knight-Wallace Journalism Fellowship and they have also donated "Wallace House," to the programme for working dinners, colloquia, and study. Wallace is a graduate of the University of Michigan, where he earned his first

stimulate and to stir debate ... we try to put flesh and blood into these issues.” (Mike Wallace, Ann Arbor Conference: February 22, 1999). Wallace said:

Let me tell you how the program about Jack Kevorkian was generated ... I [Wallace] had not met Jack Kevorkian ... [I had a call] from Charles Eisendrath [Director of the University of Michigan Knight-Wallace Journalism Fellows]... [He told me] there was a first rate former Michigan Journalism Fellow, Jack Lessenberry, sitting there, who wants to talk to [Wallace]. Jack Lessenberry told [Wallace] on the phone that Dr. Kevorkian wanted to speak to me on the phone about a video he had, please give me the number where I will call [Kevorkian], and [Wallace] did.

I said, ‘Dr. Kevorkian would you kindly send me a copy of the tape’ [T]he next morning, it was on my desk.

I was stunned. It was immediately apparent –*it was a very big news story, which was our business* (Mike Wallace: Ann Arbor Conference: February 22, 1999)(emphasis added).

Wallace briefly outlined the protocols he began to follow in considering whether and how to broadcast:

I showed [the Kevorkian tape] to a few people in the [CBS] office first, and it was *virtually unanimous that it was the kind of piece America should see*. Why?

Assisted suicide was in the forefront of the national agenda for the past decade, especially.¹⁹² [But the] subject of euthanasia was less on the forefront of the American people,¹⁹³ and it seemed to me to put flesh and blood on this

degree. The programme invites 12 American journalists and four to six international journalists for a one-year cycle annually.

¹⁹¹ Wallace has also openly talked about his battles with clinical depression and a failed suicide attempt of his own, in which he took an overdose of pills.

¹⁹² At first instance, this sounds like “pack journalism” it fits within the ambit of “mass pursuit by reporters of a story illuminated and given authority by their own activities,” cf., Paul Rock, in *Reconstructing a Women’s Prison: The Holloway Redevelopment Project, 1968-1988* (1996. p.29, n. 146 and accompanying text) in which Rock cites, R. Ericson, et al., *Representing Order: Crime, Law and Justice in the News Media* (Toronto: University of Toronto Press, 1991). However, in November 1998 the day before Kevorkian called Lessenberry to put out the tape, and three weeks prior to the original *60 Minutes* programme of the Kevorkian/Youk euthanasia, Michigan saw a (failed) ballot initiative to legalize physician assisted suicide. On a national level, the United States Supreme Court had contemplated assisted suicide in 1997 in the paired New York (Quill) and Washington (Glucksberg) civil cases (discussed earlier in this dissertation). During this same period of time, and thereafter, the Oregon Death with Dignity Act (which had been voted into law by ballot initiative Measure 16 in 1994, and survived a 1997 ballot measure seeking its repeal) was implemented by the state and challenged by the federal government (where it ultimately reached the United States Supreme Court in 2005 and upheld on procedural grounds on January 2006 in *Gonzalez v. Oregon*, 2006 U.S. LEXIS 767), with the result that Oregon remained the only one of the United States to allow for legal physician assisted suicide and exempted state-licensed physicians from civil or criminal liability, where they complied with the Oregon Death with Dignity Act procedural safeguards, and dispensed or prescribed a lethal dose of drugs upon the request of a terminally ill patient.

¹⁹³ This statement, while technically correct and accurate, is nevertheless incomplete due to a material omission taken as axiomatic by Michiganders, and implicit during trial. As I will discuss further in the next section of this part, Kevorkian called Lessenberry to promote the Youk euthanasia on election

whole discussion, the whole debate (Mike Wallace, Ann Arbor Conference: February 22, 1999)(emphasis added).

This description dovetailed with the argument of Rock (1973, p.74) that journalists “are governed by an interpretative faculty called ‘news sense,’ which cannot be communicated or taught (footnote omitted) ... [and that] the critical task of capturing news is entrusted to an indescribable skill whose workings are uncertain.” It was also in keeping with what Howarth (2007, p.110) argued – “what makes news is determined by what the media consider to be newsworthy and by the way they investigate and construct their accounts.” In addition, it would in time anticipate and underscore her observation that “the proliferation of news media around death events challenges the view that death has been banished from public discourse” (Howarth 2007, p.110, citing also Walter 1991, 2004; Giddens, 1991; Mellor and Shilling, 1993).

Wallace told the 1999 conference body that Bob Anderson, the producer, flew to Michigan and then Wallace went in early November 1998.¹⁹⁴ Wallace and

night, when Proposition B, the “Terminally Ill Patient’s Right to End Unbearable Pain or Suffering” ballot initiative proposed by Merian’s Friends, seeking to legalize assisted suicide, was defeated. Thus, Wallace was not faced with a simple and consensual medical euthanasia, but a complicated local legal and political issue, as will be expanded upon throughout this chapter by use of evidence and argument at trial, as well as background events leading to the Youk euthanasia and its subsequent publicity.

¹⁹⁴ This was the same teaming for the June 3, 2007 post-parole Kevorkian segment in Wallace’s “My Favorite Stories” years later. I would further note and argue that this 2007 post-parole segment met the criteria of Rock (1973, p.76) enumerating, albeit for newspapers, a showing that “demonstrates that significant change has occurred during the time interval that elapsed between editions.” Among the events that took place between the original *60 Minutes* programme in 1998 and the post-parole interview and broadcast in 2007 were Kevorkian’s trial and conviction, Kevorkian’s incarceration, and the segment was produced on the occasion of Kevorkian’s parole, with Wallace again as interviewer. One of the interesting aspects in this 2007 segment was that there was a very brief cut of Judge Cooper at the April 13, 1999 sentencing, saying to Kevorkian “You have been stopped.” This quote as used in the new 2007 edit created an impression that undercuts Judge Cooper’s previous favorable treatment of Kevorkian – which included allowing him to remain at liberty following the jury verdict and pending sentencing, and only became what seemed harshly punitive in sentencing after Kevorkian told probation officials at a pre-sentencing interview that they “could not stop” him. Hence, the 2007 cut failed to show that Judge Cooper was actually being responsive to Kevorkian’s unregenerate and remorseless statement effectively promising recidivism if allowed to be sentenced to probation. Kevorkian apparently learned the lesson of this (which was further discussed in Chapter 3), and as Wallace and Kevorkian drove away from the prison on parole day, Kevorkian told Wallace he “[did not] feel like a free man. Parole is a virtual tether. ... can’t promote or practice assisted suicide ... talk in detail about the procedure, can’t advise, counsel anybody, can’t be present at a suicide or

Anderson met with Kevorkian, and also met with the Youk family members. The family included Tom Youk's mother, widow and two brothers, and formed what Wallace called a "very private family" in terms of the "business of publicity," in airing this material, since "we knew that it would cause a stir" (Mike Wallace, Ann Arbor Conference: February 22, 1999). In this instance, as I discussed previously in the chapter regarding Kevorkian families, one might reasonably conclude that this was a *bas relief* to Howarth's (2007, p.100, citing also Walter *et al.* 1995) arguments concerning the contemporary trend in the 'psychologicalization' of grief and individualization of mourning styles – that is, that the Youk family was a vehicle for teaching the American public a style of loss, grief and mourning styles in euthanasia or assisted suicide cases.¹⁹⁵ The decision of CBS to include the Youks, who appeared quietly dignified in the "Death by Doctor" segment of the original *60 Minutes* programme, would seem to be a continuing theme from the last chapter on families, and the preceding chapter on juries. That is, those popular and/or cultural attitudes to medically-hastened death (in the Youk case, by euthanasia) are continually emerging in discourse and in protocol.

In Ann Arbor, Wallace also engaged in a public re-examination of CBS and the decision to air the Kevorkian tape, as it was edited and narrated to create the original *60 Minutes* programme broadcast approximately three weeks later. Specifically, Wallace reflected that he "agree[d] with Dr. Caplan that the media failed

euthanasia" (Kevorkian Interview on *60 Minutes*, "My Favorite Stories," June 3, 2007). When Wallace asked in 2007 what he would do if someone came to him to ask him for assistance in dying, Kevorkian answered "it would be painful for me, but I would have to refuse it, because I gave my word that I won't do it again." In my observations during the bail proceeding on March 26, 1999, Kevorkian gave his word that he would not assist in suicide or euthanasia pending sentencing using similar language of promise, a promise he honored in 1999 while awaiting sentencing, notwithstanding his statements. It is my conclusion that to say he is giving his word is the height of language of promise and intention for Kevorkian, a very earnest vow. This said, I would argue that it is an open question as to what Kevorkian would and will do in the days after his parole is concluded --- which Kevorkian (who is a master of language parsing, in my observations) made no promises about.

¹⁹⁵ In a way, this seemed to me to be evocative of Swarte *et al.* and their study of Dutch families post-euthanasia, as discussed in the chapter regarding families.

to discuss the background of euthanasia and assisted suicide [and] we failed too at 60 *Minutes* and particularly noted that the team had not sufficiently examined the Youk family background, and what Tom Youk's medical condition had been, as well as the hospice care he received (Mike Wallace, Ann Arbor Conference: Wallace February 22, 1999). The solution to this, in Wallace's analysis, was that he "can see demanding, though it's hard to demand, *more time*" (emphasis in original) (Mike Wallace, Ann Arbor Conference: February 22, 1999). Nobody (including me) questioned what this meant; I took it as implicit that he meant more time to develop and produce the segment. Wallace may have meant that they needed more time to decide whether to air the tape, but the more likely interpretation was that he meant that they needed more time to construct a segment in a balanced way.

Assuming that the latter was the case is consistent with another statement Wallace made. As a remedial effort, Wallace observed that "we have now gone back and talked to people with ALS¹⁹⁶ around America, talked to people in hospice," for a piece that was broadcast on February 28, 1999 (which was within one week of the conference, and less than one month prior to the Kevorkian euthanasia murder trial).¹⁹⁷ Wallace's recitation (which almost sounded like an allocution and restorative effort) points to the possible conclusion that he had some regret about his role in a

¹⁹⁶ As a brief reminder, ALS is, according to www.als.org, a short name for amyotrophic lateral sclerosis, often referred to as "Lou Gehrig's disease," which is a progressive neurodegenerative disease that affects nerve cells in the brain and the spinal cord. Motor neurons reach from the brain to the spinal cord and from the spinal cord to the muscles throughout the body. The progressive degeneration of the motor neurons in ALS eventually leads to their death. When the motor neurons die, the ability of the brain to initiate and control muscle movement is lost. With voluntary muscle action progressively affected, patients in the later stages of the disease may become totally paralyzed. There is, as of the time of this writing, no cure or treatment that reverses ALS, and patients experience a decline until they die either of the illness or of another cause (such as opportunistic infection, accident, or as in Tom Youk's case, a hastened death by euthanasia).

¹⁹⁷ The title of the piece, "Choosing Life (A.L.S.)," was not named by Wallace at the Ann Arbor conference, but a date "will be broadcast in the next two to three weeks" was (Mike Wallace, Ann Arbor Conference: February 22, 1999). One might ask whether this was a previous scheduling, or whether the date was advanced. The segment was not pro-life *per se*, but it was about people choosing to live with, rather than to die because of, ALS (the same illness Youk had). In a sense, it was a reply to "Death by Doctor" in which hope and options were the focus, rather than the hastening of death.

Boorstin style “pseudo-event” and his seeming descent into the fray of Ericson’s “pack journalism.” Wallace, as both CBS broadcast editor and Kevorkian interviewer, may have structured and sculpted the landmark narrative telecast segment of the original *60 Minutes* programme; however, the media event was created with clay supplied by Kevorkian and Michigan newspaperman Jack Lessenberry. It is this latter that I shall now discuss and analyse.

B. The Role of Reporter Jack Lessenberry in the Kevorkian Cases and 60 Minutes Programme

Some of the speed (of the production of the Kevorkian programme by CBS) was explained by reporter and Kevorkian go-between, Jack Lessenberry, who announced at the February 22, 1999 conference that he “thought he’d start out by revealing for the first time what really happened – how the tape got to Mike Wallace”:

Kevorkian called me on election night when his former attorney, Geoff Fieger failed to be elected governor [on the same day that Proposition B, the “Terminally Ill Patient’s Right to End Unbearable Pain or Suffering” ballot initiative proposed by Merian’s Friends, seeking to legalize assisted suicide, was also defeated]. I said, I feel fine (laughter). I met him the next day and he said, “I’ve done a euthanasia. I want to talk to you in your professor/media ethics role. I want as much attention as possible – what do you recommend I do?”

Lessenberry advised Kevorkian that “*60 Minutes* is the highest rated, most successful news show in the country,”¹⁹⁸ to which Kevorkian reportedly said, “I like Barbara Walters” (an ABC senior moderator and news producer). (Jack Lessenberry, Ann Arbor Conference: February 22, 1999). Lessenberry then told Kevorkian that he thought, “Mike Wallace has an interest in this issue,” at which point Lessenberry

¹⁹⁸ The prominence of *60 Minutes* was certainly no secret. Indeed, in the 1999 fact based popular film entitled, *The Insider*, starring Al Pacino (as a *60 Minutes* producer) and Russell Crowe (as a big tobacco whistleblower) and Christopher Plummer (as Mike Wallace, whose role in the film was that of a supporting player), within the first five minutes and in the second film scene sequence, Al Pacino has lines to the effect that “*60 Minutes* is the highest rated, most respected news show in America,” a line echoed later in the film by Christopher Plummer.

quipped that Kevorkian replied, “I think Barbara Walters is really cute.” Lessenberry related anecdotally that Kevorkian asked if Lessenberry “suppose[d] Mike Wallace is closer to this issue than Barbara Walters?” Lessenberry told the conference that Wallace was 10 years older,¹⁹⁹ “and that’s how history was made.” (Jack Lessenberry, Ann Arbor Conference: February 22, 1999).

First, the proposition that Kevorkian was “shopping”²⁰⁰ around the tape of the Youk euthanasia was plausible,²⁰¹ and Kevorkian reputedly had unsuccessfully approached Barbara Walters (a senior female counterpart to the senior Mike Wallace at another network) about showing an assisted suicide on television. Lessenberry’s connections to the Michigan Journalism Fellows and, in turn, to Wallace and CBS

¹⁹⁹ The inference seems to be that Walters, who was then in her late 60s was further from death than the octogenarian Wallace, though both were seemingly in good health and alive (and working in television, though Wallace is semi-retired) as of the time of this writing.

²⁰⁰ I use this word deliberately – Kevorkian was not paid (or asking for money) for the tape, nor was he seeking to neither sell nor peddle the tape for money, and I note that to “shop” an item is a colloquial expression for an effort to distribute or disseminate, as was the case here. It is also a colloquial extension of the legal phrase to “forum shop” or to seek a friendly venue for a case.

²⁰¹ Indeed, this would be an extension of the practice of forum or “judge shopping,” a practice that Kevorkian’s former lawyer, Geoffrey Fieger, had engaged in – in 1996, “seeking to stop prosecution of Kevorkian, he filed thirteen separate suits and then, after each was assigned, withdrew twelve so that he could effectively avoid the random draw [of judges] and get the judge he wanted” (Betzold 1997: 2). Fieger was in fact officially sanctioned and received a fine of over \$8,000.00 and an official professional “reprimand” for this. In the *Matter of: Geoffrey N. Fieger, Michael A. Schwartz, and the Law Firm of Fieger, Fieger and Schwartz*, No. 97-1359, 191 F.3d 461 (6th Cir. Sept. 10, 1999). Kevorkian and Fieger had also engaged in prior video shopping efforts, as the *New York Times* confirmed in an article by James Barron with Alex Kuczynski, entitled, “Public Lives,” on November 25, 1998 (the week after the “Death by Doctor” segment was broadcast by CBS on *60 Minutes*), that Ms. Walters said no to Kevorkian. “Ellen Murphy, a spokeswoman for ABC News, said that a lawyer for Dr. Kevorkian had contacted Ms. Walters last year. But Ms. Murphy said that Ms. Walters and her bosses decided not to do a Kevorkian segment on ‘20/20,’ which had shown parts of a Dutch documentary on assisted suicide in 1994. ‘We made the decision at that time that we would not include the moment of death,’ she said, ‘out of respect for the audience or the privacy of the person who died.’ The conversations with the lawyer for Dr. Kevorkian, Geoffrey Fieger, ‘never went that far along,’ Ms. Murphy said. ‘What they wanted Barbara to do was witness a death and presumably film it. Her immediate reaction was that was not something she was interested in doing.’ Of course, this would stand in contrast with the decision of Mike Wallace and CBS, which did broadcast the moment of Tom Youk’s death on a Sunday evening.

Later, it would be Walters who would be turned down – by the prison, where she sought to interview Kevorkian with his permission. The prison invoked a rule not permitting media to film, other than stock footage. The resulting litigation was unsuccessful and the interview did not take place. *American Broadcasting Companies, Inc., a/k/a ABC v. Michigan Department of Corrections et al.*, No 228757, 2001 WL 63361 (Mich. App.), 29 *Media L. Rep.* 20022 (Mich. App. 2001)(Not Reported). In this instance, “Not Reported” is a legal designation that the case is not reported officially and therefore may not be cited as precedent, but rather is solely decided in a way that is limited to the case at hand before the Court.

showed the change in his role in the Kevorkian cases and how far entrenched he had become since the early coverage he relayed to me in our March 15, 1996 interview. In effect, he had sought out Kevorkian and Fieger originally as a “stringer” (occasional reporter) for *The New York Times*. (Lessenberry Interview: March 15, 1996). By the time of the Youk euthanasia, Fieger was no longer representing Kevorkian and it would be reasonable to conclude that Lessenberry was effectively an agent of Kevorkian (and I would argue that he was effectively an unindicted co-conspirator). However, at the Ann Arbor conference (at which Lessenberry correctly predicted that Kevorkian would be convicted in the Youk euthanasia), Lessenberry expressed himself as follows:

In the interest of full disclosure, while I vehemently deny that I am some sort of “apologist” [a reference and reply to the 1997 *New Republic* article by Michael Betzold, which criticized Lessenberry for ethics in his reporting on the Kevorkian cases and Lessenberry’s relationships with Kevorkian and Fieger] for Kevorkian, I do feel that people ought to have a right to choose to end their life, and in certain circumstances, to be able to receive medical assistance in doing so.

Turning back to our prime topic, the media has [sic] covered this – Kevorkian’s effect on the issue has been a two edged scalpel. Certainly on June 4, 1990 [before Lessenberry knew him, based upon our March 15, 1996 interview], with his first in-your-face assisted suicide, Kevorkian has made this an issue in the public mind. Tim Quill²⁰² didn’t do that. Derek Humphrey generally didn’t do that, all (sic) the Hemlock meetings and debates in the world never could have done that.

Kevorkian did. (Jack Lessenberry, Ann Arbor Conference: February 22, 1999).

I argue that it was actually Lessenberry, along with Kevorkian, who was constructing the narrative that would be attached to Kevorkian’s activities, and that Lessenberry’s fellow reporters discerned this prior to the Youk case. Interesting

²⁰² This is a reference to Dr. Timothy Quill, the hospice physician who invited prosecution in 1991 with his *New England Journal of Medicine* essay on providing a lethal prescription to a cancer patient, and who subsequently sued New York State in federal court in what was to become the United States Supreme Court case of *Vacco v. Quill* 117 S.Ct. 2293 (1997), as one of a pair of companion cases (along with *Washington v. Glucksberg* 117 S.Ct. 2258 (1997), which challenged the Washington State ban on assisting in suicide) in which the Court held that there was no due process or equal protection right to assisted suicide as a matter of constitutional law.

counterpoints to Lessenberry's statement emerged from earlier (1997) statements of two Michigan reporters who were not on the panel at the February 22, 1999 University of Michigan Journalism Fellows/University of Michigan Law School Conference, "Covering Assisted Death: the Press, the Law and Public Policy" in Ann Arbor. These two reporters were Michelle Kelly, working for *The Ionia Sentinel* newspaper during the June 1997 mistrial in Ionia County (whom I interviewed on June 17, 1997) and Michael Betzold. The latter was a former *Detroit Free Press* reporter who authored the 1993 book, *Appointment with Doctor Death*, and later wrote an excoriating criticism of Kevorkian, Fieger and Lessenberry for *The New Republic*, released on May 26, 1997 (shortly before the Ionia mistrial). I now add to my earlier argument that everyone has a story to tell or a vested interest that come into play in the Kevorkian cases. Betzold, in his 1997 *New Republic* article, noted that his 1993 book "was based on [his] work as a reporter for The Detroit Free Press [and that] as [he] was starting the book, [his] cousin, Martha Ruwart, arranged to die with Kevorkian's help rather than battle cancer to the end, [and] learned about this after she died." While this may, at first blush, appear to be a more personal connection than some of the other interviewees, a common theme has emerged to the effect that judges, lawyers, jurors, legislators and task force members have often had some sort of private experience in the arena of end-of-life issues and cases.

Kelly and Betzold were, respectively, small town (in Ionia, there was generally a 5,000 person readership, according to the Kelly Interview: June 17, 1997) and big city established reporters. Both had harsh words about Lessenberry (for Betzold's, I draw from the 1997 *New Republic* article; and I note that some of these were replied to by Lessenberry in 1999 at the Ann Arbor conference). If the Ann Arbor conference was an opportunity for the presentation of medical ethics and

journalistic commentary on the media, Kelly and Betzold provided a “press on press”²⁰³ construction of the media, and pointedly on Lessenberry.

For example, Betzold wrote:

Journalists legitimize Kevorkian’s activities as medical practice by calling him a doctor,²⁰⁴ without mentioning that his Michigan medical license was revoked in 1991, and that the only remedies he ‘prescribes’ are poisons. They call his customers patients, though people come to him to be put away, not cured. They call the deaths ‘assisted suicides,’ though no one really knows how his customers die (Betzold 1997, p.2).²⁰⁵

He continued (1997, p.5):

Normally, journalists are cautious in characterizing suspicious deaths, and those involved in them. But on the Kevorkian story, it is the norm for the press to report as fact whatever Fieger [Kevorkian’s lawyer in all the Kevorkian trials, except the 1999 Youk euthanasia murder trial] says. Someone has died with Jack Kevorkian at the bedside. The coroner has ruled the death a homicide. In any other circumstance, the death would be treated in the press as such. But in this case, the headline reads, “assisted suicide.” Why are the media so willing to suspend disbelief and accept the view of the man accused of participating in the homicide. The answer, ultimately, is about the biases that journalists bring to their jobs, and a prime example is the work of one of the most influential reporters on the Kevorkian beat, the man who covers Dr. Death for *The New York Times*, Jack Lessenberry. Lessenberry, a Detroit freelancer who is the *Times*’s principal writer on Kevorkian, pretends objectivity in his *Times* pieces. But in an op-ed column he regularly writes for [*Detroit*] *Metro Times*, a Detroit weekly, Lessenberry betrays his views, describing Fieger as “a brilliant lawyer” who seems to be on the brink of changing history. Kevorkian as a compassionate doctor who “has standards” and the police who pursue Kevorkian as “Keystone Cops” (*Ibid.* 5)...

There is much more to the relationship. Lessenberry admits he edited an article Fieger wrote for Penthouse, and that he passed on to *The New York Times*, via his own computer, an op-ed piece Fieger wrote and the *Times* published. Last summer [referring to 1996, after the two 1996 trials to acquittal], Lessenberry threw a party with Kevorkian and Fieger as the guests of honor. Fieger recommended that ‘*Frontline*’ producers hire Lessenberry as a reporter for a 1994 documentary, “The Kevorkian File”; they did so. Last September (1996), in the *Times*, Lessenberry broke the story of Fieger’s

²⁰³ All three – Betzold, Kelly and Lessenberry – wrote for newspapers and/or newsmagazines, thus this phrase.

²⁰⁴ I now note that in reviewing portions of the 1999 trial transcript of testimony, opening and closing arguments, the court reporter identified Jack Kevorkian as “Dr. Kevorkian,” as were many references on the record. I would argue that a rhetorical question emerged -- ought one to conclude that the criminal justice system in some way still legitimized him from this?

²⁰⁵ An online version of Betzold’s *New Republic* article is referenced with page numbers 1-9; however, the original 6544-word article was printed in hard copy of the May 26, 1997 issue starting on page 22, under the headline, “The Selling of Doctor Death.”

revelation that Kevorkian had aided in unreported deaths of Michigan residents.... Lessenberry denies any bias in his *New York Times* stories. Although he hopes one day to write the authorized biography of Kevorkian (*Ibid.* 5).²⁰⁶

Less than one month later, and in the days after the Ionia County prosecution of the Loretta Peabody assisted suicide case ended in a mistrial (immediately following Fieger's inflammatory opening),²⁰⁷ Michelle Kelly was also critical of Lessenberry's multiple roles. Kelly told me, "if you write opinion columns, you don't report on actual events" (Kelly Interview: June 17, 1997). One possible conclusion for such a general practice is because the role of an independent reporter is different from that of an editorial or opinion piece writer. Lessenberry answered this (though not specifically her) at the Ann Arbor conference celebrating,²⁰⁸ as well as criticizing, the original *60 Minutes* programme he had actually had a major role in orchestrating:

I have won awards for my work on [Kevorkian] and I've come under intense fire for it. – partly because I've written point of view columns about all of this at the same time I have done my more conventional reportage (Jack Lessenberry, Ann Arbor Conference: February 22, 1999).

At first blush, Lessenberry may have been addressing a difference in style or of opinion. However, given his active role in the Youk case, and his symbiotic relationship with Kevorkian, it might be closer to say that Lessenberry's conduct approached of co-conspirator rather than independent reporter. First, it is reasonable to conclude that he had more severe conflicts of interest than even Betzold and Kelly

²⁰⁶ Ultimately, the author of the authorized biography, *Between the Dying and the Dead: Dr. Jack Kevorkian's Life and the Battle to Legalize Euthanasia*, by friend and former Kevorkian assistant Neal Nicol, former Kevorkian neighbor Harry Wulie, and Cheeri Rao and with contribution by Kevorkian, was published in June 2006, with an acknowledgment to, but not authorship by, Lessenberry.

²⁰⁷ I discussed this earlier in Chapter 3, with the support of interviews of the Ionia prosecutor and judge.

²⁰⁸ For example, Faye Girsh, then Executive Director of the Hemlock Society, which advocated what she called "physician aid in dying" said she "[thought] *60 Minutes* was brave and important," after which she argued for "greater and more sophisticated use of double effect and terminal sedation." (Ann Arbor conference: Girsh February 22, 1999). Since the principle of double effect, as discussed in the Bodkin Adams case, regards a primary intention of pain relief and/or comfort care, with an unintended secondary effect of hastening death, one possible conclusion was that Girsh was actually arguing for euthanasia by a more euphemistic phrase, and likewise as to terminal sedation.

suggested, given that Kevorkian called Lessenberry in 1999 for advice on promoting and delivering the Kevorkian/Youk euthanasia tape, and given Lessenberry's actual role in so doing with CBS.

Second, I conclude that Lessenberry was far more of an active participant in the Kevorkian events than an "apologist" or even taking favouring a position or even advocating one, by inserting himself into the actual process precipitating investigation and prosecution. Third, I argue that by actually being seated at defence counsel's table during the mid-1990s trials (Pappas observations), Lessenberry's mere presence constituted a compromise of attorney-client privilege. I conclude that this reached beyond Rock's argument that "journalists religiously read their own and others' newspapers, they consult one another²⁰⁹ and look for continuities in the emerging world which their reporting has constructed" Rock (1973, p.77, footnotes omitted).

Ultimately, the Ann Arbor conference showed that the original *60 Minutes* programme first, reflected the political ideology of members of the "press," as the media collectively were referred to in the conference title, and second, met all of the elements of "newsworthiness" enumerated by Reiner (2007, p.324, drawing upon Chinball and Jewkes). The Youk euthanasia broadcast was marked by immediacy, dramatization, titillation and novelty. Third, structural determinants of news making were displayed (Reiner 2007: 324; Rock 1973: 76-79). However, the media event and original landmark narrative of the 1998 "Death by Doctor" segment of the original *60 Minutes* programme was in the mainstream of homicide news. I find support for this argument particularly as constructed and analysed by Caplan in his conference remarks and by Turow, Caplan and Bracken (2000). I further argue that the politics of death and hospice care for the dying was an afterthought. I find as the proof of

²⁰⁹ I would point to a case in point here -- that Michelle Kelly told me she spoke with Mike Betzold shortly before the Ionia (1997) Kevorkian trial (mistrial) for assisted suicide of Loretta Peabody (Kelly Interview: June 17, 1997).

this the announcement of Mike Wallace in Ann Arbor and the subsequent February 28, 1999 broadcast of the *60 Minutes* segment “Choosing Life (A.L.S.)” segment . This was less than three months after the landmark narrative broadcast and was one month before the Kevorkian (1999) euthanasia murder trial.

This part of the chapter discussed the constructions created by the media and the original *60 Minutes* programme. As the original research shows, the media actually created the news in a relationship with Kevorkian so symbiotic as to approach conspiratorial (at least as to Lessenberry, if not others). Members of the media effectuated this by determining what was newsworthy and shaping the debate about euthanasia in Michigan – and across America with a national audience. For this argument, I draw support from the fact that Kevorkian created the Youk euthanasia tape, but that it *only* became newsworthy after Lessenberry and Wallace became involved. Furthermore, the Youk euthanasia became prosecutable²¹⁰ only after Wallace and CBS broadcast the “Death by Doctor” segment and Kevorkian interview some two months after Youk’s death.

In the next part of this chapter, I shall consider legal constructions of two tapes. These were the Kevorkian 1998 tape (i.e., the tape that Kevorkian and Lessenberry arranged to be delivered to CBS) and the prosecutor’s clips of the *60 Minutes* programme segment “Death by Doctor.” For that argument, the words of those in court at trial and the legal construction of the prosecutor’s clips will be juxtaposed in an innovative methodological analysis – that of parallel text by use of footnotes.

²¹⁰ By this, I mean a prosecutorial policy and decision to prosecute – rather than the culpable conduct of the defendant.

Part II. Legal Constructions of the September 1998 Kevorkian Tape and the Prosecutor's Clips of the November 1998 Original 60 Minutes Programme as Employed During the 1999 Trial

As I have already discussed and developed in Part I, CBS came to the decision to use the Kevorkian tape from September 1998 and then went on to create the November 1998 "Death by Doctor" segment. "Death by Doctor" included first, portions of Kevorkian's September 1998 tape of his interactions (question and answer, as well as the purported consent colloquy) with Tom Youk, as well as the actual euthanasia. Second, the original *60 Minutes* programme included narration and commentary regarding the September 1998 tape by both Kevorkian and Wallace during the course of Wallace's interview of Kevorkian for the original *60 Minutes* programme. Third, the "Death by Doctor" broadcast contained commentary by family members and experts.

The prosecutor in the final Kevorkian (1999) trial claimed that he had deliberately focused solely upon whether or not there was intentional criminal conduct that led to the death of Tom Youk, rather than upon the debate about euthanasia. However, as the trial went on, the politics of euthanasia and assisted suicide were referenced and argued by both sides. The former was set at the beginning of trial, and I argue that the latter developed in the course of this trial, brief though it was. My argument, presented through juxtaposition of relevant transcript quotes, is that this fitted what Livingstone, Allen and Reiner (2001, p.182) called a "revisionist" aspect of oral history. As with Goffman (1959, p.211), I take as axiomatic that a trial inevitably is a literal oral history in an official legal proceeding and social construction of an alleged criminal event, circumscribed by lawyers presenting witnesses and evidence. Livingstone *et al.* noted:

[O]ral history itself is caught between two opposing arguments. On the one hand, the construction of a history “from below” attempts to counter, or complement, the “harder” history based on documentary evidence (Dayles, 1992). But such a history risks naïve realism. On the other hand, oral history data is [sic] revisionist, for people tell stories about the past from the standpoint of the present and for the purposes of the present (Samuel & Thompson, 1990). Thus oral history interviews offer a persuasive rhetoric as well as a descriptive account, and the two may be epistemologically indistinguishable (Livingstone, Allen and Reiner 2001, p.182).

In the 1999 Kevorkian trial, not only was there inevitable interpretation during the oral court proceedings, but there was also a transcript.²¹¹ I suggest that this transcript may be understood by the construction of Livingstone, Allen and Reiner of a hard history alteration, in that the prosecutor’s 9²¹² minutes of video clips of the approximately 18-minute long “Death by Doctor” segment. The 18-minute version was broadcast as the original *60 Minutes* programme and was pruned to a 9-minute version to match the elements of the crimes charged²¹³ (and not any defences or excuses).

At this point in the chapter, I offer the reader an explanatory note in terms of how the words spoken (or video clips shown) at trial were reduced to the written word of the transcript. I further offer a contemplation of the impact upon presentation in this chapter for interpretation by a potential reader. Notwithstanding the fact that a trial is a formal proceeding, it is also an oral one, replete with spoken word, cadence, tone and overall demeanour. These words are taken *verbatim* from the transcript

²¹¹ This official record did not always match what transpired in the courtroom, such as during the post-conviction bail hearing pending sentencing, where Judge Cooper referred in court to an “TV push” which has a different and more familiar construction than the more common phrase of “TV injection,” which the court reporter transcribed. Previously, I offered both of these in discussion of judges, but note it here as a reminder. Further, how the appellate court constructed the official transcript did not always match what was transcribed (in the less benign example of including in its appellate decision that the jury saw the original *60 Minutes* programme, rather than carefully selected clips of approximately one half the tape, and omitting material at the discretion of the prosecutor); this subsequent appellate decision, as will be discussed later in this part, became an official legal construction of the trial in a way that neither occurred at the trial (which I was present at) nor in the official transcript, and regarded the fundamental piece of evidence.

²¹² Although the standard grammatical rule is to use written words for “one” through “nine” and numbers for 10 and on, I deliberately chose this numeric representation as a visual representation here.

²¹³ By this, I make a social comment, not a legal criticism, as to Skrzyński’s choice as to how he created the prosecutor’s clips.

(with citations to date, page, speaker details). Thus, this formal recorded written version of the words spoken includes fragments of colloquial sentences, word contractions (and in some places, *contradictions*) and other matters many a grammarian would likely shudder at seeing in an academic document or legal document or any publication. These spoken words by doctors, lawyers, and judicial officials, have been left intact so as to show the speaker's flow. In turn, this afforded me here an opportunity to show cadence at the trial in a novel way; for this, I shall inevitably be compromising my analysis on grammatical matters, but have used original words, as transcribed and captioned by the court reporter at the 1999 Kevorkian trial. In a sense, I hope I shall offer the reader an opportunity to *see* what the court reporter *heard*.²¹⁴ One caution I issue however, is that tone, cadence and demeanour are (perhaps by definition) less obvious in a written rendition of an oral process.

In this regard, I draw some support from what would otherwise be an obscure source – Keri Hulme's 1983 novel, *The Bone People*, which won the Pegasus Prize for Literature. Hulme's novel was originally a work created in an academic setting, and she wrote in her preface to the first edition,, "Standards in a non standard Book" (*sic*, reprinted in the Penguin edition published in 1986):

The editor should have ensured a uniformity (*sic*)? Well, I was lucky with my editors, who respected how I feel about ... oddities. For instance, I think the *shape* of words brings a response from the reader – a tiny, subconscious, unacknowledged, but definite response. "OK" studs a sentence. "Okay" is a more mellow flowing word when read silently. "Blue green is a meld, conveying a colour neither blue nor green but both: "blue green" is a

²¹⁴ In one particular way, there will also be a transcribed version of what the court reporter saw, in that there are transcribed representations of a video that the prosecutor created and vigorously used in clips of the original *60 Minutes* program, which in itself contained excerpts of Kevorkian's September 1998 tape of his interactions with Tom Youk. This material will be analyzed later in this chapter, and include what at first glance appears to be erroneous shifts in the line by line labeling, which in fact is directly quoted from the transcript as the visual representation of the court reporter's visual and auditory perception of the tape.

two-colour mix (Hulme 1983/1986, non-paginated reproduction of Preface to the First Edition)(emphasis in original).

Hulme's effort to create a method of written visualisation of an auditory experience was intriguing to me, and challenged me to seek to do likewise. Whether Hulme included this as an effort to offer an additional visual cue for the reader, or whether she included it as an effort to explain a freshman work containing an unorthodox practice that might be mistaken for illiteracy, I did not know. I did – and still -- believe that the disclaimer might be read in both of these ways. In using this passage, I have attributed *both* of these as important for two reasons of interpretation I shall now offer the reader of this dissertation. First, in my prior professional life, I experienced trial work both as a young trial lawyer *seeing* and *hearing* in the courtroom, and then as an appellate lawyer and legal academic by way of transcript review and *reading*. Since I was at the trial, I can rely upon my experience of seeing or hearing or may choose to rely upon reading of the transcript, with a visual/auditory recall along with the written rendition of the trial proceedings; a reader does not have this option.²¹⁵

My intention in offering the reader any given passage as visually transcribed (i.e., how it literally appears on the page of the court record) is two-fold. First, as a former appellate lawyer, the transcript was the supreme source of what occurred at trial, and I wanted to afford readers an opportunity to come along with me to see the flow of the proceedings and the arguments depicted by the transcript.

²¹⁵ In theory, a reader who attended the trial is in a position to do as I do; however, as a practical matter, even this would have been subject to varying factors of who was in or out of the courtroom at any given time, or their/my place in the courtroom – for example, spectators at trial would surely have had a different experience than the parties or the lawyers or the judge, or even the jurors, the last of whom had observations of only that part of trial that was evidence or argument to the jury and whom did not experience any prior Kevorkian trial. Similarly, members of the media would have been subject to not only similar varying factors, but to searching for their news story of the day/week (and thus, would not have had the transcript). Lastly, and upon my further deliberation of this, even were one to watch a tape of the trial now, the tapes did not have full courtroom vision – one such example was the jury, another the entrance/exits that were so compelling to watch during verdict return.

Second, I wanted to take the reader on the journey of how the material was used and developed at trial, and offer my own interpretations as a parallel text. However, I do want to point to a further matter which emerged for future exploration in another study at another time – the court reporters themselves engaged in the process Hulme described above in rendering the transcript.²¹⁶ Here, I shall simply use the Kevorkian transcript, with the grammar, quotation, and citation styles as depicted in the original, although the inevitable result is what would otherwise appear to be a lack of uniformity or a lack of grammar at times.

Introducing the case, prosecutor John Skrzynski argued on opening:

Now this is not an assisted suicide case²¹⁷. Tom Youk didn't kill himself with Jack Kevorkian's help. Jack Kevorkian killed Tom Youk by injecting him with drugs. And this case is not about the right to die. That's a topic that's to be discussed by all the people of this state and to be decided in a difference place. That's not what this case is about.

This case is about Jack Kevorkian's right to kill. (Kevorkian Trial Transcript March 22, 1999: 249-250).

You know, we wouldn't even know that Jack Kevorkian killed Tom Youk at all except for the fact that Jack Kevorkian videotaped the killing. He videotaped the killing and then he took it to the CBS network and he gave it to them, and they aired it on their program 60 Minutes, in November to million(s) (sic) of people all over the country. You'll get to see that tape that he gave to 60 Minutes,²¹⁸ you'll see that tomorrow. And what that tape shows is Jack Kevorkian killing Tom Youk injecting him with drugs.

You'll also see *excerpts* of the actual 60 Minutes program and in those *excerpts* a statement that Jack Kevorkian makes to Mike Wallace about why he did what he did, and it gives insight to why he did what he did and into why we're here. Dr. Kevorkian told Mike Wallace, I've got to force them to act. He means the prosecutor. "They must charge me. He tells him, "Either they go" – meaning the prosecutor -- or I go. If I'm acquitted they go because they know they'll never convict me." And then he goes on to tell Mike Wallace,

²¹⁶ It would be interesting to pursue a line of research on this use and (literally) visual depiction of language heard in typed transcription, rather than to have an axiomatic use and bedrock source (this is not to say that I view the transcript as incorrect, other than where –in rare instance – particularly noted).

²¹⁷ Although Kevorkian was also charged with assisting in a suicide, the prosecutor dismissed this, although Kevorkian moved to reinstate (Motion Hearing, March 16, 1999: 43-45).

²¹⁸ While I highlight *60 Minutes*, the court reporter generally simply typed 60 Minutes (sic) without quotes.

“One of the two is gonna go and that’s why I did this. The issue has got to be raised to the level where it’s finally decided” (emphasis added).

And the issue that he’s talking about is his right to kill. Jack Kevorkian used the death of Tom Youk to publicize his own political agenda which is the legalization of euthanasia -- that’s killing -- and he did it in such a way that there will be no debate on this issue by all the people of this state. There won’t be any vote on a ballot by all the people of this state about this important issue. He did it in such a way that he forced the Oakland County Prosecutor to charge him with murder by having a murder broadcast all over the country, and that’s exactly what the Oakland County Prosecutor did. (Kevorkian Trial Transcript, March 22, 1999: 252-253)(emphasis added).

Hence, at the 1999 trial, the prosecutor initially outlined to the jury a theory of the euthanasia murder case (his proposed legal construction of what and how a crime happened). The prosecution was thus circumscribed in its legal construction of Kevorkian’s conduct relating to the September 1998 euthanasia death of Tom Youk, rather than a social construction of the politics of assisted suicide or euthanasia.²¹⁹ While that was, and had to be, the prosecutor’s job, it was a contrast from the trials earlier in the 1990s.

This was the beginning of a short trial of less than one week, with *60 Minutes* the key in a trial that had a swift and certain verdict by week’s end.

*A. The Prosecutor’s Clips of the Original 60 Minutes Programme as a Jury Media Loop*²²⁰

Now, I shall examine what portions of the initial Kevorkian tape and the original *60 Minutes* programme were used in the trial – and what were excluded – and how these may have affected the structure and the outcome of the trial. Kevorkian’s

²¹⁹ As I shall argue later in this chapter, both the prosecutor and Kevorkian nonetheless moved on to make repeated references to the politics of euthanasia and assisted suicide during their closing summations.

²²⁰ I delivered a related paper, “Socio-Legal Constructions of Demeanor in the Criminal Law: A Spoken Past, A Taped Present, and A Digitized Future,” at the Midwestern Criminal Justice Association, Chicago (2005).

acts, and his invitation to, and interview with, CBS, taken together, met Reiner's (2007, p.316-318) requirements for the "logically necessary preconditions" of a crime – "labelling, motive, means, opportunity and the absence of those controls." This said, at trial, the jury did not see the originally broadcast landmark narrative 18-minute segment whole, but rather in carefully extracted parts (equalling less than the sum, and creating an entirely different whole, as I shall argue).

The original *60 Minutes* programme was constructed by the media to show "Death by Doctor" upon the repeated, recorded request and purported consent of Tom Youk and with family approval. This may be as compared with homicide cases generally (Rock 1998, p.83). The representation was shown to the jury at trial by use of the prosecutor's clips, which he repeatedly cited as the *60 Minutes* tape. By doing so, rather than as excerpts, I would argue this progressively inculcating the jury with an interpretation of the clips as a different whole than the sum). Moreover, the prosecutor's clips pointedly excluded details related to Youk's pain and suffering due to illness and also excluded information and statements of the Youk family support of, and gratitude to, Kevorkian.

Further, the Michigan Court of Appeals held that this, similarly to the exclusion of any trial testimony of Melody and Terry Youk, was expressly "to prevent a jury nullification argument," 248 *Mich.App.* 373, 438 (2001). This entailed a return to the Michigan folk culture of jury nullification in the Kevorkian cases, one that that might be raised by tugging on the sympathy of the jury for Youk by Kevorkian and to forestall the possibility of an acquittal like those of the mid-1990s.

As I shall show, the results were not done justice (in the colloquial sense of the phrase) by transcribed pages of the cold hard record.²²¹ In his opening, the prosecutor hinted at this:

When you look at the evidence of this case – and I want you to look at the evidence, especially the videotapes – it will be difficult for you not to focus on Tom Youk when you first see this. But I urge you – you’ll be able to take those videotapes into the jury room – *look at those videotapes over and over. Don’t focus on Tom Youk, begin to focus on what Jack Kevorkian does and what Jack Kevorkian says, and when you do that what you’re going to see is a man who is breaking the law.* Jack Kevorkian killed Tom Youk and Jack Kevorkian does not have the right to kill (Kevorkian Trial Transcript, March 22, 1999: Skrzynski Opening p. 260)(emphasis added).

Moreover, the appellate court, in its decision affirming Kevorkian’s conviction and sentence, concluded “by noting that the jury, no doubt influenced by the gritty realism of the videotapes defendant made as well as his flat statement of culpability in the *60 Minutes* interview, convicted [Kevorkian] of second-degree murder as well as delivery of a controlled substance.” 248 *Mich.App.* 373, 405 (2001). Notwithstanding the fact that I had seen the original *60 Minutes* programme in the comfort and privacy of a friend’s dwelling, I think it important to comment that watching clips played

²²¹ On a number of occasions during my time as an appellate lawyer, the thorny question arose as to what a witness might have meant by intonation, or whether his demeanour reflected credibility. When I became a judicial law clerk to an appellate judge, I was very sensitive to this issue, and took opportunities to explore the question of witness demeanour, and (in a move that was considered highly unusual), would seek to requisition tapes where available to consider the demeanour of witnesses beyond the typed pages, and to comment, as in the case of *People v. Norton*, 164 A.D. 2d 343 (1st Dept. 1990). In that case, Justice Carro (for whom I drafted decisions) wrote, “It is said that a reviewing court, facing a cold, bare record cannot see, hear or have a real feel for the witness, but can only read the words typed on the pages of the record. However, *this* reviewing court was *not* without benefit of examining the demeanor (sic) of the victim Roldos. We have listened to his tape recorded recantation, and find Roldos to have sounded calm, and fairly articulate, not fearful or confused. Roldos acknowledged talking to defendant before going to see defense counsel but unequivocally stated that he had not been coerced or threatened in any way.” My contemplations of demeanour carried on into this doctoral project and on into a subsequent Faculty Innovation Grant in 2005-2006. In the case of the former, one of my explorations, shared by those at the Kevorkian trial in 1999, was Kevorkian’s demeanour in the September 1998 Kevorkian tape, and the prosecutor’s clips of the original *60 Minutes* program; in the case of the latter (and a subsequent advanced class I developed in “Crime, Law and Society”, I had students examine the CBS tape of the November 1998 program available for purchase, and read them the relevant portions of the trial transcript for discussion. Further discussion of these is deemed beyond the scope of this writing, though I shall at some point develop an article relating thereto.

repeatedly in the court for the jury over a few days was emotionally.²²² The prosecutor, during his closing statements (his initial summation and his rebuttal to Kevorkian's summation), repeatedly referred to detail in the tapes, as well, to highlight this:

It's a small thing, but you would think that he would close Tom's mouth before he started taking the tubes out. Just tells you where his focus is. It's not Tom Youk.

That wasn't a movie, that was a real human. That was a man just killed before your eyes. And then again on national TV. Dr. Kevorkian took the tape, took this tape to CBS, a major network and CBS broadcast the most – one of the most intimate moments that a human being can have, the moment of their death. Broadcast to millions and millions and millions and millions of people. Why? Death with dignity. Why do this? (Kevorkian Trial Transcript, March 25, 1999; Skrzynski Closing at 41).

Thus, the film of the Youk euthanasia provided evidence and also provided avenues by which the prosecutor was able to argue intent. This may stand as a parallel to an argument made by Robert A. Ferguson in his 2007 book, *The Trial in American Life*. Discussing television viewers of court cases, Ferguson argued:

Advances in the electronic tools of observation have improved access to the extent that seeing on a screen can be more intimate than an experience in court.... An electronically fed image culture is complicating previous distinctions between private and public knowledge, observation and participation, reception as opposed to actual perception. Comprehension of a public trial now comes through video projection with recognition dictated by voice overs, sound bites, pictorial bombardment, action sequencing, reaction shooting, zoom camera movement, and constant but very selective repetition. Broadcasting reaches a huge but impersonal audience, one in which the sender cannot know the receiver or what has been understood in reception. From the other side, an individual viewer must cope in isolation with a regime of

²²² The prosecutor implicitly acknowledged this in his summation rebuttal, when he argued: "[Kevorkian] said this is the final solution for Tom – a final solution. You know, maybe there's not so much outrage because of Tom Youk's condition. [Kevorkian] said that we didn't show much sympathy for Tom Youk. I didn't broadcast Tom Youk's death to millions of people all over the country. I didn't do that. I didn't videotape this man in his death throes. I didn't do that, [Kevorkian] did. This. Didn't even bother to close that man's mouth [referring to Youk]." (Kevorkian Trial Transcript, March 25, 1999: Skrzynski Rebuttal at 64). I conclude that by this, the prosecutor was arguing that Kevorkian did not show dignity for Youk while he passed away and died, which while not an element of the crime charged *per se*, pointed to a culpable level of criminal intent as opposed to a professional rendering of a medical service.

seemingly authoritative appearances but without the benefit of full sensory perception or context. (Ferguson 2007, p.268).

The Kevorkian/Youk euthanasia tape, with its original small screen intimacy designed for an at-home television audience, was brought into the courtroom on large screen view for the jury in the 1999 trial, whose jury members were compelled by legal duty to repeatedly watch and study. The jury was repeatedly, if not relentlessly, fed the large-scale life-sized²²³ electronically-fed images of the Kevorkian tape and the prosecutor's clips of the original *60 Minutes* programme. In fact, the in-court trial viewing time was approximately one-half of the original *60 Minutes* programme, and the "constant but very selective" sections, were re-imaged to reach a small, but very personal, audience of the jury. The prosecutor as courtroom "sender" repeatedly played, editorialised and compellingly constructed the video clips for the members of the jury.

I argue that the 1999 Kevorkian jury was thus confronted by the actual authoritative appearances and arguments of the prosecuting attorney. However, unlike the home audience imagined by Ferguson, the Kevorkian jury was without the benefit of the full sensory perception or context of facts sympathetic to the defence that the original *60 Minutes* programme would have provided in its 18 minute "Death by Doctor" segment. The repetitive playing and transcript reading of the abridged portions of both the tapes made by Kevorkian and the prosecutor's clips of the original *60 Minutes* programme and transcripts went palpably beyond the "gritty realism" the appellate court commented upon, and became the in-court equivalent of a media loop carefully excluding the original, wider media construction of CBS and

²²³ I use the phrase "life sized" based upon my physical observations at the trial, which predated the proliferation of large screen television for home use, and thus would have been an unusual viewing construction. I argue that this is all the more so given that the original *60 Minutes* programme was designed for at home-viewing and hence, by expansion was by definition and colloquial construction, the small screen of television.

Mike Wallace.²²⁴ This was a departure from the “context” given during the issues trials of the mid-1990s, although it was legally correct.

Moreover, immediately when court commenced on the first day following jury selection and opening statements, the morning of March 23, 1999, the prosecution promptly introduced exhibits and distributed transcripts of its excerpts of the two 1998 tapes, called “the Kevorkian tape” and “the *60 Minutes* tape.” As soon as this task was completed, the prosecution played the two tapes for the jury.²²⁵ These were the excerpts of the September 1998 Kevorkian tape (from 8:40 AM to 9:16 AM, Kevorkian transcript March 23, 1999: 9-23) and the prosecution’s clips of the original *60 Minutes* programme (from 9:17 to 9:26AM, Kevorkian transcript March 23, 1999: 23-31). Two reasonable conclusions readily became apparent.

First, as a social observation, the first thing the jury experienced together *as a jury* was that on their first morning of service, before 10:00 AM, they were required to watch these two tapes, including the euthanasia of Tom Youk. Furthermore, that they saw excluded the purported balancing information included by Wallace in the original *60 Minutes* programme (regarding the family, and Youk’s pain and suffering). This material, that Wallace implied at the Ann Arbor conference was insufficient, had nonetheless softened what had, in its original state, been advertised as “disturbing” material. Being literally and legally compelled to watch these seemingly private matters, including the moment of death, in a public space (in which the jurors themselves and the jury as a collective were being observed by anyone and

²²⁴ At the end of trial, this was underscored when the prosecutor played and read excerpts during his summation and further encouraged the jury to replay and to reread transcribed versions in deliberations.

²²⁵ I am constructing the presentation as playing the tapes to and for the jury, although the judge, spectators, lawyers and Kevorkian himself were all present for this video presentation; the reason for this is that evidence is introduced for the jury’s consideration, and that in this regard the target audience was of its member jurors.

everyone in the court), would have made for an unhappy shared experience for group bonding (Goffman 1959, p.211).

In addition, and with tacit consent by both sides, “everyone did see the videotape, over and over, repeatedly” (Kevorkian Trial Transcript, March 25, 1999: Kevorkian Closing at 57). I argue that while it is possible (indeed, even likely) that members of the jury had seen the original *60 Minutes* programme in November 1998 and before the March 1999 trial, the transcript does not have any specific evidence in this regard, though it does have a colloquy of the judge asking prospective jurors if they had heard of Kevorkian (with an assumption that they had, as discussed in the Juries chapter). Thus, I am making the necessary assumption on the basis of the trial record that the jury was exposed solely to the clips at trial, rather than to the programme segment *in toto*.

Whether one views the matter as a glimpse of the awesomeness of death (to recollect the Rev. Phifer’s interview) or embraces the prosecution’s theory of the case as a revelation of the monstrosity of murder, at best it had to be difficult for the jury members repeatedly to watch such matters in court without being able to take a break or to walk away²²⁶ or to change the channel or to have the opportunity of a discussion and debriefing.²²⁷ Given that the trial was of such a short duration (under one week

²²⁶ This phrasing is deliberate. On the evening of the original *60 Minutes* broadcast, Adam Heilman, Esq., a high school friend of some 20 years invited me to come to his apartment for supper and to watch the much-anticipated programme. The friend, who was legally trained and who knew of my work and field work in the mid-1990’s, had a fair idea of what might transpire, but walked out of the room in the middle of the national broadcast, saying he could not watch anymore.

²²⁷ Students of mine who watched a “for sale” version of the original *60 Minutes* programme in Spring 2006, had the opportunity for both an immediate classroom debriefing discussion and also an electronic blackboard debriefing. I note here that they were repeatedly told prior to the April 2006 viewing that it could be difficult to watch, and that anyone who wished to absent him/herself from the class in Crime and Civil Liberties that day, or who wished to leave the room at any point for any reason or no reason, could do so. That viewing, which was conducted consistent with a grant study, also had benefit of a senior colleague, who had seen the original *60 Minutes* programme in 1998 when the broadcast was on. This colleague and I commented on edited excerpts and then had a lengthy conversation about matters in each of our own families that related to the assisted suicide and euthanasia debate. Although not deliberately constructed as such, he and I effectively had our own mini-debriefing, in which we

from jury selection to verdict, minus one day for the judge's calendar day), I conclude that perhaps the jury's deliberations period served as the discussion and debriefing opportunity. As the prosecutor noted in his opening, the jurors ultimately were first allowed to discuss the tapes "with 11 people that [they do not] know and ... with the whole world watching" (Kevorkian Trial Transcript, March 22, 1999: Skrzynski Opening at 254). One might also wonder whether the jury convicted Kevorkian for his conduct and/or for his intentions based upon the bare facts of the case, or for his audacity in sending the tape to the media and inviting both interviews and prosecution.²²⁸

Second, as mentioned earlier in this chapter, the prosecutor's clips, composing²²⁹ his excerpted version of the original *60 Minutes* programme was approximately half as long as the actual programme broadcast nationally in November 1998. The prosecution's excerpted version was tailored to excise any and all discussion of Tom Youk's pain and suffering, in a specific effort to prevent any possibility of jury nullification²³⁰ in the Kevorkian case (248 *Mich.App.* at 438). Likewise²³¹ removed by the prosecutor was the 1998 Youk family interview by

commented on the tape, our family matters, and the students' immediate perceptions and comments in class after the viewing.

²²⁸ As discussed earlier in Chapter 4, the convicting jury declined to hold a press conference after the verdict and its members chose not to speak to members of the media, opting instead for an exit escorted by court officers. Hence, I would argue that the question remains open as of the time of this writing.

²²⁹ My choice to write that the prosecutor's clips "composing" is phrasing to show, as with a musical piece of orchestration, a deliberate (indeed, literally creative) process; this to me is a more active word as to the prosecution role than to say the clips "formed," which seems a more passive activity than what occurred.

²³⁰ Indeed, this was part of a sustained effort on the part of the prosecutor. For example, the appellate court noted that, "[b]efore trial, the prosecutor moved to preclude defendant from asserting the defenses of consent and euthanasia and from introducing any irrelevant testimony regarding Youk's medical condition, pain and suffering, and quality of life, and to prevent a jury nullification argument" 248 *Mich.App.* at 438. This shorthand, with which even casual observers became *au fait*, referred generally to Kevorkian's success in obtaining acquittals in earlier cases in the mid-1990s. I have given this aspect of the case further in-depth treatment in Chapter 4.

²³¹ Although at first blush this seems to violate the axiom that a prosecutor is a disinterested officer of the court whose job it is to offer a balanced and unemotional account and evidentiary introduction of the underlying facts pertaining to the charge, the prosecutor in the 1999 Kevorkian trial was actually seeking to legally and correctly offer the jury the facts relating to the charges of murder and drug delivery for which Kevorkian was on trial. This is yet another way in which the Kevorkian prosecution

Wallace, and the family members' comments praising and thanking Kevorkian. What was left was no more than a Kevorkian narrated version of the Youk requests and purported consent, and of the Kevorkian euthanasia of Tom Youk by lethal injection.

Kevorkian's statement in his summation to the jury may have exacerbated, rather than mitigated, the prosecutorial slant when Kevorkian argued at one point that, "I staged the whole thing. Really. I'm not much of a producer or a director in movie (sic)" (Kevorkian Trial Transcript March 25, 1999: Kevorkian Closing at 53).

These may initially seem to be contradictory statements. That said, I argue that the first is entirely consistent (and the second not inconsistent) with the general practice of videotaping surgical and medical procedures. This is a routine protocol for use as a tool in defending against medical malpractice cases, rather than purportedly consensual euthanasia and not for a mass audience. However, it would seem that Kevorkian also removed both his tape and the prosecutor's version of the *60 Minutes* "Death by Doctor" segment from the realm of Howarth's argument (2007: 109) in terms of media and the debate on euthanasia, and "documentaries devoted to debates on moral imperatives and the ethical implications of birth, life and death." At the same time, Kevorkian placed the tape of the Youk euthanasia and the prosecutor's clips of the *60 Minutes* programme squarely within Rock's 1998 construction of crime (particularly murder) and the mass media (1998, p. 225), as an "exceptional homicide" to be repeatedly reviewed for lessons in the political and legal arenas, as well as the personal and moral arenas.

Perhaps it is ironic (or not) that Tom Youk's brother Terry, who gave a lengthy oral statement on Kevorkian's behalf at the April 1999 sentencing

was unusual, even as the prosecutor sought to confine the case to the elements and the limits of the law. I argue that the paradox here is that the prosecutor was actually seeking to be a disinterested officer of the court, by keeping emotional family matters (which Kevorkian sought to introduce on his own behalf) beyond the scope of the trial, a family reality which the history of the Kevorkian cases suggested would have trumped the legal theory.

proceeding,²³² was in fact a documentary-maker who had knowingly participated with CBS in the original *60 Minutes* programme,²³³ although he was not present at the euthanasia of his brother. Terry Youk, as well as brother Rob, mother Betty and Tom's widow Melody, gave CBS an interview for the original programme, that was again excerpted and played in the 2007 updated segment of Mike Wallace's "Favorite Stories" on the occasion of Kevorkian's parole.²³⁴ During the 1998 CBS interview in the original *60 Minutes* programme (replayed in the 2007 post-parole segment), Terry agreed with Mike Wallace that it was "socially useful to have [Tom Youk's death] broadcast." Melody's 1998 comment to Wallace was that she was "so grateful, I don't consider it murder, I consider it humane." While this had no legal force, I conclude that the expectation was for her statements of Kevorkian support to be played for the jury, which would have been consistent with prior trial inclusion of the families at trial. I note that this was replayed to a national audience again in June 2007 on the occasion of Kevorkian's parole, though excluded from the prosecutor's clips at the Kevorkian trial.

The prosecutor's clips at the 1999 trial showed Kevorkian struggling with the intravenous injection and Youk crying out "ow" in pain.²³⁵ They further showed

²³² This was given in-depth treatment in the earlier chapter regarding families.

²³³ As an aside, I note that the Youk family was cited in the June 3, 2007 post-parole *60 Minutes* segment of Mike Wallace's "favorite stories," but that images and words were taken from the Youk family in 1998 – not contemporaneously with the 2007 parole, although the CBS edit lends a misleading appearance of immediacy and recency to the family clips in the 2007 production. That there was not a new statement in and of itself was not misleading, but the application of the 1998 statements in conjunction with the 2007 release, taken together, created a different and almost inevitable interpretation for a television viewer who either has not seen the earlier programme or sat in the trial. When I first saw the 2007 broadcast, I took as an obvious given that the family member statements were from 10 years ago; however, colleagues I spoke with in the following days thought the Youk statements were imminently recent, which drew attention to this as a possible media manipulation of prior statements as present in nature.

²³⁴ This begs the currently unanswered question of why no new updated interview or supporting statements from the Youks were included in the 2007 segment, which might appear to invite a presumption of family ambivalence or reluctance.

²³⁵ There was a similar description of one of the mid-1990s cases by Michael Betzold the Detroit reporter who originally wrote *Appointment with Doctor Death* in 1993. The lengthy follow up article "The Selling of Doctor Death," for *The New Republic* (May 26, 1997) argued that Kevorkian

Kevorkian straddling Youk's wheelchair. They also showed the moment of death with interview narration by Kevorkian. Each of these was carefully pruned from the June 3, 2007 version of Mike Wallace's "Favorite Stories." In other words, while the prosecutor's clips were designed to show a homicide that was unmitigated by either the decedent's purported consent or by the family's support, CBS in its revised version sought to emphasise the debate about euthanasia and to portray Kevorkian more sympathetically (Howarth 2007, p.109). I argue that taken together in juxtaposition, the two versions (the prosecutor's 1999 clips and the CBS 2007 "remix" of the original 60 Minutes program) also constituted compelling evidence (in the colloquial sense of the word). This pointed to Ferguson's argument that "the greater the controversy in a high-profile trial, the stronger the public desire for a subsuming narrative with victory for one side or the other, [and] the greater the likelihood of serious competition between legal and nonlegal narratives" (Ferguson 2007: 268).

If, as Caplan suggested at the Ann Arbor conference, Kevorkian hijacked the press, then I argue that the prosecution was able to hijack the original *60 Minutes* narrative at the trial in his clips of the November 1998 "Death by Doctor" segment, supplemented by the Kevorkian tape made in September 1998. This *coup* became evident by reviewing the trial transcript, and observing that trial citations of the tapes

repeatedly placed a gas mask on emphysema patient Hugh Gale, even after two entreaties to "take it off." The February 15, 1993 Gale assisted suicide, which preceded the 1998 Kevorkian/Youk euthanasia by several years, was described by Betzold as "the most disturbing possibility of duplicity." In specific in the latter piece, Betzold argued:

"Kevorkian's original written report on Gales' death certificate said that, after the procedure was resumed, Gale made a second request to 'take it off' but fell into unconsciousness. The mask was then left in place." Later, Kevorkian, using white-out and a manual typewriter, deleted references to any second request to "take it off" and "substituted a sanitized version of what had happened. Fieger says the original writing that Kevorkian excised was "a typo" -- a typo four lines long. The discovery of the altered memo nearly got Kevorkian prosecuted for murder, but the witnesses to Gale's death closed ranks. In depositions, Gales' widow, Cheryl, and Neal Nichol, who attended the death, both swore that Gale had made no second request to "take if off." At his trials, eyewitnesses have parroted the defense that Kevorkian's actions were not meant to cause death."

fell into three categories. These three were references to the prosecutor's cut of the "Death by Doctor" segment of *60 Minutes*, references to the Kevorkian tape from September 1998 (the tape that Kevorkian and Jack Lessenberry arranged to have sent to CBS and Mike Wallace), and references of what might appear to be a mixed (i.e., unspecified) nature to either the tape or the video.²³⁶ In this last regard, it is fair to conclude that the prosecutor and Kevorkian were working in shorthand (as, in fact, were a number of the people in the gallery who, like myself, had been present listening and observing at previous trials). They were dealing with material that they had come to know very well over a period of time beyond that of the materials relating to the Youk euthanasia, and with adversaries who were well known to one another (Skrzynski had been the trial prosecutor in the first 1996 Kevorkian trial, at which Judge Cooper had also been the Presiding Judge, although the 1999 trial did not include former Kevorkian counsel Geoffrey Fieger). However, to a juror or spectator seeing or hearing these matters for the first time, the material offered at trial was linear, rather than contextual or cyclical.²³⁷ This was legally immaterial that this was contextual or cyclical

In the next section, I shall discuss how the prosecutor's clips were used and argued by the prosecutor in building the case for the jury and by Kevorkian in defending against that case.

²³⁶ As an aside, it took me the better part of a day to unravel these citations, and I created a chart in the traditional "digesting" method that I was taught as an appellate lawyer (I used quotes and transcript page numbers, which I then listed in three categories for analysis).

²³⁷ This reminded me of my interview with Judge Breck after the 1996 (2) trial, in which he expressed awe at Geoffrey Fieger's summation. In and of itself, it was spectacular, but to those who had sat in the 1996 (1) trial presided over by Judge Cooper, it was clear that it was a "canned" summation (a form with the parties and new facts filled in to a previously written, albeit compelling, script), which diminished its effect. For jurors who may have seen the original *60 Minutes* programme, they may have experienced a similar *déjà vu* (although with enhanced effect, in view of the prosecutor's clips and exclusions), but for members of the jury who had not seen the 1998 programme, the prosecutor's clips and the Kevorkian tape would likely have been similar to an anvil in impact. I argue that only those who had comparative of longitudinal experiences of these – whether the *60 Minutes* or the trials – would have been able to consider this analytical perspective. Of course, jurors were required to consider only the evidence that had seen and heard at trial, but I would suggest that an interesting question emerged in this regard, one that will never be answered.

B. Construction of the Elements of the Crimes Using the Kevorkian and 60 Minutes Clips

As the prosecutor noted in his opening, “the crime of murder, like all crimes in [Michigan] is composed of ingredients or what we call the elements” (Kevorkian Trial Transcript, March 22, 1999, Skrzynski Opening p. 250). In a brief reminder to the reader, the prosecution must satisfy (or meet) the burden of guilt beyond a reasonable doubt as to each element before a person may be convicted of a crime. These are generally the *actus reus*, which is the external physical act (or conduct) and the *mens rea* or guilty mind, which is the minimum requirement of culpability (or intent).²³⁸ I note that the question of whether the identity of the defendant was the same as that of the alleged perpetrator was not in issue here. Neither was the question of whether the Oakland County criminal justice system had jurisdiction over the case.²³⁹

Professor George P. Fletcher, in his 2002 updated version of *Rethinking Criminal Law*, wrote of two general “modes of thinking about homicide” (Fletcher 2002, p.238). Fletcher, who spent 1971 as a Deputy Assistant Attorney in California’s LA County, set forth that:

For the sake of convenience, we shall refer to these modes of thinking about homicide, respectively, as the “harm-oriented” and the “act-oriented” approaches. Each of these modes requires some clarification.

The essence of the harm-oriented analysis of homicide is expressed in Blackstone’s influential rule of thumb: killing another human being amounts to murder except where “*justified ... excused* on the ground of accident or self preservation; or *alleviated* into manslaughter....” [... The defendant/s and/or counsel] concede the wrongdoing of killing and interpose new matter on grounds for acquittal or mitigation.

The act-oriented approach to liability takes intentional or negligent killing as a necessary component of the *prima facie* (sic) case. Most issues of justification and excuse are not affected by this shift, but the claims of mistake

²³⁸ Gardner and Anderson discuss these generally in chapter 3 (33-57) of their 2006 book, *Criminal Law* (9th ed. Instructor’s Edition).

²³⁹ Jurisdiction, though unusual in a criminal trial, was brought into issue in the 1994 Wayne County prosecution and trial of Kevorkian for the assisted suicide of Tom Hyde, with the question of whether the death occurred on Belle Isle in Wayne County or in Royal Oak or another location in Oakland County; this question was raised by Fieger on summation in his closing remarks.

and accident cease to function as excuses and become instead denials of the prima facie (sic) case (Fletcher 2002, p.238)(emphasis in original; footnotes omitted).

I shall show that the evidence and arguments of the prosecutor were act-oriented (until his closing statement and rebuttal statement to Kevorkian's closing). I shall further show that the evidence and arguments of Kevorkian were harm-oriented, with focus variously placed on both justification (acting within his professional duties) and excuse (by saying to Mike Wallace that it "could be manslaughter"). In constructing the elements of causation and intention, a good deal of information was used from the Kevorkian tape and the prosecutor's clips of *60 Minutes* (rather than the full original *60 Minutes* programme and the full content of the "Death by Doctor" segment). I shall now examine how both the prosecutor and Kevorkian developed material during the course of the trial, and I shall offer through analysis how this likely (if not inevitably) led to the verdict of guilty as the outcome of the trial.

*1. Causation and the Case of the Duelling Doctors*²⁴⁰

One aspect of the 1999 Kevorkian trial was that there were competing contentions as to the cause of the death of Tom Youk in September 1998. At first blush, this may sound absurd, given Kevorkian's tape and the *60 Minutes* programme interview with Mike Wallace, during which Kevorkian narrated and provided commentary (in both the original programme and the prosecutor's clips) as he injected Youk with a lethal cocktail.²⁴¹ However, there was a possible (albeit seemingly far

²⁴⁰ I delivered a related paper, "Theories and Realities of Criminal Causation in Euthanasia and Physician Assisted Suicide Prosecutions," at the Canadian Society of Criminology Conference, Toronto, Canada (2005).

²⁴¹ The protocol Kevorkian used in his lethal injection was remarkably similar to the lethal injection protocol developed by Utah's Chief Medical Examiner Dr. Jay Chapman in 1977; Chapman, like Kevorkian, was a pathologist and his "execution method mimicked the induction of general anesthesia," according to Elizabeth Weil, writing in "The Needle and the Damage Done, *New York*

fetched) alternative conclusion the jury could have reached – that Youk died from the underlying disease of ALS (described earlier in the chapter) in the course of the events taped, and was “already dead.”²⁴² If the jury concluded that Youk had died of the underlying ALS, that would have gone beyond the standard of reasonable doubt for an acquittal to an actual doubt; however, had the jury embraced the possibility of such a death, it would have been legally required to acquit Kevorkian, due to a lack of proof of the element of cause of death.

Oakland County Medical Examiner Ljubisa L. Dragovic testified at length about the September 17, 1998 autopsy (which he witnessed) and his viewing of the Kevorkian tape. In short, he testified that there was enough secobarbital (a barbiturate to induce sleep) present in Tom Youk’s body to kill him within a few hours and further that the paralysing muscle relaxant anedctadine was present in a sufficient quantity to kill him within five to eight minutes. However, the autopsy could not determine whether the potassium chloride had been injected because that is present in the body after red blood cells die. *People v. Kevorkian* 248 Mich.App. at 299 (2001). Kevorkian commented on Youk’s death for Mike Wallace in a portion of the prosecutor’s clips of the *60 Minutes* programme shown on March 23, 1999

Times Magazine, February 11, 2007 p. 46, 49. At the time of this writing, the United States Supreme Court is considering a case, *Baze v. Rose*, No. 07-5439, argued on January 7, 2008, in which the central question is whether death penalty imposed by lethal injection (including a three pronged protocol of anesthetic/sleep; paralyzing drug; and potassium chloride to stop the heart) is in violation of the Eighth Amendment ban on cruel and unusual punishment. I note that lethal injection is the only method under such consideration, which would not affect death penalty by electrocution, gas, hanging, or firing squad (Staff Article, Associated Press, “States Methods of Execution,” January 6, 2008). I further note that Michigan does not have the death penalty in any event and that it is not available as a punishment for any crime at the time of this writing.

²⁴² In 1950, a New Hampshire jury acquitted Dr. Hermann Sander of murdering a terminally ill cancer patient by administering four air bubbles into the patient’s veins, in a practical application of this unlikely theory, as reported by Daniel C. Maguire, “Death, Legal and Illegal,” in the February 1974 edition of *The Atlantic Monthly* (*The Atlantic Online*). and which I discussed further in my M.Sc. dissertation (Pappas:1992). The purpose of this artifice is simple – one cannot kill a dead wo/man, and hence, there can be no causation supporting a conviction of homicide in a case where the victim is “already dead”.

(Kevorkian Trial Transcript at 28-29) to, and transcribed for, the jury (as show below, as *verbatim* and as styled from the trial transcript):

- K And we're ready to inject. We're gonna inject you in your right arm now. Okay? Okie-dokie.
- K Sleepy Tom? Tom are you asleep? Tom are you asleep? You asleep? He's asleep.
- ...
- W And this—
- K Paralyzes the muscles.
- W But he's still alive?
- K He's still alive, but, ah, and that's why I...
- W Now I can see his breathing just a (inaud).
- K That's why I have to, you know, now that there lack of oxygen getting to him now, but he's unconscious deeply so it doesn't matter.
- W Is he dead now?
- K I don't, he's dying now, cause his oxygen's cut off, he can't breathe. So now I'll quickly inject the potassium chloride to stop the heart.
- K²⁴³ Now there's a straight line (*sic*)
- W He's dead.
- K Yep. The heart has stopped.
- K Straight line. The cardiogram will be turned off.
(Kevorkian Trial Transcript, March 23, 1999 at 28-29)(*sic*).

Taken together, the testimony of Dragovic plus the narration by Kevorkian could be (and presumably was) construed by the jury as sufficient evidence to prove the element of causation in Tom Youk's death beyond a reasonable doubt.²⁴⁴ The

²⁴³ Double indentation indicates Kevorkian narrating his own tape to Wallace.

²⁴⁴ Ironically, Defendant's Exhibit B (stipulated to by the prosecution) was an Oakland County Medical Examiner Investigation Report/ Hospice Report dated September 4, 1998, reporting the impending death of Youk. (Kevorkian Trial Transcript: March 23, 1999 at 84-86). By the Report, Angela Hospice faxed the notice of impending death of Thomas Youk, a 52-year-old white male. In addition,

narrated tape was referred to by the prosecutor in his opening statement (Kevorkian Trial Transcript, March 22, 1999: Skrzynski Opening at 258), again by the prosecutor in his closing statement (March 25, 1999: Skrzynski Closing at 38), and yet again compellingly replayed by the prosecutor in his closing statement (March 25, 1999: Skrzynski Closing at 39) with further commentary.

Setting up the replay of his clips of *60 Minutes*, he argued:

Dr. Kevorkian tells Mike Wallace he [Youk] was very afraid of choking to death and he must have – he must have felt that he was on the verge of it. Yet you’re going to look at that scene, I’m going to show you that scene in just a few minutes, and you look at that tape to see if there’s any evidence of him choking or his being afraid of choking. This is supposedly the rationale of why he did this.

Now he narrates. When you look at the *60 Minutes* tape you’ll see that they’re watching monitors and they’re watching Dr. Kevorkian’s tape and Dr. Kevorkian starts to narrate to Mike Wallace exactly what he’s doing. And we know that he’s injected the Seconal, the sleeping drug, and now he’s injecting the second drug and Mike Wallace says, “And this –” and Dr. Kevorkian says, “Paralyzes the muscles.” “...there’s a lack of oxygen’s getting to him now....” “... he’s dying now, cause his oxygen’s cut off, he can’t breathe. So now, I’ll quickly inject the potassium chloride to stop the heart.” He’s narrating this to Mike Wallace. He’s telling him exactly what’s going on in Tom’s body. The man who was afraid of choking is now suffocating to death. Of course, Dr. Kevorkian says he’s asleep, so it doesn’t make a difference.

(Kevorkian Trial Transcript, March 25, 1999: Skrzynski Closing at 37-38).

the autopsy report stated “ES/ALS”, which, when asked by Kevorkian on cross-examination, Dragovic contended that he did “not know what ES stands for,” although it was reasonable to accept Kevorkian’s argument that it referred to end-stage (or imminently terminal) illness. (Kevorkian Trial Transcript, March 23, 1999: 87). While Kevorkian engaged with Dragovic in a high level version of what I would call “dueling doctors” and exposed a “viable argument” or possible claim of lack of causation (such as in the case of 1992 in regard to Nigel Cox in Winchester, England, or in the 1950s in regard to Dr. Hermann Sander, who was acquitted in New Hampshire of an injection death on a theory of an “already dead” patient), Kevorkian—in a way that a lawyer almost certainly would not have – all but conceded causation in his summation (Kevorkian Trial Transcript, March 25, 1999: Kevorkian Closing at 56-59), in which he litanized the way in which he created a protocol to put Tom Youk to sleep and to stop his heart as part of a “medical service and medical control” (Kevorkian Closing at 56). As an aside, I observed that the in-court experience of Kevorkian and Dragovic as dueling doctors appeared to be a discussion between equals, more akin to Katz, *Scalpel’s Edge: The Culture of Surgeons* (1995: chapter 5, especially 91-94) than communication to a lay jury (compare, Katz, chapter 6, at 105).

During the actual playing of the clips, it was the prosecutor who narrated the *60 Minutes* tape, in a sense taking a cue from the technique of Mike Wallace and Kevorkian in the original *60 Minutes* programme.

And it's interesting, ladies and gentlemen, that he had his first meeting with Tom Youk on the 16th at around ten o'clock in the evening and on the 17th at around ten o'clock in the evening Tom is dead. He knows Tom Youk for less than 24 hours – just a few minutes really – before he kills Tom Youk. That's all he knows about Tom Youk.

Then he tells Mike Wallace – he injects the potassium – he's dead. Mike Wallace says, "He's dead." Jack Kevorkian says, "Yep. The heart has stopped." "Yep. The heart has stopped." (sic). He's very conscious of what he's doing. This is very purposeful conduct. This is a methodical killing of a human being. You can't get around that.

I want to show you again. You saw what happened. I've narrated to you by using the transcripts of this – of the tapes, but this is what happened. (Portion of tape replayed, prosecutor comments).
(Kevorkian Trial Transcript, March 25, 1999: Skrzynski Closing at 37-39)(emphasis added).

Kevorkian, who for the first time did not testify at trial,²⁴⁵ and who for the first time acted as his own attorney, took the opportunity in making his closing statements²⁴⁶ to argue that an EKG (electrocardiogram) provided for:

[b]etter control. If you use a device and try to do assisted suicide, what if the electricity fails right in the middle, what do you do then? Or if the needle accidentally pops out, what do you do then? You can't do a medical service haphazardly or willy-nilly. That's why the cardiogram was there to make sure the heart had stopped, definitively, and that there will be no more harm for the patient, no more suffering, that it was over. (Kevorkian Trial Transcript, March 25, 1999: Kevorkian Closing at 56).

I conclude that had the jury sought a viable causation issue relating to the prosecutor's clips of *60 Minutes* or of the Kevorkian tape, they might have embraced

²⁴⁵ Technically, Kevorkian did not testify in the 1997 Ionia trial for the assisted suicide of Loretta Peabody; however, that trial ended in mistrial after then-attorney Geoffrey Fieger's opening as discussed in the Juries chapter and no evidence or testimony was adduced or received. Further, although that trial never had evidence taken and was for a charge of assisted suicide, the issue of causation was of interest in that the autopsy showed needle marks on the arm, suggesting euthanasia, as mentioned previously. However, since the trial never proceeded to the taking of evidence, the issue of causation was never explored.

²⁴⁶ While there was an appellate issue relating to an objection by the prosecutor during Kevorkian's closing, in which he referenced the defendant's failure to testify, that is beyond the scope of the instant project; in any event, the argument was unavailing and the conviction was affirmed.

the possibility of *novus intervenus* or intervening cause of death (Fletcher 2000. pp.361-368), by the underlying end-stage illness, as in the 1950 case of Dr. Hermann Sander in New Hampshire (Pappas 1996). However, Kevorkian did not argue lack of causation in his closing to the jury, notwithstanding the fact that he raised it as possibly failing in reasonable doubt during the cross-examination of Medical Examiner Dragovic. I would argue that unfortunately for Kevorkian, this wholesale omission (whether strategic or inadvertent) resulted in forfeiting a viable and, if successful, complete defence. Lack of causation as a legal issue was argued, unsuccessfully, for the first time on appeal, when Kevorkian again had counsel. However, the Michigan Court of Appeals was unpersuaded by this argument, and determined that (further to the prosecutor's redirect examination at trial):

[I]n Dr. Dragovic's opinion, Youk did not die from ALS, ALS was not an underlying cause of Youk's death, and ALS did not contribute to Youk's death in any way. Rather, Dr. Dragovic firmly reiterated that the poisons injected into Youk killed him, constituting a homicide (248 *Mich.App.* at 299).

For the jury to have embraced a far-fetched (though legally viable) theory of lack of causation in the Kevorkian (1999) case, the jurors would have had to parse reasonable doubt as to the proximate cause of death. To do this, jurors would -- individually and collectively -- have had to conclude by finding that Youk had died (or could possibly have died) of the underlying ALS, notwithstanding the timing of Kevorkian's injections and Youk's death. By its guilty verdict, the jury indicated that it chose not to do this, and that it chose to embrace the prosecution's theory of causation (conceded by Kevorkian on summation, notwithstanding arguable testimony elicited from the Medical Examiner, Dr. Dragovic)

This seems a reasonable conclusion in a criminal trial, though one must wonder whether they were convicting the folk devil who went on television, rather than the ex-doctor who injected the end-stage terminal patient and potentially waived

a viable causation issue when in his summation (albeit not evidence), Kevorkian told the jury he “caused death. Yes my action caused death.” (Kevorkian Transcript, March 25, 1999: Kevorkian Closing at 48). I argue this in view of the physicians who were acquitted (New Hampshire’s Sander in the United States) or tried for lesser offences of attempt (Winchester’s Cox in England). I likewise argue this view under circumstances of injection (Sander for a series of four air bubbles, Cox for two separate ampoules of potassium chloride) without a landmark narrative broadcast to the country, or excerpts of a tape played to the jury by which a coroner was able arguably to ascertain testimony as to an element of the crime. I shall next examine some examples pertaining to the issue of Kevorkian’s level of intent, after which I shall explore some political and social uses of the excerpted tape at trial.

2. The Element of Intent as Explored Using the Prosecutor’s Clips of the 60 Minutes Tape

In the last section, I offered quotes from the 1999 Kevorkian trial to examine how the prosecutor deployed the Kevorkian tape and the prosecutor’s clips from the landmark narrative *60 Minutes* “Death by Doctor” segment to further establish the element of cause of death. This section offers an opportunity to show how the prosecutor was able to make use of his nine minutes of clips²⁴⁷ of the *60 Minutes* tape to show intent, and also to show how Kevorkian constructed these clips. These transcript quotes will show that the distilled clips of the November 1998 media event were compellingly used as evidence and in argument at the March 1999 trial.

Using the trial transcript, I shall argue this, in three regards. First, as discussed in earlier chapters, although consent is not a defence to euthanasia as a matter of

²⁴⁷ This calculation is based upon the original trial viewing of the morning of March 23, 1999 from 9:17AM to 9:26AM as transcribed in pages 23-31 of that day, and upon further uses in the trial transcript.

Anglo-American law, Kevorkian's own account of the consent of Tom Youk was self-repudiating. Second, Kevorkian made statements to Mike Wallace that included legal terms of culpability, which the prosecutor was able deftly to weave into his summations. Third, as the trial summations showed, the case progressed to include political arguments, as well as those pertaining to the simple legal elements.

a. Consent and Intent

During Mike Wallace's interview of Kevorkian for *60 Minutes*, the issue of whether, and to what, and how Tom Youk consented to euthanasia was discussed. Also, Kevorkian provided a narrative of his own September tape as it was played for Wallace in the course of the "Death by Doctor" segment. The prosecutor included the following excerpt in his clips of the *60 Minutes* programme (Kevorkian Trial Transcript, March 23, 1999 at 25-28), which I am reproducing in full here (and am including the embedded tape within a tape as visually represented by the court reporter in the transcript as a double indentation, which recollects my earlier discussion in this chapter of Hulme and the visual representation of seemingly agrammatical or unpolished writing style) for juxtaposition and discussion, with the double indented lines as reflecting the court reporter's transcription of the Kevorkian tape, played during the Mike Wallace interview in an embedded fashion:

W Did Tom know that you were making, in effect, an example –

K Yes.

W -- of him?

K Yes.

W He did?

K *Yes. And, I sensed some reluctance in him, I did.*

W Because he thought he was getting assisted suicide?

K Ya, that's right. And, and (sic) actually this is better than assisted suicide. It's better control. Ah, and ah, ah, then he, he did agree. He, which, ah, I think, I didn't force him to agree. He did agree. (inaud).

W How do you know he agreed?

K I had him sign saying that he chose direct injection and he, and he signed this, and he signed it. (second indentation in original to show two tapes).

K²⁴⁸ Okay, now I'm gonna read it to you and I want you to understand, I want to make sure you understand it and you gotta, you gotta listen closely and stop me if you can't understand it.

Y Alright.

K This reads this way – I Thomas Youk, the undersigned, entirely voluntarily without any reservation, external persuasion, pressure or duress, and after prolonged and thorough deliberation, hereby consent to the following medical procedure of my own choosing, and that you have chosen direct injection, or what they call active euthanasia, to be administered by a competent medical professional,²⁴⁹ in order to end with certainty my intolerable and hopelessly incurable suffering. Did you understand all that?

Y Yes.

K Okay.

...

K You sure you thought about this very well?

Y Yeah. Very much.

K You want to wait a week? How about two weeks? Two weeks?

Y (inaud)

²⁴⁸ Again, this "double indentation" reflects the transcript and how the court reporter chose to visually represent the tape-within-a-tape of the September 1998 Kevorkian tape as played for Mike Wallace in the creation of the November 1998 original *60 Minutes* programme, in turn edited into the half-length prosecutor's clips of the *60 Minutes* "Death by Doctor" segment for the March 1999 trial.

²⁴⁹ Ironically, Kevorkian was not licensed as a medical professional at this time, as he had been stripped of licenses in both California and Michigan. This was discussed in an earlier chapter.

K One week? Can you wait one week?

Y Yeah.

K Alright. At least we'll stretch it out one week, Okay?
Let's not hurry into this.

K But I got a call the next night from his brother saying "Tom wants it now" and I couldn't say, "Well, no, "I'm gonna make you wait a week."

W Why? What was happening there?

K He just was terrified in getting, he wasn't, he was a, a very afraid of choking to death and he must have felt that he was on the verge of it. *And I couldn't have him suffer in that kind of frame of mind because if a man is terrified, it's up to me to dispel that terror.*

W Um, hum.

...

K²⁵⁰ Tom, do you want to go ahead with this?

Y Yes.

K Shake your head yes if you want to go? Alright, ah, I'm gonna have you sign again your name and I'm, and we're gonna date it today okay?

Y Yes.

K And we're ready to inject. We're gonna inject you in your right arm. Okay? Okie doke.

(Kevorkian Trial Transcript, March 23, 1999, Prosecutor's *60 Minutes* clips at 25-28)(emphasis added).

This series of clips compiled by the prosecutor covered a short period of time of less than two days from first meeting to euthanasia. In addition, it showed that Youk had actually requested assistance in his own suicide (although that was also illegal in Michigan, despite Oakland County Prosecutor Gorcyca's dismissal of all

²⁵⁰ This double indentation again is taken as it was visually represented in the original trial transcript, to depict visually the tape-within-a-tape construction, discussed earlier in this section.

remaining pending assisted suicide charges brought by displaced Prosecuting Attorney Richard Thompson when Gorcyca took office).²⁵¹ It was Kevorkian himself who pressed forward for performing euthanasia actively. Moreover, I argue that Kevorkian's statement that he "sensed some reluctance in [Youk]" (transcript at 25) would be the end of any assisted suicide conversation.²⁵² That is because this could be construed as being a less than enduring request (and would be applicable only to an assisted suicide request, since consent is not a defence to euthanasia).²⁵³

This was something on which the prosecutor seized during his closing:

That's the whole mission of this trip, is to get the consent form signed because Dr. Kevorkian has an agenda here. He's got a plan. He's filming this and that film is going to go someplace and it's going to cause something. It's going to *60 Minutes*.... it's going to cause a murder charge, it's going to create a trial.... (Kevorkian Trial Transcript, March 25, 1999: Skrzynski Closing at 29-30).

Now we know that he was supposed to wait – supposed to wait for a week, but this is where he calls – he tells Mike Wallace – this is a transcript, from the *60 Minutes* programme, and he tells Mike Wallace, "But I got a call the next night from his brother saying, "Tom wants it now'." (Kevorkian Trial Transcript, March 25, 1999: Skrzynski Closing at 31).

At this point, I remind the reader that the crime Kevorkian was tried for in

1999 was murder (not assisted suicide, although that too was then a crime under

²⁵¹ In Chapter 3,, I discussed at length the fact that Gorcyca's campaign platform had as a central plank then Oakland County Prosecuting Attorney Thompson's role and allegedly wasteful spending in seeking to prosecute Kevorkian, who in the mid-1990s eluded conviction, to great taxpayer expense. As previously noted, Gorcyca won the election, ousting the long-term prosecutor Thompson, and immediately dismissed any remaining Kevorkian cases, as promised during his campaign.

²⁵² At the time of this writing, Oregon is, by virtue of the Oregon Death With Dignity Act, Ore. Rev.Stat. Sections 127.800 *et seq.* (2003), pursuant to a ballot measure (Measure 16) in 1997, the only state that allows for physician assisted suicide, upon repeated and enduring requests over a prescribed period of time, and by prescription only (not direct injection). In particular contrast in regard to the "reluctance" Kevorkian described pertaining to Youk's consent colloquy, I note the pertinent portion of the Oregon enactment, "Section 127.840 s.3.06. Written and oral requests. In order to receive a prescription for medication to end his or her life in a humane and dignified manner, a qualified patient shall have made an oral request and a written request, and reiterate the oral request to his or her attending physician no less than fifteen (15) days after making the initial oral request. At the time the qualified patient makes his or her second oral request, the attending physician shall offer the patient an opportunity to rescind the request. [1995 c.3 s.3.06]."

²⁵³ Likewise it is reasonable to conclude that calling the next day might not be deemed an appropriate length of time between requests from first to last, whereas Kevorkian's answer was that it was up to him to dispel the terror between days.

Michigan law), and that “consent is not a defence to homicide” (Fletcher 2000: 236). Indeed, as Fletcher reminded in the 2000 edition of *Rethinking Criminal Law*, [t]hough we are inclined today (sic) to think of homicide as merely the deprivation of secular interest, the historical background of desecration is essential to an adequate understanding both of the history of homicide and the current survival of many historic assumptions.... The reason [that consent is not a defence to homicide] is that the religious conception of human life still prevails against the modern view that life is an interest that the bearer can dispose of at will” (Fletcher 2000, p.236). As if predicting the Kevorkian 1999 euthanasia murder trial, Norman St. John-Stevas, wrote in *Life, Death and the Law: Law and Christian Morals in England and the United States*, “[d]octors or others ... are principals in the first degree to murder if they administer the fatal dose themselves, whether or not the patient has given his consent” (St. John-Stevas 1961, p.263).

In what I conclude was a failed trial strategy by Kevorkian, in an effort to have the jury accept an alternative (if unlawful) theory of consent, he argued that there was consent by Tom Youk to the euthanasia. He contended in his own summation and closing:

Then there’s the implication that Thomas didn’t consent to this procedure. I had him purposely sign twice. There is no other way to show consent than sign twice. *Also, I didn’t know enough about him. It was a cursory examination, a cursory discussion. That tape wasn’t meant for a prolonged discussion of his condition.* Do you honestly – did he honestly think I wouldn’t know his medical condition ahead of time, that I wouldn’t have doctor’s reports to go over? (Kevorkian Trial Transcript, March 25, 1999: Kevorkian Closing at 36-37)(emphasis added).

What Kevorkian raised was a different matter from the “reluctance” to have euthanasia administered at Kevorkian’s suggestion. As something of an irony, if the jury had believed Kevorkian’s interview with Mike Wallace, it would still have been

reasonable to conclude that there had been an equivocal consent – a consent that would not have technically mitigated the crime charged.²⁵⁴

b. Kevorkian's Statements of Legal Culpability to Mike Wallace

In what may have been the most masterful of the prosecutor's editorial decisions in constructing his version of the *60 Minutes* programme, the tape played for the jury opened with what sounded like an immediate acknowledgment of some level of criminal culpability.²⁵⁵

W You killed him.

K I did, but it could be Manslaughter, not Murder. It's not necessarily Murder. But it doesn't bother me what you call it. I know what it is. This could never be a crime in any society which deems itself enlightened. (Kevorkian Trial Transcript, March 23, 1999 at 23-25).

This exchange from *60 Minutes* provided an opportunity to show the jury what appeared to be a *de facto* confession, made prior to the involvement of the criminal justice system. However, I argue that there is an alternative hypothesis regarding intent here, which Kevorkian failed to fully raise. St. John-Stevas argued, albeit parenthetically in a footnote, that:

... [w]hile technically guilty of murder, they may be held guilty only of manslaughter. Thus, in *Regina v. Murton*, 3 F. & F. 492 (1862), Byles, J. said: 'If a man is suffering from a disease which in all likelihood would terminate his life in a short time, and another gives him a wound or hurt which hastens his death, this is such a killing as constitutes murder or at least manslaughter.' Under the Homicide Act of 1957, such a killing would be very unlikely to be capital murder, (s.5). (St. John-Stevas 1961, p/236 n.2).

²⁵⁴ I shall leave aside the prosecutor's rebuttal commentary, as being beyond the scope of the *60 Minutes* clips, to the effect that "euthanasia is not a justified or excused kind of killing. That's the law...." (Kevorkian Trial Transcript, March 25, 1999: Skrzynski Rebuttal at 61-62).

²⁵⁵ I discussed this seeming concession of the element of causation earlier in this Part. This particularly regarded the Medical Examiner's testimony and the possibility of Youk's end-stage ALS as *novus intervenus* (or an intervening cause of death) that might have resulted in an acquittal due to insufficient proof of causation and *actus reus*.

Initially, St. John-Stevas' footnote seemed an interesting theoretical footnote and commentary to a case over 100 years before St. John-Stevas wrote this footnote passage and nearly a century and a half before the Kevorkian case. However, it seemed to be pertinent to the Kevorkian 1999 prosecution, in that Kevorkian told Mike Wallace in his 1998 *60 Minutes* interview that "it could be manslaughter," rather than murder. While it is an open question as to whether Kevorkian had read either the 1862 case or St. John-Stevas's 1961 academic work, all three seemed to make an argument that doctors be accorded special status such as to diminish the degree of responsibility pertaining to euthanasia as an offense (especially when committed by doctors – and, in Kevorkian's view, *only* when committed by doctors).

In any event, whereas Kevorkian was *discussing* his theory of the law of euthanasia with Wallace in the November 1998 interview, the prosecutor was *trying* the *evidence* and a specific case of euthanasia before the jury in the March 1999 trial. Professor Andrew Ashworth, in the 2003 version of *Principles of Criminal Law* (4th ed.), made the following observations regarding the concept of what he called "mercy killing" (Ashworth 2003, pp.288-289, 292), and which, while Ashworth's commentary specified English criminal law, is also applicable to the United States in its formulation that "mercy killing" (including medical euthanasia within its ambit):

... has no special significance in English criminal law. Where there is a clear case of mercy killing by a doctor, he or she is likely to avoid prosecution or to benefit from Devlin, J's concession that to good motive in the *Adams*²⁵⁶ case.... The House of Lords Select Committee on Medical Ethics²⁵⁷ examined the issues and decided against recommending an offence of mercy killing, largely on the ground that existing provisions are sufficiently flexible to allow appropriate outcomes to be achieved. In respect of doctors, this flexibility is achieved through such distinctions as that between bringing about a patient's death through omission (which may be lawful) and bringing it about by a positive act (which is not) and between intending to cause death and intending to relieve pain while knowingly accelerating death, although even then a

²⁵⁶ I discussed this at some length in Chapter 4.

²⁵⁷ In 1993-1994, I attended some of the hearings of the House of Lords Select Committee of Medical Ethics; however, this is beyond the scope of the current dissertation, except where and as specified.

‘blind eye’ may be turned to the practices of some doctors. But doctors cannot be assured that a ‘blind eye’ will be turned and relatives and friends may be exposed to the strict law. (Ashworth 2003, pp.289-290)(footnotes omitted).

I submit that Kevorkian was using the specific medical case of Youk to further the general issue of euthanasia, whereas the prosecutor was using the law of homicide to try the specific legal case of Kevorkian.

The prosecutor on summation was also able to argue:

As a matter of fact, when he gets – now he has taken the tape, this tape that he’s made. Now he takes that and he gives it to CBS, to *60 Minutes*. And the first thing that Mike Wallace says to him is, “You killed him.” And he says, “I did, but it could be Manslaughter, not Murder. It’s not necessarily Murder. (Kevorkian Trial Transcript, March 25, 1999: Skrzynski Closing at 36).

Although the Kevorkian/Wallace murder versus manslaughter colloquy²⁵⁸ was first seen in the prosecutor’s clips, and was nearly the first seen on the original *60 Minutes* programme, that order of presentation may have been an editorial decision by CBS.²⁵⁹ While that may not have changed the programme or the jury’s views of the prosecutor’s clips of the original programme, it is reasonable to conclude that this order of presentation was an editorial programme construction -- a media construction, rather than Kevorkian’s own.

However, once made, the prosecutor was able to continue to (in a turn of phrase that captures my meaning) interpret the media’s interpretation. I observed in court the prosecutor’s summation, into which he deftly wove bits of his clips of the *60 Minutes* programme into his closing commentary as he argued, in the following lengthy passage (also transcribed by the court reporter):

You know, at the beginning of this case, he got up and made his opening statement and he told you in the opening statement that you know, I

²⁵⁸ This colloquy was between two non-lawyers, whose use of legal words may nevertheless have been different from a criminal lawyer or a deliberating juror who had been instructed as to terminology.

²⁵⁹ In other words, I cannot determine whether this was the natural flow of the Kevorkian/Wallace conversation, or what is commonly referred to as “an abrupt cut out” of the tape (a television or audiotape equivalent to a cut and paste).

certainly wasn't committing a crime. I wouldn't have gone to national television committing a crime, yet he's saying it would be manslaughter, not necessarily murder, it could be manslaughter instead. That comes from his own mouth. He knows what he has done is kill a man, and he know the law says you can't kill, don't do it. *That's the first thing he says to Mike Wallace.* (Kevorkian Trial Transcript, March 25, 1999: Skrzynski Closing at 37 with emphasis added, and prosecutor's closing continuing with quotes from Mike Wallace interview of Jack Kevorkian).

Mike Wallace then asked him:

W Did Tom know that you were making, in effect, an example of him?

K Yes. And, and (*sic*) I sensed some reluctance in him, I, I did.

W Because he thought he was getting assisted suicide?

K Ya, that's right. And an actually (*sic*) this is better than assisted suicide. I explained that to him. It's better control.

But Tom Youk didn't have any control at all. He means it's better control for Jack Kevorkian. Tom Youk was out of control. It was Jack Kevorkian at the control once the injections started. Tom couldn't move. (Kevorkian Trial Transcript, March 25, 1999, Skrzynski Closing, continuing, at 36-37).

Dr. Kevorkian tells Mike Wallace he was very afraid of choking to death and he must have – he must have felt he was on the verge of it.... He's narrating this to Mike Wallace. He's telling him exactly what's going on in Tom Youk's body. The man who was afraid of choking to death is now suffocating to death.

(Kevorkian Trial Transcript, March 25, 1999: Skrzynski Closing at 36-37).

Kevorkian offered his own interpretation of the prosecutor's interpretation of this during his own closing argument, conducted after the prosecutor's own closing was completed:

The issue is this. Did Thomas Youk have a choice to end his agony, and by helping him achieve that aim did I commit murder, first or second degree, or manslaughter? That's the issue which you've got to decide. You'll notice Thomas Youk isn't very much involved in this, his condition....

There was nothing, no talk – there was no talk about Thomas Youk's condition. You did see it on the tape, though. I don't think you needed words. Just look at the tape. Couldn't swallow, fear of choking, can't move except right arm a little bit, no bodily functions controlled, stomach tube, though the abdomen feeding, pain. I mean you don't need much else. You see it on the

tape and it was all described. (Kevorkian Trial Transcript, March 25, 1999: Kevorkian Closing at 58-59).

My comment is that this was a way for Kevorkian to seek to put evidence of pain and suffering of hospice and end-stage²⁶⁰ ALS patient Youk into issue, since the Youk family statements were excised from the prosecutor's clips of the *60 Minutes* segment, and the Youk family members were not permitted to testify on behalf of Kevorkian.

A reasonable conclusion is that the distilled prosecutor's clips of the *60 Minutes* "Death by Doctor" segment showed that Kevorkian had some criminally culpable level of intent – whether relating to manslaughter, murder in the second degree or premeditated murder in the first degree. Another conclusion is that this was almost inevitably underscored by the removal of the family interviews with Mike Wallace from the version shown to the jury. Legally proper, this was devastating in view of the prosecutor's use of Youk's purported consent (which was itself no defence). Kevorkian's unsuccessful attempt to have Melody and Terry Youk testify further isolated him from the possibility of a buffer to pursue the chance of acquittal either on the facts or as jury nullification. Deprived of family testimony and support such as that mounted in prior trials by Kevorkian's former lawyer, and with the Youk family statements to CBS excised from the prosecutor's clips of the *60 Minutes* programme, Kevorkian was left with his own words from the Mike Wallace interview. From these intent could be constructed and established. In another

²⁶⁰ The phrase "end-stage" is consistent with trial testimony and notes on the autopsy, and denotes imminent death of days or a week or two, a shorter period than that suggested by the phrase "terminally ill," which is generally construed to mean life that may last six months (Oregon) or a period of months. For example, the Oregon Death With Dignity Act articulates: " 'Terminal disease' means an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months. [1995 c.3 s.1.01; 1999 c.423 s.1]" In 1994, the House of Lords Select Committee on Medical Ethics similarly defined a "[t]erminal illness as an illness which is inevitably progressive, the effects of which cannot be reversed by treatment (although treatment may be successful in relieving symptoms temporarily) and which will inevitably result in death within a few months at most. HL Paper 21-1 London: HMSO , p.11).

compelling cut, the prosecutor closed his nine minutes of *60 Minutes* with the following exchange, which also pointed toward Kevorkian's intentions:

W And those who say that Jack Kevorkian, Dr. Death, is a fanatic?

K Zealot. No, not if, sure, you try to take a liberty away and I turn fanatic. That's what I'm fi--, I'm fighting for *me*, Mike, me. This is a right I want when I, I'm 71, I'll be 71. You don't know what'll happen when you get older. I may end up terribly suffering. I want some colleague to be free to come and help me when I say the time has come. That's why I'm fighting, for me. Now that sounds selfish. And if it helps, everybody else, so be it.

(Playing of videotape ends about 9:26AM) (Kevorkian Trial Transcript, March 23, 1999: 30-31)(emphasis in original voice).

Unlike the previous trials and occasions on which Kevorkian testified and could be "rehabilitated" by counsel,²⁶¹ Kevorkian had no choice but to seek to take his case to the jury in his closing argument. In view of the conviction for murder in the second degree and drug delivery charges, it is reasonable to conclude that they did not accept his argument that causing Tom Youk's death was not the same as murder – medical or otherwise, or even that his level of intent rose at most to that of the lesser offence of manslaughter. One might reasonably conclude that Kevorkian had erroneously hoped that his merciful motive would serve as justification for his conduct and to negate the element of intent. In the next section, I shall argue that the prosecutor and Kevorkian used the prosecutor's clips of the *60 Minutes* programme in ways beyond the elements of the charges and into the politics of euthanasia, with implicit references to assisted suicide, in Michigan.

c. Political Interpretations of Kevorkian and the Prosecutor's Clips of the 60 Minutes "Death by Doctor" Segment

Both the prosecutor and Kevorkian made a number of political and social statements in the course of the 1999 euthanasia murder trial as the trial progressed.

²⁶¹ This phrase is a term of art and legal parlance, referring to the process of rebuilding a witness' credibility after s/he has been impeached or has made a statement that could be adversely interpreted.

These sometimes went beyond the simple elements of the case, and resonated features of the decade-long Kevorkian saga, as I shall show by juxtaposition of quotes and arguments at trial. One such example previously discussed in this chapter, was where we learned that despite the knowledge that Youk's September 17, 1998 death was caused by intravenous injection, there had originally been no prosecutorial plan to press charges against Kevorkian. This did not change until after the original *60 Minutes* programme aired in November 1998. This was something that was amplified during the prosecutor's clips and the summations.

For example, when the prosecutor played his clips of *60 Minutes*, the following exchange between Kevorkian and Mike Wallace was played (and transcripts provided to the members of the jury):

...

K Everything can be abused. You learn from abuse, you punish the abuser, and then, then you, if you want to control, you say only certain doctors can do this in certain areas, nobody else. Got that? That's the way to control it.

...

K Absolutely. Absolutely. I've got to force them to act. They must charge me. Because if they do not, that means they don't think it's a crime. Because they don't need any more evidence do they? Do you have to dust for fingerprints on this[?]

W Um mum (sic)²⁶² (Kevorkian Trial Transcript, March 23, 1999, *60 Minutes* at 30).

...

First, I note here that the "..." above signifies edits of the prosecutor's clips as depicted in the Kevorkian Trial Transcript, and thus is a legal construction and

²⁶² This is directly quoted from the transcript, and exemplifies my earlier argument that visual representations are important – "um mum" on its own may appear to sound like jibberish, but it is generally accepted as a written representation of an assenting sound of "hum, hum" that often accompanies nodding assent (as was the case in the original *60 Minutes* programme and the prosecutor's clips).

reinterpretation of the original *60 Minutes* programme. Second, as discussed in Chapter 3 previously, prosecutors have discretion in deciding to prosecute and charge or to decline to do so – and given that this prosecutor had dismissed assisted suicide charges pending against Kevorkian when he was elected, he could have chosen to decline to prosecute Kevorkian again merely for assisting in a suicide.

Third, this portrayed a reason for creating a media event, and the politics of euthanasia in Michigan; even if the latter was (and remains) synonymous with the name Kevorkian, the trial is for crimes allegedly committed, rather than a subtext.²⁶³

Fourth, if it was true that the Oakland County Prosecutor was “forced” to charge Kevorkian, that meant that Kevorkian in 1998 was able to wrest control of the Michigan criminal justice system and its policies away from the legal authorities. I argue this was similar to the process by which the assisted suicide laws were passed in Michigan in the mid-1990s (and as expressed by Senator Fred Dillingham in our 1994 meeting, with regard to what Dillingham called “the Kevorkian law”). All of these were beyond the scope of the elements of the 1999 trial for crimes allegedly committed in 1998, although I do note that the element of intent may have been underscored.

I further argue that another broad example can be garnered during the prosecutor’s clips of the *60 Minutes* “Death by Doctor” segment, a key media colloquy between Mike Wallace and Kevorkian, that was included for the jury (Kevorkian Trial Transcript, March 23, 1999: 29).

K Either they go or I go.

²⁶³ This should not be construed as an argument that the elements of the crime were not met by use of the tapes and the evidence relating thereto, as I am not arguing a lack of sufficiency of the evidence to prove the elements beyond a reasonable doubt, nor am I arguing that there was any lack of proof beyond a reasonable doubt. Rather, this is an observation of note in a macro sense as to the politics of euthanasia and the politics of assisted suicide, and comparing the prosecutor’s reactions thereto as a continued theme.

W What does that mean, they or I go?

K If, if I'm acquitted, they go because they know they'll never convict me.

W Um hum.

K If I am convicted, I shall starve to death in prison, so I shall go²⁶⁴. One of the two of us is gonna go and that's why I did this. The issue [of euthanasia] here has got to be raised to the level where it is finally decided.

W *You are engaged in a political, medical, macabre, ah publicity venture.* (emphasis added).

K Um hum.

W Right?

K Probably.

W And in watching these tapes, I got the feeling there's something almost ghoulish in your desire to see the deed done.

K Well, it could be. I, I can't argue with that. Maybe it is ghoulish. I don't know. It appears that way to you. I can't criticize you for that. (Kevorkian Trial Transcript, March 23, 1999: 29)

This exchange, as with others included in the prosecutor's clips, was not necessary to prove the elements of the crime relating to causation or intent. However, this, as with other clips, was within the prosecutor's ambit and provided an opportunity to hint at Kevorkian's contempt for the law and legal process, and provided fodder for his summation (Kevorkian Trial Transcript, March 25, 1999: 18-46, especially 41-44). In this part of the argument, I have taken the considered decision to include the relevant passage *in toto*, as presented by the prosecutor. I now offer the following 568-word block quote from the prosecutor's summation, for which I have annotated some commentary of my own in footnotes.

²⁶⁴ Although Kevorkian had staged hunger strikes in the mid-1990s when held for bail in cases that were ultimately either dismissed or resulted in acquittal, once he was incarcerated for the Youk euthanasia, he served out his time until paroled in June 2007.

In reproducing this block, and offering an accompanying footnoted parallel text, I shall show the reader the prosecutorial flow in his closing argument at trial, and the deftness with which the prosecutor chose to legally construct the related political portion of the original *60 Minutes* programme, which by now had gone through two legal *re*interpretations (italics deliberate). These interpretations were first, the prosecutor's clips as played to the jury, while second is this passage, in which the prosecutor read the relevant passage and provided his own parallel running commentary.²⁶⁵

*They will never convict me. In the future tense, like it's going to happen again. He's making a political statement. He's got a political agenda, and he killed a man to further his political agenda, to videotape it, to put it on national TV to get the prosecutor to charge him because he knows the prosecutor must charge a murder, because that's surely what this is, to go into a courtroom. But before all the people, not before all nine million people that live in this state, not for a public debate, not so that we can all have our input, both pro and con, into this issue.*²⁶⁶

What he said is we're going to bring this into court, and he said, "One of the two of us" -- meaning him or the Prosecutor -- is gonna go and that's why I did this. The issue has got to be raised to the level where it is finally decided." And the issue he's talking about is Jack Kevorkian's right to kill. It's euthanasia. That's the issue. He's bringing that into court. He's not taking that to the electorate, he's not campaigning, he's not writing petitions, he's not asking for public debate on this. He's not asking what the people think. He's not buying airtime or running a campaign. The debate is ended.

He's stopping the debate. And he's saying not let's have a discussion. And we're not going to decide with all of the people of this state, we're going to bring it into a courtroom, we're going to force this into a courtroom and we're going to have 12 people decide.²⁶⁷

And the 12 of you who are left to deliberate it will do it not in the comfort of your own home, not conferring with people that you know and trust, not conferring with other people that might give you some insight --

²⁶⁵ I observed this at the time in court, and it was compelling in technique and delivery.

²⁶⁶ Subtext of this, likely unstated as unnecessary to remind Michiganders who composed the March 1999 jury, was that the original *60 Minutes* programme was aired in November 1998, less than one month after the November Election Day in which Proposition B, which would have allowed for lawful assisted suicide, was defeated by the voters in Michigan.

²⁶⁷ A reasonable conclusion is that this *sub silentio* accepted the premise that if there was an acquittal, that would be a rejection of the charges against Kevorkian, and a *de facto* and prospective nullification of the law.

doctors, lawyers, workers, health care workers, people who are handicapped, people who are not – you won't get any of that input because this matter is out of the political process now and it's into the courtroom and it's on you, because that's what he wanted.²⁶⁸ That's where he wants it decided. He wants it on you. You will do it with the whole world watching, because that's what he wants.²⁶⁹ He killed a man to make that happen.

Mike Wallace says to him – he tells us at the beginning of this trial – I called him a celebrity. He says, "They made me a celebrity. I don't want – I don't want to be a celebrity. I don't want any fame. I don't want this publicity. And Mike Wallace says to him, "You are engaged in a political, medical, macabre" – strange, weird – "publicity venture." And he says to him. "Right?"

"Probably."

That's exactly what he's doing here. That's exactly what he's doing here. (sic, double). You know, I'm cutting you off, you may want to read more of the transcript [of the prosecutor's clips of the *60 Minutes* "Death by Doctor" transcript]. You're going to have the transcripts to read, and I urge you to read the whole thing. I just want to highlight a couple of things for you. I don't mean to be rude and turn it off, but I just want to show you – to show you that I'm not making this up. That's what he said and that's what he's done. (Kevorkian Trial Transcript, Skrzyński Closing, pp. 42-44).

Celebrity was a theme expressed by Kevorkian in his opening and closing statements as well (Rojek 2001). I want to argue one point previously alluded to as I introduce those passages of the transcript. The opening and closing (and any cross-examination or colloquy in which Kevorkian participated at trial) listed him in the transcript as "Dr. Kevorkian," in stark contrast to the prosecutor's transcript of the Kevorkian tape and the prosecutor's clips of *60 Minutes*, which listed "K" for Kevorkian, "W" for Wallace and "Y" for Youk (as noted in relevant quotes I am offering in this chapter for readers); the general convention is to use surnames in

²⁶⁸ A plain reading of this part of the passage supports my argument earlier in this chapter with regard to the jury being socialized as a jury by the viewings of the Kevorkian tape and the prosecutor's clips of the *60 Minutes* programme. Further, there are traditional instructions to Juries not to discuss the case or the issues with anyone either on the jury or at home during trial and until after a trial has been concluded and deliberations to a verdict had.

²⁶⁹ I would argue that this part of the passage raised the bar of the jury already charged with the responsibility of deciding whether to convict or acquit Kevorkian – or any person – of homicide charges; it placed the jury and its members in a national and international arena, rather than simply on a case. This jury reacted to this in a way different from that of the mid-1990s Juries discussed in the earlier chapter.

transcripts. My interpretation of the disparity here has two elements. First, by referring in the transcript to “Dr. Kevorkian,” the court and court reporter accorded a professional status, beyond that usually seen in a transcript of “Judge” “Mr. X” (prosecutor) and “Mr. Y” (defendant/defence attorney), with “Dr.” reserved for expert witnesses with a medical license (M.D.) or Ph.D. (again, Kevorkian no longer had a medical license, having been stripped in two states, including Michigan).²⁷⁰ However, in creating the prosecutor’s clips of the Kevorkian tape and the *60 Minutes* programme and assigning one letter of each name to the three participants, without prefixes, there was a hint of status change for Kevorkian lowering him from a professional doctor to a mere man (or a simple letter of the alphabet) on tape and on trial.

In this first and last trial in which Kevorkian represented himself, the first thing he did was to comment on his celebrity status,²⁷¹ in itself an argument, which I supplement with my footnotes. As Kevorkian began his opening comments, he argued:

First of all, it’s an honor to speak to you because I invited myself here to speak to you. I’m the guest here. I didn’t do this for publicity as everyone

²⁷⁰ I take as additional support for this commentary a reference from popular culture, Jerome Robert Lawrence and Robert Edwin Lee’s 1955 play that was made into the 1960 classic movie, *Inherit the Wind*. This film, a fictionalized account of the 1925 Scopes “monkey trial,” was intended as a docudrama of events in which a Tennessee teacher was prosecuted for teaching Darwin’s theory of evolution to grade school children. In the movie and subsequent 2007 Broadway revival Henry Drummond (the Clarence Darrow-based character) objected to Matthew Harrison Brady (the William Jennings Bryan-based character) being referred to (in the courtroom) as “Colonel” a title bestowed by the townspeople before the trial with “all the pomp and circumstance that goes with it”; the solution was to make Drummond (the Darrow-based character) a “temporary Colonel” for the duration of the trial. This may have been an embellishment by the playwrights, and is not included Clarence Darrow’s anecdotal autobiography, *The Story of My Life*, (1932/1996, pp.244-279, regarding “The Evolution Case” and related chapters). I would argue that the inclusion of this material in the play (2007 version) and movie (1988 version) continue to underscore the importance of this representation of professional status in the courtroom (in which the lawyers were not colonels in the fictional version, and Kevorkian was no longer licensed as a physician in the end of century trial). I further note that at the time of this writing, Jack Kevorkian is the sole physician (or formerly licensed physician) to be tried and convicted of murder flowing from medical euthanasia (or physician assisted suicide, for that matter) in the United States, so a comparison to similarly situated persons is not possible.

²⁷¹ Kevorkian’s opening statement started in the bottom 3 lines of page 260, and by the second paragraph on page 261, he was talking about his celebrity status. (Kevorkian Trial Transcript March 22, 1999, Kevorkian Opening).

says. You haven't heard me make all kinds of interviews in the last two or three months. Publicity is the last thing I need²⁷² and if I'm a celebrity, I didn't want it. I'm a reluctant celebrity. The press makes me a celebrity. They make me a celebrity by these court actions.²⁷³

You have – you know, you've been told and you all understood, you have the obligation and honor of representing your community, in particular, the consciences of your community and the conscience of society in general²⁷⁴ and therefore it's an honor for me to address you. That why (sic) I went to *60 Minutes*, to get into this sanctum – sanctorum where it's difficult to lie and get away with it. As he said, the press is not the place to debate this. I did this to get where I am now, and I appreciate the privilege (Kevorkian Trial Transcript, March 22, 1999: Kevorkian Opening at 261-262).

In the closing, Kevorkian returned to the theme of publicity and celebrity:

I had to do something to raise this whole issue to a level where it might be resolved, and this is the forum for it. It certainly isn't the political forum, because that will be debated for years and decades.²⁷⁵ But this forum can help get it to a stage quickly where it can be decided definitively. And that's why I did it. It wasn't staged for any other purpose, not for publicity or anything else. (Kevorkian Trial Transcript, March 26, 1999: Kevorkian Closing at 54-55).

Then Kevorkian (mimicking Fieger's mid-1990s highly successful

summations and closing arguments, but without either the same effect upon the jury,

which did not have this additional context) moved onto a theme of famous civil rights

leaders, and argued:

When Rosa Parks sat on the bus, was that a crime, sitting in the front of the bus? You saw what happened to her. Did Martin Luther King want to go to jail? He did anyway.

²⁷² I would argue that this sounds inconsistent with Kevorkian's recruitment of Lessenberry and CBS, as discussed in Part I of this chapter regarding the Ann Arbor Conference of February 22, 1999, but I shall here accept both statements as earnestly made.

²⁷³ This statement, included in the quote of Kevorkian's opening remarks, is quoted for his argument, rather than for the truth of the matter asserted. Whether Kevorkian was a reluctant celebrity or a self-promoting evangelist may have been for a juror to conclude, but this is rather to reflect one of the lines of argument offered by Kevorkian at the 1999 trial.

²⁷⁴ I interpret this as an invitation to jury nullification, as expanded upon in the Juries chapter, and alluded to in the Youks' commentary at the sentencing proceeding as discussed in Chapter 5.

²⁷⁵ It might be reasonable to conclude that this was a comment regarding the defeat of Proposition B on Election Day 1998, the day before Kevorkian contacted Lessenberry to arrange for the Youk euthanasia to reach a national television audience.

There are certain acts that by sheer common sense are not crimes. This may be one of them. That's for you to decide. I don't know. (Kevorkian Trial Transcript, March 25, 1999: Kevorkian Closing at 60).²⁷⁶

This last seemed a response to the prosecutor's argument to the jury during his summation that:

That's why I tell you this is a murder trial. This is about the murder of Tom Youk, a murder that's committed to make a political statement. Is that any better than murder for hire? Is that any different than murdering somebody for money? And then to wrap it up under the guise of mercy when it's a political statement. He's willing to kill a man to make his political statement. *Mike Wallace says some people call you a fanatic and he says zealot.* He's a zealot and he's proud of it. He's willing to sacrifice this man for his cause and then he puts it on you to decide the cause – you decide it.

Give me this right. He's asking for it. He's asking for you to give him a right that no one else in this state has. He's asking for you to give him a right that even the State of Michigan itself does not have. This state does not have capital punishment ... the State itself will not even take a life.... You'd have to ignore the law. You'd have to ignore all the law. You'd have to create a new exception to the murder statute. That's what he wants you to do. That's the right to kill he's asking for. (Kevorkian Trial Transcript, March 25, 1999: Skrzynski Closing at 46)(emphasis added).

As I previously discussed in Chapter 4, the 1999 Kevorkian jury returned a verdict of guilty as to murder in the second degree and delivery of a controlled substance, but the jury and its members declined to give interviews to the media or others discussing the verdict. This verdict may have been what is commonly referred to in practice as a "compromise verdict" in that it was less than what the prosecutor had sought regarding first degree premeditated murder, and greater than what Kevorkian told Mike Wallace during his *60 Minutes* interview and included in the prosecutor's clips – that it "might be manslaughter."²⁷⁷ On appeal, the Michigan

²⁷⁶ At this point, the prosecutor raised an objection and raised a theme discussed in my *Juries* chapter, though not ultimately at issue in this case of conviction – that of jury nullification; Mr. Skrzynski argued, "Well, objection. That's not for the jury to decide. Judge, he's arguing a nullification." (Kevorkian Trial Transcript, March 25, 1999: Kevorkian Closing and Court Colloquy at 60).

²⁷⁷ In fact, although Kevorkian was poker faced and composed at the reading of the verdict, he was shocked at the result, as in the much published comment to Lessenberry -- "Manslaughter, I could understand how they would arrive at that. But murder? This? They must have been an astonishingly cruel jury!" Jack Kevorkian told reporter Jack Lessenberry, "[y]ou tell them I said this." He went on, "I don't want to be a martyr. I want to be free. And that's why I am doing this, and you should print that. I

Court of Appeals devoted approximately three pages of its lengthy decision (248 *Mich.App.* 373-443), affirming the conviction, to a factual “Overview” to the underlying facts of the case, and of this, less than two pages to the *60 Minutes* interview and “Death by Doctor” segment, although reference was made in other parts of the appellate writing (248 *Mich.App.* 373, 374-382). In the course of researching this chapter, I reviewed the appellate writing, which contained a factual error (proven by this chapter writing, most particularly Part II). In specific, Judge Whitbeck, writing for the unanimous court, stated that:

Defendant twice videotaped himself interacting with Youk. In the first videotape, defendant went to Youk’s home to discuss his condition. In the second videotape, defendant administered a lethal drug to Youk. Defendant later was a guest on the television news show *60 Minutes*, during which segments from both videotapes were shown. *The jury saw the videotapes and the 60 Minutes interview at defendant’s trial.* Nevertheless, defendant attempted to persuade the jury not to convict him because the murder he was charged with committing was, in his view, a “mercy killing.” (248 *Mich.App.* 373 at 374-375)(emphasis added).

One must wonder if this does not recreate the landmark narrative, given that the prosecutor used carefully pruned clips of but half of the original *60 Minutes* programme. A reasonable conclusion is that, with the authority of judicial *fiat*, the prosecutor’s clips have become a landmark narrative by virtue of this passage. However, this is not what the factual reality at trial was, nor was that the factual reality of the original *60 Minutes* programme, as the research and writing of this transcript based part of the chapter documented and argued. As to the factual reality at trial, the input resided in the word “guilty,” although that rested with the jury. In this regard, I now wish to posit how the jury might have arrived at that verdict (two verdicts, actually, one as to murder and one as to drug delivery).

need to be free to die.” Indeed, it would seem that he actually did expect to be acquitted yet again, and was taken aback at the verdict, despite his comment to Mike Wallace that seemed to parse the elements to the least bad possibility of criminal conviction.

D. Social Constructions of Kevorkian's Public Account at the 1999 Trial

Since Kevorkian did not testify in 1999, his account of what transpired between him and Thomas Youk was essentially introduced by way of the media, and by the arguments of the prosecuting attorney and Kevorkian acting *pro se* (representing himself). Thus, the Kevorkian tape created in September 1998 was sent to CBS, where Mike Wallace and his production team took clips and created the “Death by Doctor” segment broadcast as the original *60 Minutes* programme in November 1998. In turn, the Oakland County Chief Prosecuting Attorney, along with the trial prosecutor and his staff, decided to charge Kevorkian and to create for trial the Kevorkian tape clips and the prosecutor’s clips of the *60 Minutes* programme. Those tape clips, yet again in turn, formed the heart of the evidence at the Kevorkian trial in March 1999. Last, they shaped the interpretations of the arguments that both the prosecutor and Kevorkian used to construct opening and closing arguments. For Kevorkian, the taped clips served as a vehicle by which he was able to introduce his account and interpretation of the events of September 1998 and to expand upon the motivations he presented in November 1998, without cross-examination, as documented by the transcript.

If, for the purposes of the last section, I invited the reader to walk with me down the legal path the prosecutor and Kevorkian proceeded toward the jury’s verdict of guilt, then in this section, I invite the reader to assume the verdict while looking back at the path. The quotes, the tape clips and the words spoken in court will have been no different,²⁷⁸ but the focus now is to consider Kevorkian and his system of public accounting from the same trial transcripts with the same words, playing before the same audience (jury) on the same stage of court. Different situations have

²⁷⁸ For reasons relating to word count concerns, I am not repeating the actual block quotes in this section, but refer the reader to sections A, B and C in this portion of the chapter.

different vocabularies (Mills 1940, pp. 906-907), and so it is that while the jury was in a court of law, it is also reasonable to conclude that its members experienced Kevorkian as a member of society who had deviated from its norms or its laws (by virtue of the guilty verdict the jury rendered).

Whereas the law regarding homicide is focused upon intent, Mill's seminal writing regarding the "Situating Actions and Vocabularies of Motive," was trained upon the vocabulary of motive. Condry (2007, p. 95) observed that "[v]ocabularies of motive are historically and culturally specific, so certain motives will be acceptable and influential in particular societies at particular times." Professor Stan Cohen, in an homage to Mills, issued the reminder that "the fact that each audience may be offered a different account, far from undermining the theory, confirms the radically sociological character of motivation [with] accounts that may be justifications or excuses" (Cohen 2006, p.59).

What if the *same* audience (or jury) hears the *same* account, but a different theoretical framework is imposed in considering the listening viewer (or juror)? In *Rashomon*, the viewer was encouraged to see how different people in different roles (victim, defendant, witness) experienced an alleged crime. Mills encouraged social observers to see that accounts were not simply formed after the fact, but before, during and after an occurrence – and to embrace that "motives are accepted justifications for present, future or past programs or acts" (Mills 1940, p.907). The Kevorkian trial did the latter with Kevorkian's own words, before, during and after the crime charged, but without testimony.²⁷⁹

²⁷⁹ Motive and intent are sometimes confused, and in consideration of possible compassionate motivations that nonetheless do not mitigate intent regarding assisting suicide or euthanasia, I offer C. Wright Mills' elegant answer. "[I]ntention or purpose (stated as a 'program') is awareness of anticipated consequence; motives are names for consequential situations, and surrogates for actions leading to them" (Mills 1940, p. 905).

Ordinarily, I would protest that without the protections of oath and cross-examination, this is of great concern, a lawyer's bias. However, and as discussed earlier in this chapter (as well as others), Kevorkian attested his sincerity and veracity without objection; this accorded with my observations over time and argued earlier in this dissertation that Kevorkian took honesty very seriously, in his "word" or "vow" and in terms of court (regardless of whether he was sworn as a witness). The prosecutor was not concerned that Kevorkian was untruthful in his tape or courtroom assertions, other than as to matters of form and evidentiary permission in court.²⁸⁰ Similarly, Kevorkian was not contesting that the prosecutor misidentified him or Tom Youk or the acts Kevorkian had engaged in. Rather, I would suggest that Kevorkian's arguments were evocative of the following quote from Sykes and Matza (1957, p.666):

The normative system of society, then, is marked by what Williams has termed *flexibility*; it does not consist of a body of rules to be binding under all conditions.

This flexibility is, in fact, an integral part of the criminal law in that measures for "defenses to crimes" are provided in pleas such as nonage, necessity, insanity, drunkenness, compulsion, self-defense (sic), and so-on. The individual can avoid moral culpability for his criminal action – and thus avoid the negative sanctions of society – if he can prove that criminal intent was lacking. *It is our* [that is to say Sykes' and Matza's] *argument that much delinquency is based on what is essentially an unrecognised extension of defenses (sic) to crimes, in the form of justification for deviance that are seen as valid by the delinquent but not by the legal system at large.* Sykes and Matza (1957, p. 666, emphasis in original, footnote omitted).

Here, Kevorkian would have found (unauthorised and ultimately ineffectual) support that his actions in providing a medical service removed him from the ambit of

²⁸⁰ For those who might argue that Skrzynski's objections to Kevorkian's attempts to offer evidence in the course of his summation were proof that Kevorkian might not have been truthful, I would counter that the procedural Fifth Amendment issues concerning Kevorkian's attempts to introduce information which had not previously been introduced as evident and testimony (which appeal Kevorkian lost on the merits, during appeal) were just that – procedural. Kevorkian was inartful and inelegant when acting as his own lawyer, but not dishonest. Indeed, there was no objection by the prosecutor when Kevorkian told the jury that he did not lie, perhaps because the truth of the matters asserted provided the heart of the crime charged. The more truth Kevorkian told, the more convictable he was, in a sense.

the general law. I would argue that this was a way of “normalising the act,” which Condry (2007, p.119) observed was a strategy that was rarely used by participants in her study of accounts by family members. Condry noted that some family members of violent offenders argued that, “anyone could kill given the right circumstances” (Condry 2007, p.119). Kevorkian’s argument was actually that only a very select few i.e., physicians, could administer medical euthanasia under the right circumstances, and that it could be a normalised practice for those specially trained in medicine. A doctor would provide for “better control” (a phrase that I would argue Kevorkian used in the *60 Minutes* interview, p. 25, and in his closing, p. 56, to account for professional responsibility, whereas the prosecutor used the same words to depict control focused criminal) in euthanasia as a “medical service,” (Kevorkian closing, p. 56) an adjustment of the act *per se*.²⁸¹ From Kevorkian’s perspective, his status as a physician (albeit stripped of licensure) justified his actions in alignment with Downes’ and Rock’s argument that, “[t]he experience of oneself as free to deviate depends in part on access to appropriate names and explanations” (Downes and Rock 1998, p.189). By further arguing in his summation that he had brought the cardiogram to ensure quality control in this medical service, I would argue that Kevorkian was seeking to promote himself as establishing protocols and “procedures” as a medical matter (including in Youk’s written consent, read into the *60 Minutes* programme, at p. 26-28).

A reasonable interpretation of this was that that he saw his role as a physician as an actor adjustment above an ordinary citizen – above a juror. I here make the observation that Dr. Timothy Quill was successful in doing likewise in the assisted suicide of his leukaemia patient (by way of a prescription for a lethal dose of

²⁸¹ I argue that Kevorkian’s efforts at both act adjustment and actor adjustment were designed to elevate his conduct and his status, rather than to be apologetic for them, (in contrast to the argument advanced by Condry (2007, p. 104).

barbiturates) less than one decade earlier, with the result that after he gave his account, the grand jury declined to indict him.

Indeed, throughout the trial, Kevorkian focused upon his medical identity. While he took on the situationally specific role of the self-representing “lawyer,” he declined to take on the role of defence witness in presenting his account. I argue that his statements were reasonably consistent with what a doctor might say (for example in the Youk euthanasia descriptions on the Kevorkian videotape), but not consistent with a lawyer arguing the case of a doctor accused of homicide. This left “an account [as] a linguistic device employed whenever an action is subjected to valiative inquiry, a statement made by a social actor to explain unanticipated or untoward behaviour” ... “which in ordinary life are usually phased” (Sykes and Matza 1957, pp.59-60, footnote omitted).

This status shift from ordinary person to physician and Kevorkian’s argument that this should permit him to engage in euthanasia for “better control,” was not within the law. I question whether Kevorkian’s account would have been treated unfavourably (or even prosecuted, according to the prosecutor) if it had appeared, like Quill’s, in *The New England Journal of Medicine*, rather than on CBS national television, where the graphic nature was depicted.²⁸² As Downes and Rock noted, “[w]hen acts and states can be reassessed as worthy or innocuous, when they can be presented as not ‘really’ deviant, it is a little easier to accept them” (Downes and Rock 1998, pp.189).

In essence, Kevorkian’s account on the tapes and his argument at the trial was that he was professionally justified in administering euthanasia. This was regardless of (and thereby offering a neutralisation technique as to) the law, in an appeal to his

²⁸² In fairness, I must say that Quill’s hospice physician status is (present tense deliberate) quite different than was Kevorkian’s as a pathologist.

professional loyalties (compare, Sykes and Matza 1957, p.51). By saying to Mike Wallace (prosecutor's clips at 27-28) that it was "up to [him] to dispel the terror" of Tom Youk a day after their first meeting, Kevorkian took on a medical professional responsibility for his conduct. This might be viewed in contrast to the argument of Downes and Rock that "[t]he very absence of an apparent motive can itself become a motive, liberating the offender from personal responsibility for his conduct" (1998, p. 189). I would argue that Kevorkian strode into further rule breaking, rather than drifted; he did not offer "excuses attempt[ing] to diminish the responsibility, [but continued to offer] justifications [to] attempt to normalise the act" (Condry 2007, p.97, citing Scott and Lyman). A further example of the disconnect between Kevorkian's account and the jury's verdict was where Kevorkian used Feiger's comparisons of Kevorkian to Rosa Parks and Martin Luther King, in which he analogised his actions to theirs, declaring that "there are certain acts that by sheer common sense are not crimes" (Kevorkian Closing at 60). Feiger secured acquittals, where Kevorkian sounded as though he had either a martyrdom or God complex (or both).

At trial, the prosecutor's clips of Kevorkian's interview with Mike Wallace for *60 Minutes* repeatedly depicted him condemning the condemners (Sykes and Matza 1957, p.51), by saying he had "to force them to act" (prosecutor's clips of *60 Minutes* interview at 30). This technique of neutralisation, I now argue, condemned Kevorkian himself in advance of the trial. For example, the prosecutor seized upon Kevorkian's emphatic comment in the course of the *60 Minutes* interview for the original programme (and included in the prosecutor's clips):

Dr. Kevorkian told Mike Wallace, I've got to force them to act. He means the prosecutor. "They must charge me. He tells him, "Either they go" -- meaning the prosecutor -- or I go. If I'm acquitted they go because they know they'll never convict me." And then he goes on to tell Mike Wallace, "One of

the two is gonna go and that's why I did this. The issue has got to be raised to the level where it's finally decided."

And the issue that he's talking about is his right to kill. Jack Kevorkian used the death of Tom Youk to publicize his own political agenda which is the legalization of euthanasia -- that's killing -- and he did it in such a way that there will be no debate on this issue by all the people of this state. There won't be any vote on a ballot by all the people of this state about this important issue. He did it in such a way that he forced the Oakland County Prosecutor to charge him with murder by having a murder broadcast all over the country, and that's exactly what the Oakland County Prosecutor did. (Kevorkian Trial Transcript, March 22, 1999: Skrzynski Opening, 252-253)(emphasis added).

The prosecutor was able to show Kevorkian condemning the condemners as well in the prosecutor's clips of the *60 Minutes* "Death by Doctor" segment, a key media colloquy between Mike Wallace and Kevorkian, which was included for the jury (Kevorkian Trial Transcript, March 23, 1999: 29).

K Either they go or I go.

W What does that mean, they or I go?

K If, if I'm acquitted, they go because they know they'll never convict me.

W Um hum.

K If I am convicted, I shall starve to death in prison, so I shall go. One of the two of us is gonna go and that's why I did this. The issue [of euthanasia] here has got to be raised to the level where it is finally decided.

W *You are engaged in a political, medical, macabre, ah publicity venture.*
(emphasis added).

K Um hum.

By presenting this material (and properly doing so), the prosecutor was able to use Kevorkian's account to show a politicised campaign that was publicity seeking in nature. I would argue that by condemning the condemners (Becker (1991: 28-29), Kevorkian condemned himself. Likewise, Kevorkian's self-repudiating account of Youk's consent, in which Kevorkian had "sensed some reluctance" (prosecutor's clips

of *60 Minutes* interview at 25-26) in Tom Youk undermined the claim of professional justification. Ultimately, Kevorkian's "account" failed to have its own "currency" (Cohen 2006, pp. 61-62) and was unsuccessful in its attempt to depict his justifications "as socially approved vocabularies that neutralize an act or its consequences when called into question ... and to assert its positive value in the face of a claim to the contrary" (Scott and Lyman 1957, p.51).

Conclusion

In this chapter, I have shown how the *60 Minutes* programme segment, "Death by Doctor," came to be created by actors in the media and subsequently used by actors in the law. In addition, I have shown how the media viewed themselves as a factor in precipitating the charges leading to the 1999 Kevorkian trial for the September 1998 murder of Tom Youk. This the prosecutor would otherwise not have pursued, but for the media event in November 1998.

That the death of Tom Youk became newsworthy two months later, in the wake of the *60 Minutes* contact and original programme segment, perhaps says something about the way in which people live and die. The intimate moment of death, which brought a private matter into a public sphere, was one factor in the 1998/1999 prosecution of Jack Kevorkian. However, the breach of social and legal order was what created a story – a crime story of this "exceptional homicide" (Rock 1998, p.225). This may have been even more powerful, given that the *60 Minutes* "Death by Doctor" segment was neither enacted nor partly documentary, but rather composed of the Kevorkian/Youk euthanasia tape and interviews with Kevorkian, family members, and others.

The “story” as portrayed on *60 Minutes* generated not only other stories, but also a criminal prosecution and trial. However, the story at trial had significant gaps and edits in the prosecutor’s clips of the original *60 Minutes* programme, so that the jury was presented with a different narrative. The Michigan Court of Appeals chose to overlook this fact, with the prosecutor’s redacted reinterpretation now legally considered a complete programme segment, rather than revisionism (cf. Livingstone, Allen and Reiner 2001, p.182). CBS also reinterpreted the original landmark narrative in its programme celebrating the parole of Jack Kevorkian in 2007, and creating a new story in what approached a hybrid consisting of reality television and documentary. As with reality television, “in actuality, most of what reache[d] the air ... [was] highly planned, enacted, edited, and ... fabricated to look like spontaneous and tension filled action”; while unlike a reality show, the *60 Minutes* depictions and segments were not “entertainment creations in which dialogue and action often need to be made up to create the desired element of drama” (Trend 2007, p.101).

Perhaps the sense of moral and social order was breached by Kevorkian’s conduct and the media construction of the euthanasia he administered to Tom Youk. If so, the prosecution and trial to conviction restored the sense of legal order, notwithstanding Kevorkian’s attempts to account for and justify his action (both specifically and generally). Ultimately I have shown how the same information was interpreted and reinterpreted by the media and the criminal justice system as regards Kevorkian’s account of the Youk euthanasia, each with different goals, each successfully by an objective measure – be it an audience share or a criminal conviction.

Conclusion

Before proceeding with my conclusions, I make a disclaimer of what this conclusion is *not*. It is *not* going to set forth a position either in favour or in opposition to assisted suicide. Legal at the time the original thesis was drafted in one state (Oregon) and in one more when the revised version was submitted (Washington State), it remains outside the law in the remainder of the country. Euthanasia is *against* the law in the entirety of the United States. I have been asked many times (too numerous to count) if I was “pro” or “con.” If I have written this thesis as I intended, a reader should come away with a sense that I have illuminated many aspects of the debates involved, but also that I have not taken a position on either side of the debate. One former flatmate, who read the galley proof of my “Bitter Pill” (1996) piece said that it read like a mystery, because I said that I had been tested for Huntington’s Disease, but not revealed the result (which I did in a later writing, entitled “Am I My Father’s Daughter,” in 1996). Here, I want the reader to solve the mystery – not *my* position in the debate, but to consider any information that may illuminate *their* contemplation of the debate. My job, as I have seen it, was ethnographically to investigate and discover new facts, offer a framework consistent with legal and sociological writings, but not to superimpose my opinions or beliefs. One person I met shortly after the viva asked if I “got away with that,” to which I replied that there are as many answers as there are stories. As one woman on the Michigan Commission on Death and Dying told me in private conversation, “everyone has a story,” a statement equally true of everyone involved in the Kevorkian cases.

This thesis has sought to tell the story of a group (or more accurately, several subgroups) of people²⁸³ involved in the Michigan politics of euthanasia and assisted suicide as a comparative case study of emerging criminal law and the criminal trials of Jack ‘Dr. Death’ Kevorkian during the 1990s. Before I specify chapter by chapter conclusions, I would argue a decade long vocabulary lesson. Prior to the 1990s, the phrase “physician assisted suicide” (either with or *without*) a hyphen between “physician” and “assisted” was neither a medical nor legal term of art (nor a phrase in the popular culture nor dictionary). By the end of the 1990s, this phrase was subject to great debate in medicine (whether considered in terms of medical ethics or applied medical practice), law and sociology (as one example, I had a heated discussion with a woman who insisted that there was in the mid-1990s “voluntary euthanasia” of infants, whom in law have no capacity of consent or voluntariness, in the Miranda sense of the word). It was the topic of litigation (discussed throughout this dissertation) and legislation (as alluded to in pertinent part during my arguments). The man on the Clapham omnibus debated the pros and cons, along with legislative task forces and anyone who picked up a newspaper and found themselves confronted by front-page articles.²⁸⁴ National news reported on variations of this conduct, and YouTube posted videos.

For my “lexicon,” I make three comments on the labelling of physician conduct in assisted suicide, particularly in the Kevorkian prosecutions and appeals. First, I found myself referring to “physician assisted suicide” (no hyphen), in what I

²⁸³ This is a linguistic homage to the Michigan Commission on Death and Dying, which was rendered unlawful as a body before its final report in 1994, which was then referred to as a “Report by a Group of People,” although it was divided in final rendition, unlike the unanimity voiced by the House of Lords Select Committee on Medical Ethics (1994). However, the group of people I have focused upon in this dissertation was the group (and subgroups) involved in the Kevorkian prosecutions, as examined in this dissertation.

²⁸⁴ This is, in my case, a literal statement – in June 1995, I went on a conference trip to Singapore, and the day after the plane landed my travel companion handed me a copy of *USA Today* provided by the hotel; on the front page was an article about a new Kevorkian case.

realized developed as independent clauses relating to the doctor and the act (or the doctor and the suicidant). While the grammatically correct (dictionary) term is “physician-assisted suicide,” I argue that this subordinates the doctor to the act (and indeed, this may be a deliberate linguistic construction). That said, for Kevorkian, the conduct perhaps could be constructed as “*Physican* assisted suicide,” with the clear emphasis on the doctor (and, as he argued in the 1999 Youk trial, doctor control).

Second, I suggest that in referring to Kevorkian as “Doctor” or “Dr.” in court or in transcripts, language bolstered what in fact had been a stripped credential of licensure, conferring a professional status that he was no longer entitled to, regardless of his training as a physician. The transcript provided a visual cue to a further research topic, relating to visual imagery of that which is oral (Hulme 1984). Third, language interpretations such as the “embedded” transcriptions of the prosecutor’s clips of the *60 Minutes* “Death by Doctor” segment, containing K/Y/W for Kevorkian, Youk and Wallace, may perhaps have been the most technically correct, yet available only in viewing the literal transcripts (whether in the jury room or subsequent analysis of the trial transcript). This visual representation may have emerged from sharing office space with a group of court reporters, yet found academic support from Hulme (1984).

This last was focused on the *act*, rather than labeling the *actors*. I suggest that, coming together, these three linguistic matters may have explicitly or implicitly furthered Kevorkian’s conviction. This is important as Kevorkian was (as Judge Cooper noted at sentencing) no longer a licensed physician. His death penalty-like lethal cocktail was not within the ambit of palliative care, nor was it within the category of drugs permitted by states which do allow for assisted suicide (generally oral depressants). I began to impute *political* connotations into the words, the same

words, in different contexts, perhaps consistent with the fact that physician assisted suicide and medical euthanasia were much debated during the decade.

Conversely, there were words that were seemingly axiomatic in the United States that were not so in the United Kingdom. One such example is the word “segment,” which referred to a piece of a talk show or newsmagazine (most notably “Death by Doctor” on *60 Minutes*) that was a specific bit and generally between commercials and advertisements. In the United States, this seemed a given of a piece of material, whereas colleagues in the United Kingdom asked me if I was likening the Youk euthanasia to an orange being divided (in fact, the language seems to be a “colloquial term of art” in the media. A more granular example of this was the way in which the phrase “jury nullification” came to be used in Michigan, and commented about in pertinent portions of the juries and families chapters – nullification in the mid-1990s Kevorkian trials became a term of colloquial art so much so that it was generally bandied about by prosecutors and members of the Youk family in advance of trial in 1999. Delineations and definitions of what was (or was not) either assisted suicide or euthanasia seemed to emanate from the Kevorkian cases, and make their way around the world. This was the case both in the practical application of the law and in the media. At the same time, applications of theoretical law (such as the construction of jury nullification) seemed to be condensed into the Kevorkian cases for Michiganders.

In the first chapter, I introduced recent historical perspectives and pointed toward some of the interlacing academic literature and debates relating to medical euthanasia and physician-assisted suicide, and a methodology discussion, which I also alluded to in subsequent chapters. I conclude that the value of the ethnographic study, which here used, *inter alia*, in court observations, transcripts, and interview, was a

real-life and real-time opportunity to engage in the construction of my own version of David Hare's *Murmuring Judges*. It was a fascinating, but incredibly expensive, opportunity. Someone once told me that my PhD was costing me a million dollars, despite scholarships, fellowships, jobs and cost cutting efforts during research; he then showed me some of the numbers based upon travel expenses and projected income that I had not earned. In a pre-viva meeting, Paul Rock invited me to consider if there was anything I would have done differently. While I might not have engaged in 10 years of research and continually re-opened my field work and writing efforts, in all candour, I wanted a completed body of research. The appellate lawyer in me held out for moments of conclusion, a costly proposition in terms of both money and missed opportunities. Whatever the abnegation, it was self-imposed and in retrospect, I do not regret it, although I confess I thought I was going in for a couple of years of research (as I did with a similar methodology researching anti-stalking measures in Minnesota and New York in Pappas 1997; Pappas 2000) and not a dozen years.

While I do believe I had a relatively complete corpus of material, I do need to note that the life of assisted death marched on. The week after I filed the original dissertation, Kevorkian lost a campaign for Michigan state legislature. Washington State approved a ballot initiative to allow for physician-assisted suicide on the same day. I wanted my dissertation back, to add more, and was desolate that the original draft was filed for the viva. A month later, on December 10, 2008, a documentary on Sky Television "Real Lives" television showed the Swiss "Dignitas" clinic euthanasia of Craig Ewert, a 59-year-old retired professor and ALS patient, was broadcast on British television; which I would have liked to compare to the 60

Minutes “Death by Doctor” segment.²⁸⁵ By May 31, 2009, there was a waiting list of 800 Britons for the Dignitas clinic (guardian.co.uk) and Debbie Purddy, a 46-year-old with multiple sclerosis was scheduled in June to go to the House of Lords to ask whether her husband, Omar Puente, would be prosecuted if he helped her to travel abroad to die (under the *Suicide Act 1961*). This, I would have liked to compare to the 1994 case of Tony Bland, and consider the extension that Purdy sought supported by Dignity in Dying. Prosecutorial issues regarding a potential generalised new right, to assisted dying abroad, was included in an interview by Sir Ken Macdonald, former Director of Public Prosecutions (www.news.bbc.co, 2 June 2009).

In Chapter 2, I discussed Kevorkian’s campaign for physician- assisted suicide²⁸⁶ and how it had an enormous impact upon society on many levels. Among other things, Kevorkian caused a re-appraisal of medicine in patient end of life care, and a further re-appraisal of the role of law (and particularly the criminal justice system) regarding doctors who were in transgression of the (emerging) law.²⁸⁷ In this, I found an opportunity to examine the roles of Kevorkian and his legislative nemesis, Senator Fred Dillingham – a former mortician and fellow death worker, a pairing that I suspect both would eschew.

During the period of research, I found myself having to adapt my research methodologies in shifting legal sands (an unanticipated and reportable finding in and of itself) of litigation and legislation in Michigan. This may have reflected an

²⁸⁵ I am grateful to Ms. Lisa Haddock, who sent me a link regarding this, and which I verified at www.timesonline.

²⁸⁶ I note that at the time that I submitted my dissertation for my M.Sc. in Criminal Justice Policy in late 1992, the common phrase was still medical euthanasia, whereas by 1993/4 both Kevorkian and the phrase “assisted suicide” were known, and by 1995/6 popular television shows used phrases such as “to Kevorkian” or “Kevorkian’s place.” I would argue that this was an emerging phrase to identify new conduct, in contrast to my arguments (Pappas: 1994, 1996, 1999) regarding stalking as a pre-existing conduct given a new name.

²⁸⁷ By this, I take as a given that the transgression of law takes place in a public space or arena, rather than as a private patient matter at home, or in a hospital setting, as I discussed at great length in Chapter 6.

emerging collective social consciousness borne of personal/family experiences of changes in the perception of what Glaser and Straus (nearly 30 years earlier) labelled “death trajectories” as much as the media’s `construction of a story and precipitation of an issue. I have argued throughout the field work chapters of this dissertation that a reasonable conclusion was that assisted suicide (as either a patient or as a physician) was a widespread “coming out” issue (not unlike women’s suffrage in the 20th century or same sex marriage in the current century). People (such as family members) who one might have expected to be shy of interviews were very open, and some in fact sought them out. Likewise, others in the public eye (for example, judges and members of the media) sought to tell their own personal stories (which encouraged me to tell my own in a 1996 lecture and related essay). I found that people – ordinary and extraordinary people – wanted, and sometimes *needed* to talk, about these issues and their personal stories that a polite conversant might have thought too personal or “sensitive.” My original *aide memoir* of 1993²⁸⁸ developed into the IRB statement of 1996 -- by which I advised interviewees of the interview, what it was for, where my affiliations were, explaining that confidentiality could not be assured in this high profile series of cases, but that requests for confidentiality or going off the record would be assured.²⁸⁹ The one-page, single-spaced IRB statement, which I read prior to interviews, and gave copies to interviewees, was dubbed by one interviewee as “Miranda for academics.” In the IRB process, I learned to give a phone number and other contact detail, and to offer interviewees the opportunity to ask further questions or contact me or present other concerns. (Some interviewees, such as line prosecutor John Skrzynski, cut me off early in the IRB colloquy, saying “yeah, yeah, I consent.”)

²⁸⁸ I am grateful to David Downes, who originally suggested this plan to me in the LSE Tuesday Mannheim Centre for Criminology seminar.

²⁸⁹ I was required to gain IRB approval for my first field trip in 1996, since I was then a Post-Doctoral Fellow at the University of Minnesota, Center for Biomedical Ethics.

What astonished me most was that I expected nobody to talk to me, except perhaps Kevorkian, yet nearly everyone I met (in court, in lobbies, while in restaurants with other interviewees) wanted to talk, perhaps to purge or to seek a cleansing ritual. I conclude that this led to unanticipated, and perhaps unprecedented, access.

Some doctors in the early 1990s used writing and/or medical documentation as a mechanism to bring matters previously considered private to exposure in the public sphere. These included Timothy Quill who went from writing a personal essay of how he gave drugs to a patient to assist in a 1990 suicide, to his participation in a U.S. Supreme Court case unsuccessfully seeking a declaratory judgment striking New York's assisted suicide law, to the book and conference circuit. Winchester rheumatologist Nigel Cox, perhaps invited prosecution by his patient notes in hospital. However, one might (if not inevitably) conclude that Quill made a political statement by writing his essay for publication in *The New England Journal of Medicine*, whereas Cox engaged in a private family matter and was "exposed" by hospital nursing staff in response to his documentation on a patient's chart.²⁹⁰ I infer an inevitable extension of Judge Cooper's remarks in interview that everyone involved in the Kevorkian cases (i.e., not only Kevorkian) was a "zealot."²⁹¹ This I say to the extent that challenges to the medical and legal culture were as much about style as about substance. "Good" doctors (who were not incarcerated), while deviant doctors were. An example is that Kevorkian was punished by loss of licensure years before he was prosecuted to conviction. This was in sharp contrast to Cox, who was

²⁹⁰ When I attended hearings of the House of Lords Select Committee on Medical Ethics in 1993/4, I repeatedly heard witnesses ask rhetorically why Cox wrote "it" down, which seemed to show a cultural construction of common practice of euthanasia *sans* documentation and which also seemed to suggest that the medical culture did not abhor the practice of medical hastening of death, but rather abhorred the public exposure of "it."

²⁹¹ The linguist construction of "zealot" in American criminal prosecutions is generally with regard to inflammatory comments by prosecuting or defense attorneys in argument, and regards prosecutorial error most frequently (with phrases such as "prosecutorial zeal" or "overzealous prosecutor" used in appellate briefs and decisions so frequently as to be *passim* in the culture of the criminal justice system); however, one might reasonably analogize this phrasing to religious zealotry or to witch hunts.

given a suspended sentence of one year by the judge, and only *subsequently* was punished by the General Medical Council, which imposed a requirement to take palliative care instruction and had his medical care supervised for one year.

During the period of research and then during the periods of analysis and writing, the terrain shifted so abruptly and repeatedly that I ultimately gave up hope that I would be able to include everything in my findings. Editing, refining and focusing are, as Paul Rock says, central disciplines in academic research; however, this was in conflict with my lawyer's sense of being complete in the case. I hoarded a great deal of related research that will have to go into other projects and writings,²⁹² and at the time of this writing, I was still unable to open a newspaper without a new development that seemed to change a feature or update.²⁹³ Further, the week after the initial submission of the thesis, Washington State by voter initiative approved legislation of physician assisted suicide regulations (Initiative 1000, "The Death with Dignity Act") on the same Election Day that Jack Kevorkian lost a Michigan bid for

²⁹² In later draft revisions, when it became clear that I had to learn more and more to write up less and less, I took solace from Stan Cohen's Preface to his 2001 *States of Denial: Knowing About Atrocities and Suffering*, when he wrote that he "*collected and hoarded all sorts of material* – newspaper cuttings, Oxfam appeals, Biafra and Vietnam war photos, quotes, book titles, bits of conversation [with the] fantasy that one day [he] would integrate all this" (Cohen 2001, p.x)(emphasis added) and later offered that the result was not what [he] had planned ,, [and that] someone else will have to write" some of the other aspects (Cohen 2001, p.xiv).

²⁹³ One such example was on September 9, 2008, when *The Star-Ledger* printed a front page "above the fold" article by Maryann Spoto and Rick Hepp, entitled "Shore RN Accused of Murdering a Patient: Authorities Say Nurse Killed Man with Injection." The article lead was "a nurse from Jersey Shore University Medical Center was charged yesterday with killing a 72-year-old patient by injecting him with an unprescribed paralytic drug" (Spoto and Hepp, September 9, 2008). This article alone could have found a place in my Juries chapter (39 year old Lorie Hentges is contending that all she did was sit next to her dying patient and hold his hand so that he would not be alone, which would fit within the nurses mini-study and Glaser and Straus' trilogy; or Chapter 6 (with a note that the nurse was accused of the murder in September 2008, regarding a death that occurred on April 13, although not as a result of a tape or interview, as with the Kevorkian/Youk case); or might have made for a note in conjunction with discussion of Winchester's Cox case (the New Jersey Department of Health and Senior Services fined the hospital \$475,000 for failing to report the incident the day it occurred on April 17, 2008 until August 1, 2008), or within a discussion of the changing roles of medical professionals with advances in medical technology (the alleged intravenous was within one day after life support was withdrawn from the decedent); or perhaps a note of changes in the criminal law in response to transgression of medical professionals (for New Jersey, in 2003/4 five years prior to the Hentges case, nurse Charles Cullen confessed to surreptitiously killing some 40 patients by lethal injection in New Jersey and Pennsylvania hospitals where he worked, which prompted a series of reforms including prompt reporting of suspected criminal events to state authorities, a response reminiscent of the Michigan response to Kevorkian's activities).

an elected state office;²⁹⁴ within one month, there was press that BBC would be airing an assisted suicide of a British citizen who sought assistance in Switzerland (where the conduct was lawful and regulated). Whereas in Oregon, doctors are being regulated to allow for assisted death and 2009 will see Washington State follow as the second state to do so, in other states (such as New Jersey), the criminal justice system is tightening regulation of nurses. I believe that a comparative study of why this dichotomy occurred is merit worthy. An additional way forward for further research would be in the arena of “regulation.”

This project, however, has been a sociological study of a series of criminal trials featuring a particular defendant in a particular state accused of a particular fact pattern of allegations. I have not sought to directly address policy or policy implications except insofar as to further the narrative. Condry (2007, p.183) in similarly delimiting her work observed, “these findings do raise particular policy implications and leave open a number of questions.” I have noted throughout this dissertation areas where I now have more questions, and it is an uncomfortable intellectual space for me. My professional analogy has been to imagine writing a legal brief on a particular point of criminal law on behalf of a particular defendant (or on behalf of the state); although one has learned a great deal about a related area, one cannot use it to argue your case. So it was with reluctance that I decided to relinquish a full comparative study of the contemporaneously sitting Michigan Commission on Death and Dying and the House of Lords Select Committee on Medical Ethics (although I attended hearings of both, reviewed documents of both, and submitted evidence to both). Such a study, had I ended my field research in 1994 (when both bodies concluded) would have placed me within the mainstream of the emerging

²⁹⁴ As an aside, I note that on Election Day 2008, the United States also elected Barack Obama to be President, and that there was a record voter turnout across the country.

sociology of death (Howarth 1994, 2007) by discussing end-of-life debates, but would have left me bereft of the chance to study the actual criminal trials.

On the other hand, engaging in this comparative study of the Kevorkian cases gave me an opportunity to do something that a brief writer or judicial body is rarely able to do – to go outside the record of any one trial and to look at comparative elements between trials. In Chapter 3, regarding Chief Prosecuting Attorneys and Trial Judges, I “got”²⁹⁵ something that most lawyers in their professional (trade) role would not have dreamed – access. The immediacy of the access, especially with regard to the judges (within days or weeks of trial, excepting the 1994 case I was unable to attend and the 1999 conviction) astonished lawyers who asked me about the work. For me as a lawyer, a judge was someone on a raised bench (literally) embodying justice; for me as a doctoral candidate, a judge was a source, someone who could give insight and information, rather than rulings and pronouncements.²⁹⁶

What I discovered in the analysis of this chapter, and only after reviewing my yellow pads and the tapes repeatedly, were emerging themes regarding prosecutorial discretion and judicial demeanour. Until I had reviewed the judicial interviews I had no idea that for the judges, I was to represent a safe space in which they could give voice to what had perhaps hitherto been unspeakable. For example, in 1996, Judge Cooper gave voice to the stress of her Kevorkian trial and Judge Breck gave voice to his Kevorkian trial as an issue forum for assisted death. In contrast to the Chief

²⁹⁵ This is an allusion to a phrase commonly used by members of the media, “the get” refers to access to a source of information that is difficult to attain, or to be the first one “to get” an interview or topic published or on the air. For example, I would argue that while Kevorkian was “the get” in the early 1990s, it was the euthanasia that was “the get” for CBS and *60 Minutes* in 1998, as discussed in Chapter 6.

²⁹⁶ One former colleague whom I invited to read an early draft of my Chief Prosecuting Attorneys/Judges chapter chastised me for referring to judges by surname in the chapter, rather than as “Judge” or “Hon.”, which had been a deliberative decision on my part. However, the hypersensitivity in this regard is common in the legal setting when a judge is someone above, as contrasted with the academic setting in which a judge is someone under examination (and I hasten – as a lawyer -- to add here that this is not intended in any disrespectful sense of “The Honorables,” either individually or collectively).

Prosecuting Attorneys, I was perhaps just another outlet for the academic equivalent of a press release or agenda setting opportunity. For Judge Cooper and Judge Miel, this regarded the media, for Judge Breck, this regarded his wife's illness and passing. In this conclusion, it was only fair that I should acknowledge that during the mid-1990s, I had no plan to construct an entire chapter on the media, nor did I intend to have a chapter regarding the Kevorkian families,²⁹⁷ both of which became not only chapter topics, but inextricably interlocking themes among chapters.

Further, it was only in hindsight that I realized that the mid-1990s Chief Prosecuting Attorneys were savvy users of the media in creating their Kevorkian cases. In the late 1990s Chief Prosecuting Attorneys had their respective Kevorkian trials essentially foisted upon them, in Gorcyca's case *by and because of the media*.²⁹⁸ In a related vein, the early Chief Prosecuting Attorneys brought clear personal agendas to the Kevorkian cases, whereas the later chiefs were lawyers "just" doing a job. This was as opposed to the early chiefs, who sat on legislative committees or seeking to promote changes in the law. I concluded that the later chiefs actually demonstrated a role of professionalism that the judges echoed in their own interviews.²⁹⁹

This carried on in Chapter 4, which discussed the Kevorkian juries. By definition, the jurors were coming to their trials as ordinary people. In a very palpable

²⁹⁷ Indeed, it was during the drafting of this dissertation that what was to have been one chapter regarding "ordinary people" who were in the Kevorkian juries and decedent families clearly became two distinct (though interlaced) chapters presenting different opportunities for discussion and analysis.

²⁹⁸ For the record, it would be unfair to assume that Voet and Gorcyca were youthfully inexperienced, since they may have had elders family members in decline; however, it was a matter of record that O'Hair was concerned with the whittling of family resources in the wake of his father's illness and death, and that Thompson was concerned with adequacy of health insurance.

²⁹⁹ This invites a (rhetorical) question that I alluded to in the chapter when discussing Judge Breck's reaction to Fieger's summation, which had been adapted from a prior Kevorkian trial – did the judges, coming to the work as lawyers doing the job of managing trial, come to the work as neophytes in a way that the Chief Prosecuting Attorneys of the mid-1990s did not? While this is not a dissertation on judicial administration, a fair question for general research later might be to examine the chief executive officer of a criminal trial bureau as compared to judges on similar cases.

way, their role for the days or weeks of trial was to the judges of the facts.³⁰⁰

However, both in the *voir dire* transcript study and in the empirical information derived from the press conferences and interviews indicated that the jury pool brought in more than their common everyday experiences. As an infamous example, Bishop Ott had written a pro-assisted suicide piece, in 1993, prior to his jury service as the foreman of the first 1996 trial. Ott was identified as a primary voice favouring acquittal, notwithstanding his clerical status, which might have suggested a conclusion to the contrary. One might conclude that Bishop Ott brought his family experiences to the jury room, and that these overrode what the parties might have assumed to have any religious or theologically based bias.³⁰¹

As another example, the 1997 Ionia jury, where Fieger looked into the box and saw no friendly faces, may have been the Michigan equivalent of *Twelve Angry Men*, had Fieger not prompted a mistrial with the highly inflammatory opening colourfully alluded to by Chief Prosecuting Attorney Voet as “jury arson.” One might reasonably ask this (unanswerable) question, as did the Ionia trial judge (in different phrasing) regarding the jury’s disappointment not to be allowed to hear the evidence and come to their own conclusion. Because the 1999 jury granted no press conferences or interviews, and eschewed media communication, it shall remain an open question whether the jurors brought in their own family experiences (as did Cameron Beedle in 1996) or whether they considered the media involvement in furthering the Youk

³⁰⁰ This phrase is consistent with pattern jury instructions, such as that issued in the final Kevorkian trial, to the effect that the judge decides the law and the jury decides the facts in the trial.

³⁰¹ One unanticipated finding for me was that the men of the cloth involved in these cases were so much more sympathetic to the issue than I had expected. While it would perhaps be overreaching to offer a conclusion that Ott and Phifer presented as more akin to pastoral care, and perhaps similar to nurses in philosophy of ministering to their flock and members than theological executives similar to the doctors, I would argue that there is a whiff of an indicative, though not conclusive finding (see Pappas 1994).

publicity. I conclude that the jurors did, and in a negative way, given their ushered departure from the courthouse and refusal to discuss the conviction.

While the 1999 jury spoke only by verdict, the *voir dire* transcript was instructive as to thematic issues of family, religion and belief systems, medicine and health care. The most surprising of the findings was the nurses' mini-study. There, the nurses expressed reluctance to adhere to the law insofar as determining guilt or innocence of Kevorkian as a doctor (albeit one stripped of license) accused of euthanasia murder. A common theme among them, expressed more strongly than the physician, led to an interesting possibility. Would nurses (who are involved in the constant care of patients) relate to physician assisted suicide or medical euthanasia differently than doctors (who generally had brief interaction with patients)? Glaser and Straus might have predicted this, but I had not (and I did not, this was an unanticipated finding). Another question emerged – was there an underground culture in which the caring profession was critical of the failings of the curing profession? My answer to this was implied by the way in which the question developed in my mind, not as an intentional device – the doctors were CEOs of the patient cases, while the nurses were left in the position of implementing with patients they knew and knew ongoingly. I argue that nurses might be particularly critical of Kevorkian as someone who knew his patient for a matter of a couple of days, with a couple of interviews and chart reviews (Katz 1999; Glaser and Strauss 1970). To the nurses, without having heard the name Quill or Cox, Kevorkian and his criminal trials might have been a place for them to be the “anti-Ott.” That is to say that these women (they were all women in the 1999 *voir dire*) used their jury questioning to express that which their profession required to be silenced and subordinate to doctors, they may not have been

seated, but they did get to express judgment about health care delivery, euthanasia, hospice and comfort care, and implicitly, of Kevorkian.

If the criminal law depersonalised victims of crimes (even consenting ones), then so too did at least one jury. As juror Cameron Beedle (1996) attested to in her interview, another juror asked to have the photos of “those dead women” turned around, away from the deliberating jurors; I would argue that the phrasing, and the request, were examples of “othering.” Conversely, I would argue that the prosecutor in the 1999 case personalised Tom Youk as a patient robbed of his dignity, a family member treated disrespectfully, and simultaneously personified Kevorkian as the anti-doctor, the publicity seeking and uncaring medical professional, Kevorkian as the “other.” Ordinarily, such vilification might have been within the objectionable culture of prosecutorial error, but Kevorkian’s *60 Minutes* interview and arguments at trial invited response. While it was a methodological limitation that I did not have the opportunity to inquire of the jurors (who again, declined all interviews post-trial), I would argue that this was compelling argument in 1999, made to a jury that, for the first time, had no benefit of testimony from the family members in support of Kevorkian.

In Chapter 5, I had the opportunity to explore the families, and their perceptions of the Kevorkian trials. I argued earlier that that it was reasonable to conclude that the judges felt unencumbered and at liberty to speak after trial, then this was doubly so for the family members. The Youk family members did so, vehemently and elegantly, at the sentencing proceeding, alleging that they had been robbed – by the criminal justice system -- of their ability to speak of Tom Youk at trial, to come to Kevorkian’s defence and step forward as witnesses for a man they felt was a caring medical professional in ending their loved one’s life. The

discrepancy between the bare facts of the case delivered at trial and the families' preference for wider context and history has analogies (Rock forthcoming 2009).

Ironically, the narrative the Youks gave at sentencing, while prepared in advance, was unencumbered by the limitations of direct examination of a lawyer (even a *pro se* Kevorkian, acting in his own defence) or the rigours of cross-examination. I have argued, and conclude, that the unfettered ability to speak at sentencing, while not replacing what would surely have been compelling (and possibly saving) testimony at trial, remains the most intact record of any of the Kevorkian families. This conclusion is based in part based upon the uninterrupted narratives the Youks offered at the sentencing hearing, and in part based upon the (negative) experiences of the criminal justice system as described by the Sherry Miller's and Merian Frederick's family members and clergy in our interviews.

Family members who testified during the mid-1990s trials expressed that they were offended by the way that attorneys (on both sides) shaped and limited what they could and could not say in court. These family members (and Frederick's clergyman Rev. Phifer) expressed themselves in unfettered ways during our interviews, which were semi-private (or, as I respectfully and accurately referred to them, the "kitchen table interviews"). While I may have chosen what comments to use and how to do so, the fact remains that the interviewees had the option to characterize their comments, which almost invariably led me to new and uncharted terrain (such as the commentary on the media and the commentary on the criminal justice system generally)

In retrospect, the Kevorkian family members and the Kevorkian judges (two of whom met me in their chambers which I would liken to a semi-public space akin or the professional equivalent of a living room, and the third of whom actually did invite me into her literal living room) had something in common in this way. Both family

members and judges could not speak freely during the Kevorkian trials, both groups had severely circumscribed roles. While the judges were symbolic of power in the courtroom, they in fact had to deal with issues that they could not speak of in court, but took an opportunity to after trial. While I always considered it a methodological limitation that I did not get an interview with Judge Cooper after the 1999 trial (because the matter was going forward on appeal), neither did I have an on-the-record interview with the Youks after the trial (although I met and spoke with them on more than one occasion, and with Melody on repeated occasions in both Michigan and New York; these were requested to be off-the-record, likely for the same reason as Judge Cooper's reluctance to grant interviews in 1999). However, Judge Cooper's unfettered comments (in our interview in 1996) and those (unfettered narratives) of the Youks (in 1999 at sentencing) had in common frustration with the limitations that the criminal justice system put upon them in their respective roles.

The Youks had the rare historic opportunity to become "families proclaimed" (I use this phrase as an homage to Condry 2007) at the sentencing, and to use their status as a sword, rather than as the defence shield it might have been at trial. This conclusion, I must acknowledge, is literally academic, as it became moot in the case.

In thematically considering the fieldwork chapters, I noted that the Youks and Judge Breck expressed complimentary comments about medical care and hospice during the decline of their family members, and pointed to medically hastened death as a last possible resort. Many of those I interviewed (including people who were professional interviewers, whether lawyers or media) had compelling family experiences; some seemed to be taking back their power by way of an interview in which they could control the narrative, even if I went in with an *aide-memoire* outline of questions. Further, Kevorkian became embraced as a member of the families of the

clients for whose deaths he was tried, and was not expelled after he was convicted and sentenced (cf. Condry 2007).

In Chapter 6, this apparent set of themes carried on, although it was the media themselves who were under the microscope. In Ann Arbor, members of the press unburdened themselves in considering the social and legal consequences of the original *60 Minutes* programme. Again, as with the interviews with the judges, I found myself so immersed in being present at the events that I only saw in hindsight the miracle of the access I had, and only so marvelled when others asked pointed questions about matters I now take as axiomatic. At first blush, this may sound descriptive as a conclusion, but I would argue that access was a recurring theme that I was very fortunate with. Just as I concluded throughout that some individuals spoke to me because I was the “other” (to those in the United States, that meant working on a doctorate in the United Kingdom; to those in the United Kingdom, that meant being a lawyer from America, with an accent from Brooklyn) and going “back” to another place, which created a geographic or academic or intellectual or emotional safe space away from them. Thematically I offer the conclusion that some of my extraordinary access was because, like members of the press (in the broad sense of the phrase) I went to where the story was, and “when” the story was (although this later cost me in methodological limitations, as I indicated in the missed opportunity to seek an interview with Chief Prosecuting Attorney Marlinga).

Just as the judges and family members criticized the lawyers for the questions they asked, so too were the media subject to criticism. As I argued, the creation of the “Death by Doctor” segment for the original *60 Minutes* programme prompted the new Oakland County Chief Prosecuting Attorney David Gorcyca to seek indictment for both assisted suicide and euthanasia murder charges. The trial prosecutor and

Kevorkian both relied upon the same programme segment in their case presentations and arguments in 1999. Thus the trial became of Kevorkian as the man, his conduct and his legal intent at the time of the crime and for the future (rather than of the issue and debate as a whole). As I conducted analysis of the tapes I “rediscovered” John O’Hair’s comments predicting such a potential outcome, some half dozen years before the 1999 trial. However, this still begs the question, was Kevorkian tried for his private conduct or his public provocation? I have argued that the 1999 trial was in large measure a media event, as much as it was created by a media event, criminal conduct notwithstanding.

There was more than one pathway to being a doctor who engaged in medical euthanasia or physician assisted suicide during the 1990s. Being a doctor who engaged in what was criminal conduct was, I learned, quite another thing from being a doctor who was prosecuted (let alone to trial). In a world where medically hastened death was more a matter of acting in a grey zone, the criminal trials of Jack “Dr. Death” Kevorkian did ultimately boil down to black and white. At the time of this writing, Kevorkian was on parole, a “tether” as he called it on the day he was released. I had a somewhat sceptical view of what would happen on the day after his parole was completed, given that he told Mike Wallace that he gave his word that he would not engage in medically assisted death while on parole. In a room full of clients, that might have been called potential for compassion; I would argue that it was potential for recidivism. That, however, is the beginning of another project, and the end of this thesis.

I do have some additional conclusions to add to this dissertation. First, while I spoke of an emerging vocabulary earlier, a conclusion I drew at the end of this project was that there was a shift from the term “euthanasia” to “assisted suicide,” and (in the

last trial) back to euthanasia. I conclude that the shift from the term euthanasia to assisted suicide showed an emerging legal issue that had its roots in a progressively more consumer-oriented patient base. Instead of doctors ending the lives of patients, doctors were being called in to facilitate in a process that included a general medical team, perhaps social support structures and family. One reason I conclude that the Youk euthanasia was such a public affront was the media and the national broadcast of the “Death by Doctor” segment. Surely this is true, but is it not also possible that as the law was providing legislative mechanisms for assisted suicide with social and legal constraints, a reason to prosecute Kevorkian was because he was *unrestrained*? He was no longer in license (a professional sanction), and sought “more control” of the patient at a time when patients were taking more control from doctors.

Line prosecutor John Szkrzynski made an interesting argument that Kevorkian’s closing arguments in the Youk prosecution, arguing for more control, meant more control for Kevorkian. I conclude that the jury took offence to this. However, the original Kevorkian tape that was sent to CBS showed a medical protocol, perhaps not unlike medical protocols generally, except that it is offensive to show the moment of death.³⁰² Kevorkian’s narration for Mike Wallace may have seemed innocuous had it been a knee surgery and Kevorkian an orthopaedic surgeon, explaining to a non-physician, as is often the case in reviews of medical procedures generally. However, because the state has an interest in protecting the sanctity of life, the criminal law has a piece of inculpatory evidence, rather than a medical protocol, to examine.

Likewise, there is a broader implication with regard to the issue of victim consent as a neglected aspect of killing. Because one cannot consent to his/her own

³⁰² I am grateful to Olga Sekulic, Esq. for pointing this out to me.

death as a matter of Anglo-American law, this falls flat. However, purported consent *could* have been a factor in mitigation of Kevorkian's sentence (as it was in the case of Cox), particularly with a judge who continued his liberty after verdict with pleas to discontinue his practice. While Youk's consent would not have reached a level of legal necessity or duress, it would have been a sympathetic fact of extraordinary circumstance in a legal system that does not allow for justifiable consensual homicide and with a judge who indicated (by bail status) an inclination to depart from the sentencing guidelines. I conclude that because Kevorkian told probation authorities that he "could not be stopped," Judge Cooper's decision to so do and sentence him to prison was an exemplary sentence. This was for flouting the law and the court's authority, as much as for the criminal conduct of which he stood convicted.

Another broader conclusion is that Kevorkian's self-promotion and dramaturgical staging was unacceptable coming from a defendant *pro se*, rather than a lawyer. While defence attorney Fieger had his detractors, nobody argued his ability to secure a verdict. After I observed Fieger and Szkrzynski sum up in 1996, I concluded that the latter's superior technical skill was trumped by the dramatics (some cinema influenced, as in the canned summations using the cadence of *To Kill A Mockingbird*). However, in 1999, and in keeping with the law school adage "he who knows the rules, wins," Szkrzynski was able to use the *60 Minutes* tape, and the underlying Kevorkian tape, to great effect – *and* excise the portions of the tapes that would have included material of family support for Kevorkian. By deploying procedural rules of law, the prosecutor was also able to exclude evidence of family support for the defence. Whether the court is the most suitable place to decide the issue or not may be uncertain, but the court ultimately was the most suitable place to decide a simple fact pattern of substantive evidence under procedural rules of law.

The Kevorkian trial trajectory proved to be inversely proportional to the acceptance of assisted suicide as an issue, as the cases proceeded from 1994-1999 with acquittal after acquittal after acquittal, followed by a defence-precipitated mistrial in 1997 and the final conviction for murder in 1999. I conclude that this is in keeping with what Paul Rock wrote in *Drugs and Politics*: “[a]ll history shapes and is shaped by publicly available reflection, but the scientific and political commentary on drugs has been most intimately fused with the manner in which their control and use has developed” (Rock 1977, p.21), by inserting the words assisted suicide instead of drugs.

An uneasy conclusion is that the dilemmas posed by the medical hastening of death were not resolvable. There were superimposed and competing constructions of what was proper for the law to mediate and, failing that, to adjudicate. Well-intended efforts to litigate and to legislate fell short with juries. The inevitable conclusion was that the juries, inextricably intertwined with the legal professionals and Kevorkian himself, repeatedly indicated that there were competing constructions of what should and should not be permitted by the law. There were sympathetic claims to be made by, and on behalf of, patients in a slow spiral toward death.

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