

The Unabomber Strikes Again

**An Investigation Into Whether the Victim and Witness
Protection Act of 1982 Violates the First Amendment or
Conflicts With the Copyright Act of 1976**

Michael B. Norman

September 2008

Contents

About the Author	5
Dedication	5
Acknowledgements	5
I. Introduction	6
II. The Victims' Rights Movement and the Legislation It Inspired	11
B. The Victim and Witness Protection Act of 1982	13
1. Background and Legislative History	13
2. The Statutory Text in Question	14
C. Restitution	16
D. Son-of-Sam Laws	17
III. Rule 41(E), the First Amendment, and the Copyright Act: the Weapons of Choice in the Battle Between Kaczynski and the Government	19
A. Rule 41(E)	21
B. The First Amendment	22
1. Content-Based Laws	23
2. Content-Neutral Laws	23
3. Prior Restraints	24
C. Copyright Law	26
1. History	26
2. Fundamentals of Copyright	27
a. Authors' Exclusive Rights	27

b. Remedies for Copyright Infringement	30
c. Prohibition Against Involuntary Transfers	31
3. The Impact of 28 U.S.C. § 1498(b) on Copyright Infringement Claims . . .	33
IV. The Story of the Unabomber	35
A. A Brief History	36
B. Next Stop Ebay: the Case History Leading Toward the Proposed Internet Auction	38
1. The Criminal Proceedings	38
2. The 2004 District Court Case	39
3. The 2005 Ninth Circuit Appeal	40
4. The 2006 District Court Case	43
V. United States V. Kaczynski and Beyond: What Are the Government’s Powers Under the VWPA?	47
A. The Rule 41(E) Motion	49
B. Kaczynski’s First Amendment Claims and Beyond	50
1. The VWPA as a Content-Neutral Regulation and Why It Passes Muster .	53
2. Why the VWPA Is Not a Prior Restraint	54
C. Kaczynski’s Copyright Claims and Beyond	57
1. The Right to Make and Distribute Copies	58
2. The Right to Create Derivative Works	59
3. The Prohibition Against Involuntary Transfers	60
4. Section 1498(b) and Why It Wins Out	62
VI. Victims Still Being Victimized: the Policy and Moral Issues Kaczynski’s Case Raises	64
A. Defendants’ Versus Victims’ Rights: the Balancing Act Continues	66
B. Is the Vwpa System Working?	69
C. Victim A Versus Victim B: Another Battle to Consider	71

D. Murderabilia and You: What Does This All Say About American Culture?	73
E. Possible Solutions to the Remaining Problems	75
VII. Conclusion	77

About the Author

Class of 2008, University of Southern California Gould School of Law; A.B. Government 2003, Cornell University.

Dedication

This Note is dedicated to my parents, Eric and Angela Norman, and to my grandmother, Antoinette Benzo. I am forever grateful to them for their unending love and support, and for being such wonderful inspirations and role models for me.

Acknowledgements

I would like to thank Professor Ron Garet and Professor Jennifer Urban for their guidance and input on this Note, my family and friends for their love and encouragement, and the editors of the *Southern California Law Review* for all their hard work preparing this Note for publication. Finally, I would also like to thank Katherine D'Harlingue for her support and constant optimism, and for putting up with me while I wrote and edited this Note.

I. Introduction

Over a decade after being arrested in a western Montana cabin, Theodore Kaczynski is once again grabbing headlines.¹ Although he is currently in a federal maximum-security prison serving the life sentence that he received for committing the Unabomber crimes, Kaczynski is now engaged “in a legal battle with the federal government and a group of his victims over the future of [his] handwritten papers.”² The government has proposed selling “sanitized versions of the materials” via an Internet auction in order to raise money for a group of his victims, and Kaczynski is fighting that plan.³

At issue, largely, is the extent of the government’s power under the Victim and Witness Protection Act of 1982 (“VWPA”)⁴ and further, what the government may do with the property it seized from Kaczynski. This property includes his “handwritten . . . journals, diaries and drafts of his anti-technology manifesto . . . [which] contain blunt assessments of 16 mail bombings from 1978 to 1995 that killed 3 people and injured 28, as well as his musings on the suffering of victims and their families.”⁵ Moreover, due to its unique set of facts, Kaczynski’s case also provides an intriguing opportunity to evaluate whether the VWPA violates the First Amendment of the U.S. Constitution⁶ or conflicts with the Copyright Act of 1976 (“Copyright Act”),⁷ and to explore the fascinating interplay between these two areas of law, both of which provide protection for individuals’ free expression.

During the 1970s and early 1980s, the “plight of the victim” became a major issue in the United States.⁸ The general sentiment was that “[a]ll too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of . . . a criminal justice system

¹ See, e.g., Serge F. Kovaleski, *Unabomber Wages Legal Battle to Halt the Sale of His Papers*, N.Y. Times, Jan. 22, 2007, at A1; Christopher Beam, *Who Owns the Unabomber’s Writings?*, Slate, Jan. 24, 2007, <http://www.slate.com/id/2158220/?GT1=9010>; Anita Ramasastry, *The Court-Ordered Internet Auction of the Unabomber’s “Murderabilia”: Why, Though It May Be Tasteless, It’s Perfectly Legal*, FINDLAW’S WRIT, Aug. 28, 2006, <http://writ.news.findlaw.com/ramasastry/20060828.html>; David Osborne, *Unabomber Belongings Allowed to Be Auctioned*, Independent, July 27, 2005, <http://news.independent.co.uk/world/americas/article301878.ece>.

² Kovaleski, *supra* note 1.

³ *Id.*

⁴ See Victim and Witness Protection (VWPA) Act of 1982, 18 U.S.C. §§ 1512-15, 3663-64 (2000).

⁵ Kovaleski, *supra* note 1. The list of Kaczynski’s items that the government currently possesses spans nearly nine full pages. *United States v. Kaczynski*, 446 F. Supp. 2d 1146, 1155-64 (E.D. Cal. 2006). In addition to his writings, this list includes numerous articles of clothing, dozens of tools, scores of chemicals, and hundreds of books. *Id.*

⁶ The First Amendment provides in pertinent part: “Congress shall make no law . . . abridging the freedom of speech ” U.S. Const. amend. I.

⁷ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

⁸ Lorraine Slavin & David J. Sorin, Project, *Congress Opens a Pandora’s Box—the Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 507 (1984). See also John R. Anderson & Paul L. Woodard, *Victim and Witness Assistance: New State Laws and the System’s Response*, 68 JUDICATURE 221 (1985) (describing the new state programs aiding victims and witnesses).

unresponsive to the real needs of such victim[s].”⁹ In response, Congress enacted the VWPA as the first federal statute aimed at “ensur[ing] that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant.”¹⁰ This tension between the rights of crime victims and those of criminals is a recurring theme in Kaczynski’s case, other cases involving the VWPA, and this Note.¹¹

In 2003, more than a year after his criminal proceedings had ended,¹² Kaczynski filed a Federal Rule of Criminal Procedure 41(e) (“Rule 41(e)”) motion¹³ demanding that the government—which had done nothing with Kaczynski’s seized property since 1996¹⁴—return the property because he wanted to donate his writings to the University of Michigan’s Special Collections Library.¹⁵ The government fought this motion, and thus began the litigation that continues today.¹⁶ In 2005, however, the Ninth Circuit ruled that the VWPA required the government to do *something* with the property that would benefit Kaczynski’s victims.¹⁷ The government proposed selling his writings and other property via an Internet auction soon thereafter.¹⁸

Though the idea of an Internet auction perhaps sounds odd, due to Americans’ apparent fascination with murderers—and in particular with serial killers¹⁹—a sale of

⁹ 128 Cong. Rec. 23,391 (1982).

¹⁰ *United States v. Mills*, 991 F.2d 609, 611 (9th Cir. 1993) (quoting VWPA, Pub. L. No. 97291, § 2(b)(2), 96 Stat. 1248, 1249 (1982)).

¹¹ See discussion *infra* Part VI.

¹² See *United States v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2001).

¹³ Fed. R. Crim. P. 41(g) (current location of amended Fed. R. Crim. P. 41(e)). The Ninth Circuit stated that “Rule 41(e) was changed to Rule 41(g) in 2002 and amended for stylistic purposes only.” *United States v. Kaczynski*, 416 F.3d 971, 973 n.3 (9th Cir. 2005). In the interest of clarity, this Note will refer only to the pre-2002 Rule 41(e), and all references to Rule 41(e) will be cited to the current Rule 41(g). For a discussion of Rule 41(e) motions see *infra* Parts III.A, V.A.

¹⁴ See *Kaczynski*, 416 F.3d at 976-77.

¹⁵ See *United States v. Kaczynski*, 306 F. Supp. 2d 952, 953-55 (E.D. Cal. 2004), *vacated*, 416 F.3d 971 (9th Cir. 2005); Beam, *supra* note 1. In a brief submitted to the Ninth Circuit in 2004, Kaczynski’s counsel stated that the University of Michigan’s Special Collections Library “has agreed to receive and store the materials for use by researchers, historians, and the public.” Brief of Appellant at 4, *Kaczynski*, 416 F.3d 971 (No. 04-10158), 2004 WL 2599277. Moreover, counsel noted that “this library is well-suited to store Kaczynski’s materials because it contains one of the largest and most important collections of materials about radical, social, and political movements, named the ‘Labadie Collection,’ after the Michigan labor union organizer Joseph Labadie.” *Id.*

¹⁶ See *Kaczynski*, 306 F. Supp. 2d at 954-55.

¹⁷ See *Kaczynski*, 416 F.3d at 976-77.

¹⁸ See *United States v. Kaczynski*, 446 F. Supp. 2d 1146, 1149-50 (E.D. Cal. 2006).

¹⁹ Editorial, *Serial Killers Are as American as Apple Pie*, Softpedia, Aug. 19, 2006, <http://news.softpedia.com/news/Serial-Killers-are-as-American-as-Apple-Pie-32916.shtml> [hereinafter *Serial Killers*].

such “murderabilia”²⁰ can be expected to raise considerable sums of money.²¹ Further, while at first glance this current showdown between Kaczynski and the federal government may appear to be based on a frivolous claim made by an individual who many would label as a “grotesque and repellent lunatic,”²² the arguments raised by Kaczynski, and the broader constitutional and copyright questions that stem from them, are quite intriguing and not entirely without merit.²³

Moreover, although the VWPA has been in force for more than two decades, and although it has survived numerous challenges to its constitutionality on several different grounds,²⁴ there have been very few evaluations of whether it violates the First Amendment or conflicts with the Copyright Act. Kaczynski’s case, however, presents a fact pattern that not only tests the limits of the government’s power under the VWPA, but also enables those needed analyses to be conducted.²⁵ Further, due to the nature of some of the items seized by the government—namely the thousands of pages of Kaczynski’s writings—issues that are commonly raised in cases involving so-called “Son-of-Sam” statutes,²⁶ but which are rarely implicated by the VWPA, have been brought under the microscope. While there has been a significant amount of scholarship evaluating whether these Son-of-Sam laws violate criminal defendants’ rights

²⁰ See, e.g., Ramasastry, *supra* note 1 (stating that “[m]urderabilia’ is nothing new”); Osborne, *supra* note 1 (describing the trade in murderabilia as “ghoulish”).

²¹ Osborne, *supra* note 1 (stating that “at least five websites that hold homicide-related auctions” exist, and citing one “auction aficionado[’s]” estimates that Kaczynski’s journals could be worth \$1000 each, and his hairbrush \$500).

²² *United States v. Kaczynski*, 239 F.3d 1108, 1121 (9th Cir. 2001).

²³ Lending support to the notion that Kaczynski’s claims have merit, Kaczynski’s counsel stated that the magistrate judge who first handled Kaczynski’s Rule 41(e) motion “recommended that Kaczynski’s motion be granted, in large part” and “noted the motion involved important First Amendment issues.” Brief of Appellant, *supra* note 15, at 5 (internal citation omitted).

²⁴ See, e.g., Thomas M. Kelly, Note, *Where Offenders Pay for Their Crimes: Victim Restitution and Its Constitutionality*, 59 NOTRE DAME L. REV. 685, 715-16 (1984) (concluding that the VWPA is constitutional); Karyn Ellen Polito, Note, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 242 (1990) (discussing why the VWPA does *not* violate the Fifth Amendment or Sixth Amendment rights of criminal defendants); Recent Decisions, *The Constitutionality of the Victim and Witness Protection Act of 1982*, 35 ALA. L. REV. 529, 534-51 (1984) (discussing why the VWPA does not violate the First, Fifth, Sixth, Seventh, or Eighth Amendment rights of criminal defendants). *But see* *United States v. Welden*, 568 F. Supp. 516, 534-35 (N.D. Ala. 1983) (holding that the VWPA violated the Fifth and Seventh Amendments), *rev’d sub nom.* *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984).

²⁵ See *infra* Part V.

²⁶ These statutes are primarily aimed at preventing criminals from profiting from their crimes. John Timothy Loss, Note, *Criminals Selling Their Stories: The First Amendment Requires Legislative Reexamination*, 72 CORNELL L. REV. 1331, 1332 (1987). See also discussion *infra* Part II.D.

under the First Amendment²⁷ and the Copyright Act,²⁸ there is a dearth of scholarship as to how these bodies of law interact with the VWPA.

Therefore, this Note will analyze the constitutional and statutory claims raised by Kaczynski in his current battle with the government, and will also evaluate the broader questions of whether the VWPA violates the right to free speech guaranteed by the First Amendment or conflicts with the exclusive rights granted to authors by the Copyright Act. In the end, this Note will explain why Kaczynski should not prevail and why the VWPA does not impermissibly impinge on rights granted by either the First Amendment or the Copyright Act.

Part II describes the victims' rights movement, the VWPA, and the goals that Congress hoped the VWPA would achieve. Part III discusses the three key bodies of law involved in Kaczynski's case: Rule 41(e), the First Amendment, and the Copyright Act. It provides some basic background information for each and details the frameworks that are utilized in analyzing claims based upon them. Part IV discusses the story of the Unabomber and lays out the case history of the ongoing battle over Kaczynski's property. Part V analyzes the Rule 41(e), First Amendment, and copyright claims raised by Kaczynski in his challenge against the government's powers under the VWPA and demonstrates why all of his arguments are bound to fail. Further, Part V moves beyond the challenges raised by Kaczynski and investigates whether the VWPA violates the First Amendment or conflicts with the Copyright Act. In the end, it concludes that the VWPA does neither. Part VI then considers some of the moral and policy issues that have been illuminated by Kaczynski's case and suggests that this case provides an opportunity to renew dialogue and discussion in this country about much-needed reforms to the criminal justice system. Finally, Part VII concludes that Kaczynski will likely not prevail in his battle against the government, and that the VWPA neither violates the First Amendment nor conflicts with the Copyright Act.

²⁷ See, e.g., Michelle L. Learned, *The Constitutionality of Cashing in on Crime: Free Expression, Free Enterprise and Not-Profit Conditions of Probation*, 1 SUFFOLK J. TRIAL & APP. Advoc. 79, 80-83 (1995); Loss, *supra* note 26, at 1333; Michele C. Meske, Note, *Between the Devil and the Deep Blue Sea: Crime Victims' Dilemma After Simon & Schuster, Inc. v. Members of the N. Y. Crime Victims Bd.*, 112 S. Ct. 501 (1991), 67 WASH. L. REV. 1001, 1017-21 (1992); Barbara Freedman Wand, Note, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443, 44962 (1978).

²⁸ See, e.g., Stephen Clark, Note, *The Son-of-Sam Laws: When the Lunatic, the Criminal, and the Poet Are of Imagination All Compact*, 27 ST. LOUIS U. L.J. 207, 217-26 (1983).

II. The Victims' Rights Movement and the Legislation It Inspired

**

A. A BRIEF HISTORY OF THE VICTIMS' RIGHTS MOVEMENT

The victims' rights movement in the United States is a fairly recent development, and commentators often point to women's rights and civil rights groups in the 1970s as being its founders.²⁹ These advocates for change rallied around the belief that "the criminal justice system [was] out of balance since it coddle[d] defendants with numerous rights, while crime victims or relatives of the victims [were] at best left out in the cold, or at worst . . . repeatedly insulted and hurt by the same system."³⁰

During the past thirty years, the victims' rights movement has achieved numerous notable accomplishments, including getting a "flood of victims' rights legislation"³¹ passed at the state and federal level, so that today, victims' assistance programs and victims' bills of rights have become standard.³² Up until the early 1980s, however, the federal criminal justice system had "been 'offender-oriented,'³³ [and] unresponsive and insensitive to the needs of victims and witnesses"³⁴ despite the fact that more than half the states had enacted laws intended to protect witnesses and victims.³⁵ Thus, Congress enacted the VWPA as the federal government's initial attempt at addressing these shortcomings.³⁶ Congress hoped the VWPA would improve the way that witnesses and victims were treated in the federal criminal justice system.³⁷

²⁹ See Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. Rev. 835, 841-44 (2005); Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocation in Texas*, 26 ST. MARY'S L.J. 1103, 1111-12 (1995).

³⁰ Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R. 5th 343, 362-72 (2001). See also Nicholson, *supra* note 29, at 1109-12.

³¹ Nicholson, *supra* note 29, at 1113. By 1992, every state had enacted some type of legislation aimed at helping crime victims. See Desmond S. Greer, *A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 J. CRIM. L. & CRIMINOLOGY 333, 334 (1994).

³² See Nicholson, *supra* note 29, at 1111-13 for a discussion of the vast number of such enactments. Further, a victims' rights amendment to the U.S. Constitution was introduced in 1996; however, it never gained sufficient congressional support. See Cassell, *supra* note 29, at 848-50.

³³ Slavin & Sorin, *supra* note 8, at 507 (quoting Anderson & Woodard, *supra* note 8, at 221).

³⁴ *Id.* (citing S. Rep. No. 97-532, at 10 (1982), as reprinted in 1982 U.S.C.C.A.N. 2515, 2516).

³⁵ *Id.*

³⁶ See VWPA, 18 U.S.C. §§ 1512-15, 3663-64 (2000).

³⁷ Slavin & Sorin, *supra* note 8, at 507. Two years later, following the recommendation of a presidential task force on crime victim compensation, Congress passed the Victims of Crime Act (VOCA) of 1984, 42 U.S.C. § 10601 (2000). Office for Victims of Crime, U.S. Dep't of Justice, *New Directions from the Field: Victims' Rights and Services for the 21st Century* 326 (1998), available at <http://www.ojp.usdoj.gov/ovc/new/directions> [hereinafter *New Directions*]. The VOCA created the "Crime Victims Fund," which as of 1998, "reimburse[d] states for up to 40 percent of their annual compensation payments to crime victims." *Id.*

B. The Victim and Witness Protection Act of 1982

1. Background and Legislative History

With the VWPA, “Congress clearly articulated the popular will that the criminal process should serve the needs of victims.”¹ Congress stated that the VWPA’s three main goals were:

(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process;

(2) to ensure that the Federal Government does all that is possible within the limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and

(3) to provide a victim/witness model for State and local law enforcement officials.²

Thus, the primary aim of the VWPA was to ensure that the victims of crime “will receive at least the same considerations and protections which are currently extended to the accused.”³ In addition, the VWPA “represent[ed] an ambitious attempt by Congress to bring restitution ideologically and practically to the fore in the federal criminal process.”⁴ In hopes of achieving that goal, the VWPA explicitly empowered sentencing

¹ Lawrence P. Fletcher, Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender’s Liability*, 93 YALE L.J. 505, 522 (1984).

² 128 CONG. REC. 23,392 (1982).

³ *Id.* at 26,809 (statement of Sen. Heinz).

⁴ Fletcher, *supra* note 38, at 505. The legislative history of the VWPA is quite interesting, though its rapid movement through both houses of Congress arguably left many loose ends, as discussed by Fletcher:

In Congressional debate, the Act was heralded by its principal co-sponsors as legislation which “will do much to restore the faith of the American public in our system of justice,” 128 Cong. Rec. [23,397], and as a measure “to begin the process of rebalancing the scales of justice . . . [to] insure that victims are given at least the rights now afforded routinely to the accused,” *id.* at [23,395]. Representative McCollum described restitution as “the ultimate justice,” *id.* at [26,354]; the Act would make restitution “the expected norm, and no longer an afterthought,” *id.* at [26,810].

Congress passed the Act with exceptional speed and bipartisan support. The Senate Judiciary Committee reported S. 2420 favorably on August 19, 1982. *See* S. Rep. No. [97532, at 1 (1982), *as* reprinted in 1982 [U.S.C.C.A.N.] 2515, [2515]. The Senate considered and passed S. 2420 on September 14, 1982. 128 CONG. REC. [23,391-404]. On September 30, 1982, the House prematurely ended committee consideration of its version of the Act, H.R. 7191, and considered and passed the bill. *Id.* at [26,348-363]. On October 1, 1982, the Senate passed the House version, but with further amendments of its own. *Id.*

courts to be able to require defendants to pay restitution to their victims, and established the procedure by which such orders were to be carried out.⁵ The scope of the government’s power under the VWPA, however, was not entirely defined.⁶ Moreover, while the VWPA was “an important first step in establishing the rights of victims in Federal court,”⁷ even its supporters acknowledged that it was “not a perfect bill”⁸ and one that would require significant future improvement and elaboration.⁹

2. The Statutory Text in Question

Although the VWPA spans several sections of the U.S. Code,¹⁰ only a small portion of it is in question in Kaczynski’s case. The sections that are pertinent to his case and this Note read as follows: “The court, when sentencing a defendant convicted of an offense . . . may order, in addition to or . . . in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim’s estate.”¹¹ Moreover, the VWPA makes clear that a “court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.”¹² Perhaps most importantly, the VWPA provides that “[a]n order of restitution may be enforced . . . by *all* other available and reasonable means.”¹³ Further, an order of restitution is considered to be “a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a [federal tax liability].”¹⁴ However, while neither literary rights nor any type of intellectual property are included in the list of property that is exempted from having liens levied against it, there is also no mention of how defendants’ free speech rights are to be balanced against the government’s property interests in its liens.¹⁵ Consequently,

at [26,803-11]. The House then approved this final version from the Senate. *Id.* at [27,386-92]. President Reagan signed the Act into law on October 12, 1982, less than two months after it left committee in the Senate. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

Id. at 505 n.2.

⁵ *United States v. Mills*, 991 F.2d 609, 611 (9th Cir. 1993). The Mandatory Victims Restitution Act of 1996 made restitution *mandatory* for certain convictions. Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A (2000).

⁶ *See, e.g.*, § 3664(m)(1)(A)(ii) (empowering the government to enforce orders of restitution “by all . . . available and reasonable means”).

⁷ 128 Cong. Rec. 23,400 (1982) (statement of Sen. Dodd).

⁸ *Id.*

⁹ *Id.* *See also id.* at 23,395 (stating that within one year of the VWPA’s enactment, “the Attorney General shall report to Congress regarding any laws that are necessary to ensure that no Federal felon[s] derive[] any profit from the sale of the” story of their crimes).

¹⁰ VWPA, 18 U.S.C. §§ 1512-15, 3663-64 (2000).

¹¹ *Id.* § 3663(a)(1)(A).

¹² *Id.* § 3663(a)(3).

¹³ *Id.* § 3664(m)(1)(A)(i)-(ii) (emphasis added).

¹⁴ *Id.* § 3613(c).

¹⁵ *See* 26 U.S.C. § 6334 (2000).

this is the statutory landscape in which Kaczynski's current case exists, and thus, these are the rules of engagement by which Kaczynski and the government are doing battle.

While much confusion and case law has arisen over the precise definition of many of the key terms included in the VWPA, such as, "victim,"¹⁶ "offense,"¹⁷ and "loss,"¹⁸ none of these are in dispute or in need of clarification in Kaczynski's case. Further, Kaczynski does not challenge the size of the restitution award. Indeed, the major issues here have to do with determining the limits of the government's power under the VWPA, and, more importantly for purposes of this Note, whether the VWPA conflicts with either the First Amendment or the Copyright Act.

¹⁶ See, e.g., John F. Wagner Jr., Annotation, *Who Is "Victim," So as to Be Entitled to Restitution Under Victim and Witness Protection Act (18 U.S.C.S. §§ 3663, 3664)*, 108 A.L.R. FED. 828, 838-40 (1992).

¹⁷ See, e.g., Fletcher, *supra* note 38, at 507 n.9.

¹⁸ See, e.g., 18 U.S.C.S. § 3663A cmt. (2006) (Nat'l Inst. for Trial Advocacy Commentary).

C. Restitution

The term restitution refers to the concept of “hold[ing] offenders partially or fully accountable for the financial losses suffered by the victims of their crimes.”¹ This notion dates “back thousands of years to the earliest forms of laws governing society.”² Interest in restitution in the United States began in the 1930s, and in the 1970s the federal government began funding state restitution programs.³ Finally, with the passage of the VWPA in 1982, federal courts were empowered to levy restitution orders on criminal defendants.⁴ Today, every state in the country has enacted a statute dealing with restitution;⁵ however, there is a wide range in terms of “scope of coverage and the extent to which they are enforced.”⁶

¹ New Directions, *supra* note 37, at 355. *See also* Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167, 177-78 (2004).

² New Directions, *supra* note 37, at 355. *See also* Goldscheid, *supra* note 56, at 177-78.

³ *See* New Directions, *supra* note 37, at 355; Goldscheid, *supra* note 56, at 178.

⁴ Goldscheid, *supra* note 56, at 178-79.

⁵ New Directions, *supra* note 37, at 356.

⁶ Goldscheid, *supra* note 56, at 179.

D. Son-of-Sam Laws

Son-of-Sam laws¹ are another product of the victims' rights movement, and "are an outgrowth of the maxim that a criminal should not be allowed to benefit from the fruits of his crime."² In 1977, New York became the first state to enact such a law, and its Son-of-Sam law aimed to "ensure that monies received by the criminal [for selling his story] shall first be made available to recompense the victims of that crime for their loss and suffering."³ The legislative intent for this statute was spelled out by the author of the law, who stated:

It is abhorrent to one's sense of justice and decency that an individual . . . can expect to receive large sums of money for his story once he is captured—while five people are dead, [and] other people were injured as a result of his conduct. This [law] . . . make[s] it clear that in all criminal situations, the victim must be more important than the criminal.⁴

Since the enactment of New York's statute, the federal government and at least forty-three states have implemented similar laws.⁵ In December 1991, however, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, the Supreme Court struck down New York's Son-of-Sam law in a unanimous decision.⁶ The Court held that even though New York's "interest in compensating victims from the fruits of crime is a compelling one," the statute was in violation of the First Amendment because it "singled out speech on a particular subject for a financial burden that it places on no other speech and no other income."⁷

Since the Court's ruling in *Simon & Schuster*, Son-of-Sam laws have been the target of numerous constitutional challenges, with most objectors citing infringement of

¹ These are also known as "anti-profit" or "literary profits" laws, but, for clarity, the term Son of Sam will be used in this Note. See Clark, *supra* note 28, at 209.

² *Id.*

³ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991).

⁴ Clark, *supra* note 28, at 207-08 n.5 (quoting *Barrett v. Wojtowicz*, 414 N.Y.S.2d 350, 353 (App. Div. 1979)).

⁵ See *In re* Opinion of the Justices to the Senate, 764 N.E.2d 343, 346 n.4 (Mass. 2002); Michelle G. Lewis Liebeskind, *Back to Basics for Victims: Striking Son of Sam Laws in Favor of an Amended Restitutionary Scheme*, 1994 ANN. SURV. AM. L. 29, 29 n.3. Many of the later Son-of-Sam statutes were modeled after the New York law. See Gregory G. Sarno, Annotation, *Validity, Construction, and Application of "Son of Sam" Laws Regulating or Prohibiting the Distribution of Crime-Related Book, Film, or Comparable Revenues to Criminals*, 60 A.L.R.4TH 1210, 1213-17 (1988).

⁶ *Simon & Schuster*, 502 U.S. at 105; Liebeskind, *supra* note 66, at 30.

⁷ *Simon & Schuster*, 502 U.S. at 123.

criminal defendants' rights under either the First Amendment⁸ or the Copyright Act.⁹ Indeed, Son-of-Sam laws have run into problems of being both over- and underinclusive in their scope. The New York law, for instance, was found, “[a]s a means of ensuring that victims are compensated from the proceeds of crime, [to be] . . . significantly overinclusive.”¹⁰

As Son-of-Sam laws generally require that the earnings of criminals who profit from selling their stories be taken away or at least shared with victims, there can be some overlap with restitution laws like the VWPA.¹¹ This may arise because in many cases, “a criminal’s only asset will be the profits from the sale of story rights.”¹² Because, however, it is Son-of-Sam laws that give states the power to seize literary profits from criminals and direct them to victims, it is those statutes, and not restitution statutes like the VWPA, which have been regularly challenged and examined on First Amendment and copyright grounds.¹³ As noted above, however, due to its unique set of facts, Kaczynski’s current legal battle provides the perfect opportunity to conduct these important and heretofore incomplete analyses of the VWPA’s validity.¹⁴

⁸ See *supra* notes 26-28 and accompanying text.

⁹ See, e.g., Clark, *supra* note 28, at 211-17.

¹⁰ *Simon & Schuster*, 502 U.S. at 121. To illustrate just how overly broad the New York law was, the Court stated:

Had the Son-of-Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the *Confessions of Saint Augustine*, in which the author laments “my past foulness and the carnal corruptions of my soul,” one instance of which involved the theft of pears from a neighboring vineyard.

Id.

¹¹ See, e.g., Sarno, *supra* note 66, at 1213-17 (discussing the mechanisms by which various states’ Son-of-Sam laws work).

¹² Liebeskind, *supra* note 66, at 58.

¹³ See *supra* notes 26-28 and accompanying text.

¹⁴ See *infra* Part IV for a discussion of the facts and circumstances of Kaczynski’s case.

**III. Rule 41(E), the First
Amendment, and the Copyright
Act: the Weapons of Choice in the
Battle Between Kaczynski and the
Government**

When an individual challenges the power of the government to retain property it seized as part of a criminal investigation, it is likely that individual will file a Rule 41(e) motion to demand the return of the property in question.¹⁵ Moreover, when a criminal has been ordered to pay restitution, it is possible that the individual will challenge the validity of the order of restitution, or even the laws empowering the court to levy such penalties on First Amendment or copyright grounds, since it is often true that “a criminal’s only asset will be the profits from the sale of story rights.”¹⁶ All three of these areas of law have been implicated in Kaczynski’s case, and the remainder of this part explores these issues and the related analytical frameworks.¹⁷

At this juncture, however, it needs to be pointed out that although this Note separates the First Amendment and copyright issues raised by Kaczynski’s case, this has been done solely for purposes of clarity and ease-of-reading and is not meant to suggest that these issues are unrelated. In fact, as will be illustrated throughout Part V of this Note, there is a truly fascinating intersection between these two areas of law, particularly in regards to how the government’s power under the VWPA is seemingly at odds with both the First Amendment’s freedom of expression guarantee¹⁸ and § 201(e) of the Copyright Act, which was enacted specifically to protect the free expression of authors from government intervention.¹⁹

¹⁵ See Fed. R. Crim. P. 41(g).

¹⁶ Liebeskind, *supra* note 66, at 58.

¹⁷ The discussion contained in Part III is not meant to be an in-depth analysis of First Amendment, copyright, or Rule 41(e) jurisprudence. Instead, it is intended to merely provide the reader with a basic understanding of these areas of law and the frameworks that courts use to evaluate whether defendants’ rights have been violated.

¹⁸ The First Amendment provides in part: “Congress shall make no law . . . abridging the freedom of speech ” U.S. Const. amend. I.

¹⁹ See 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.04 (2007).

A. Rule 41(E)

Rule 41(e)¹ “permits a criminal defendant to move for the return of property seized by the government on the ground that the movant is entitled to lawful possession of the property.”² In order to prevail on a Rule 41(e) motion, however, a defendant needs to show “that (1) he is entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either the seizure was illegal or the government’s need for the property as evidence has ended.”³

Moreover, in *United States v. Mills*, the Ninth Circuit held “that a valid restitution order under the VWPA gives the government a sufficient cognizable claim of ownership to defeat a defendant’s Rule 41(e) motion for return of property, if that property is needed to satisfy the terms of the restitution order.”⁴ The court went on to state that under the VWPA’s enforcement provisions, the federal government will “acquire[] a lien against seized property when a district court issues a valid restitution order.”⁵ Thus, the court in *Mills* found that the government acquired a possessory right to Mills’s seized property—which consisted of \$2400 in cash that had been stolen from a bank⁶—as soon as the district court issued a restitution order.⁷ Consequently, since that order was valid, the court determined that the district court was correct in having denied Mills’s Rule 41(e) motion and stated that “the government had a legitimate reason to retain the [defendant’s seized] money.”⁸

¹ Federal Rule of Criminal Procedure 41(e) provides:

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g).

² *United States v. Mills*, 991 F.2d 609, 610 n.1 (9th Cir. 1993).

³ *United States v. Van Cauwenberghe*, 827 F.2d 424, 433 (9th Cir. 1987).

⁴ *Mills*, 991 F.2d at 612.

⁵ *Id.*

⁶ *Id.* at 610.

⁷ *Id.* at 613.

⁸ *Id.*

B. The First Amendment

The Supreme Court has repeatedly stated that “the very core of the First Amendment is that the government cannot regulate speech based on its content.”¹ As the Court held in *Police Department v. Mosley*, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”² As Erwin Chemerinsky notes, however, a threshold question “is whether the government has infringed freedom of speech and therefore whether First Amendment analysis is applicable.”³ While this inquiry may be clear-cut in some cases, such as with a statute that bans speech and empowers courts to impose criminal penalties on offenders,⁴ answering this threshold question is sometimes very difficult. Some less obvious examples of infringing laws are those “that allow civil liability for expression; that prevent compensation for speech; that compel expression; that condition a benefit on a person foregoing speech; and that pressure individuals not to speak.”⁵ In sum, First Amendment analysis becomes necessary when the government takes an action that directly or indirectly burdens individuals’ freedom of expression.⁶

There are three basic avenues by which the government can burden freedom of expression: “by singling out expressive activity for control or penalty (content-based action); by impacting expressive activity through controls or penalties which pursue goals unrelated to expression (contentneutral action); or by censoring expression in advance of its dissemination (prior restraint).”⁷ The Court has stated that it is crucial to determine whether a challenged action is content-based or content-neutral in order to determine what type of scrutiny—strict or intermediate—should be applied.⁸ In addition, the Court has held that not only are laws that regulate speech unconstitutional if they are “unduly vague or overbroad,” but also, “prior restraints of speech are strongly disfavored, and thus any government action restricting speech can be challenged if it constitutes a prior restraint.”⁹

¹ Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 902 (2d ed. 2002).

² *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972).

³ Chemerinsky, *supra* note 89, at 935.

⁴ *Id.*

⁵ *Id.* at 936.

⁶ Meske, *supra* note 27, at 1018.

⁷ *Id.* (internal footnotes omitted).

⁸ Chemerinsky, *supra* note 89, at 901; Meske, *supra* note 27, at 1018.

⁹ Chemerinsky, *supra* note 89, at 901.

1. Content-Based Laws

In *R.A.V. v. City of St. Paul*, the Court stated that “[c]ontent-based regulations are presumptively invalid.”¹⁰ Therefore, the Supreme Court has made clear that a content-based law “can stand only if it satisfies strict scrutiny.”¹¹ Further, in *Simon & Schuster*, the Court laid out the framework that is used in analyzing the constitutionality of such regulations.¹² There, the Court stated that because New York’s Son-of-Sam law imposed “a financial disincentive” (burden) on “works with a particular content” (speech), the regulation needed to have been “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.”¹³ New York’s law did not meet these requirements.¹⁴ Such a stringent standard was established due to the fear that if content-based laws were permitted, then the government would be able to silence “certain ideas or viewpoints.”¹⁵

2. Content-Neutral Laws

A content-neutral law is “one that on its face deals with conduct having no connection with speech, but in application incidentally burdens free expression.”¹⁶ In *United States v. O’Brien*, the Court stated that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”¹⁷ The Court then laid out the four-prong “constitutional test for content-neutral laws.”¹⁸ First, the court must determine whether the regulation is “within the constitutional power” of the state.¹⁹ Second, the court must determine whether the regulation “furthers an important or substantial” state interest.²⁰ Third, the court must decide whether the state interest “is unrelated to the suppression of free expression.”²¹ Finally, the court must adjudge whether “the incidental restriction

¹⁰ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

¹¹ *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). *See also* Chemerinsky, *supra* note 89, at 903.

¹² *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

¹³ *Id.*

¹⁴ *See supra* Part II.D.

¹⁵ *Simon & Schuster*, 502 U.S. at 116. *See also* Chemerinsky, *supra* note 89, at 903 n.10.

¹⁶ *Meske*, *supra* note 27, at 1019 (internal footnote omitted) (citing *United States v. O’Brien*, 391 U.S. 367, 375 (1968)).

¹⁷ *O’Brien*, 391 U.S. at 376. *See also* Chemerinsky, *supra* note 89, at 1028; *Meske*, *supra* note 27, at 1019.

¹⁸ *Meske*, *supra* note 27, at 1019 (citing *O’Brien*, 391 U.S. at 377).

¹⁹ *O’Brien*, 391 U.S. at 377.

²⁰ *Id.*

²¹ *Id.*

on . . . First Amendment freedoms is no greater than is essential” to further that state interest.²² An intermediate level of scrutiny is used to evaluate the validity of such content-neutral regulations.²³

3. Prior Restraints

Prior restraints have been held to be “the most serious and the least tolerable infringement on First Amendment rights.”²⁴ Therefore, the Supreme Court has stated that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”²⁵ While a precise definition has been called “elusive,”²⁶ a relatively clear definition was given in *Alexander v. United States*, in which the Supreme Court stated that “[t]he term prior restraint is used ‘to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.’”²⁷ As such, it is understood that individuals may challenge regulations that either suppress speech or which require individuals to obtain permission prior to speaking.²⁸ Consequently, when a court determines that a statute has this impact, unless the prior restraint can be justified—which will only be found “in ‘exceptional’ circumstances”²⁹—then the court should find that statute unconstitutional.³⁰

As Chemerinsky notes, however, “[t]he Court has been reluctant to characterize government actions as prior restraints even when they seem to share many of the characteristics of what has traditionally fit under this rubric.”³¹ Illustrative of this apprehension, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Court ruled that it was *not* a prior restraint when an agency demanded that newspapers cease printing “gender-based employment advertisements.”³² While Chemerinsky states that none of the reasons given by the Court for why this did not constitute a

²² *Id.* See also Chemerinsky, *supra* note 89, at 1028; Meske, *supra* note 27, at 1019.

²³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

²⁴ *Neb. Press Ass’n. v. Stuart*, 427 U.S. 539, 559 (1976).

²⁵ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

²⁶ Chemerinsky, *supra* note 89, at 918.

²⁷ *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting Melville B. Nimmer, Nimmer on Free Speech § 4.03 (1984)).

²⁸ See Meske, *supra* note 27, at 1019.

²⁹ *Id.* (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931)). The Court noted that during a time of war, limiting what could be said in order to protect national security would meet the “exceptional case” standard. *Near*, 283 U.S. at 716.

³⁰ Meske, *supra* note 27, at 1019.

³¹ Chemerinsky, *supra* note 89, at 919.

³² *Id.* (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 380-81 (1973)).

prior restraint were satisfying, he does assert that “[a] clear judicial order directed only at stopping unprotected speech is undoubtedly a prior restraint.”³³

Additionally, the Court’s decision in *Alexander* further highlights its reluctance to find government actions to be prior restraints.³⁴ In *Alexander*, the seizure and destruction of films, magazines, and books owned by an individual convicted of violating an obscenity law was found by the Court not to constitute prior restraint.³⁵ In summarizing the Court’s holding, which he labels as “deeply troubling,” Chemerinsky states, “[t]he majority’s view was that the government may seize the assets of businesses convicted of violating [the Racketeer Influenced and Corrupt Organization Act³⁶, and it is irrelevant if those assets are in the form of books and videos that are protected by the First Amendment.”³⁷ Further, in a dissenting opinion, Justice Kennedy argued, “[t]he admitted design and the overt purpose of the forfeiture in this case are to destroy an entire speech business and all its protected titles, thus depriving the public of access to lawful expression. This is restraint in more than theory. It is censorship all too real.”³⁸ Therefore, it seems that although individuals may challenge regulations which either suppress speech or require individuals to obtain permission prior to speaking,³⁹ there is no guarantee that such challenges will enjoy success.

³³ *Id.*

³⁴ See *Alexander v. United States*, 509 U.S. 544, 550 (1993); Chemerinsky, *supra* note 89, at 920.

³⁵ Chemerinsky, *supra* note 89, at 920 (citing *Alexander*, 509 U.S. at 546, 559).

³⁶ Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-68 (2000).

³⁷ Chemerinsky, *supra* note 89, at 920.

³⁸ *Alexander*, 509 U.S. at 565-66 (Kennedy, J., dissenting).

³⁹ See Meske, *supra* note 27, at 1019.

C. Copyright Law

1. History

Copyright protection has long been afforded to authors in the United States, and such protection dates back to soon “[a]fter the close of the Revolution, [when] all of the Colonies except Delaware passed laws to afford a measure of protection to authors.”¹ However, since each state had its own philosophy on what should be protected by copyright and what authors needed to do to secure protection, if authors wanted to protect their work in a number of states, they needed to comply with a number of often confusing and, at times, conflicting laws.² Consequently, it became clear that a uniform national copyright law was needed.³

To remedy this problem, “a simple and direct clause”⁴ was included in the Constitution, which provided that “Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵ The first federal Copyright Act was enacted on May 31, 1790,⁶ with the Copyright Act of 1976 (“Copyright Act”)⁷ being the most recent incarnation.⁸

¹ Robert A. Gorman & Jane C. Ginsburg, *Copyright: Cases and Materials* 3 (7th ed. 2006). As a historical note, however, the first time the rights of authors were specifically recognized by statute was in 1710, in England, with the *Statute of Anne*. *Id.* at 2. This statute became the foundation for all later legislation pertaining to copyright in England, the United States, and elsewhere around the globe. *See id.*

² *See id.* at 4.

³ *See id.*

⁴ *Id.*

⁵ U.S. Const. art. I, § 8, cl. 1, 8. As Gorman and Ginsburg point out, although “this clause does not use the terms ‘copyrights’ and ‘patents,’ [it] nevertheless covers both forms of property. The selection of the ‘writings’ of ‘authors’ terminology for copyrights was made by the committee on detail or style and the clause was adopted by the Constitutional Convention without debate.” Gorman & Ginsburg, *supra* note 128, at 4.

⁶ Gorman & Ginsburg, *supra* note 128, at 4.

⁷ Copyright Act, 17 U.S.C. §§ 101-810 (2000).

⁸ For a discussion of the litany of revisions that have been made to the federal copyright laws, see Gorman & Ginsburg, *supra* note 128, at 4-12.

2. Fundamentals of Copyright

While the lofty language of the Framers can make the concept of copyright seem rather confusing, in its most basic sense “copyright is the right of an author to control the reproduction of his intellectual creation.”⁹ It gives to the author of a work the power to “prevent others from reproducing his individual expression without his consent.”¹⁰ Thus, in general, copyright is considered to be a unique, though intangible, form of property that for over two hundred years has been treated somewhat differently than other types of property.¹¹ This is because the property right attaches to the intellectual work of the author, and that “is incapable of possession except as it is embodied in a tangible article such as a manuscript, book, record, or film.”¹² Due to this fact, the tangible objects that contain the author’s work “may be in the possession of many persons other than the copyright owner, and [the persons] may use the work for their own enjoyment, but copyright restrains them from reproducing the work without the owner’s consent.”¹³

The rationale behind giving authors such property interests has long been “to foster the growth of learning and culture for the public welfare”¹⁴ and “[t]o give authors the reward due them for their contribution to society.”¹⁵ As one scholar notes, in order “[t]o encourage authors to create and disseminate original expression, [copyright law] accords them a bundle of proprietary rights in their works.”¹⁶

a. Authors’ Exclusive Rights

Section 106 of the Copyright Act enumerates the list of exclusive rights that an author is given as the owner of the copyright in a literary work.¹⁷ Of these exclusive

⁹ *Id.* at 12.

¹⁰ *Id.* at 13.

¹¹ *See id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 14.

¹⁵ *Id.*

¹⁶ Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 285 (1996).

¹⁷ The Copyright Act provides in the pertinent part:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

rights, three in particular are extremely valuable to authors of literary works, these being the right to make copies of the copyrighted work,¹⁸ the right to sell or otherwise transfer copies of the copyrighted work,¹⁹ and the right “to prepare derivative works based upon the copyrighted work.”²⁰ The first two of these three rights are relatively straightforward and easy to comprehend, as these are the basic exclusive rights that allow authors to “prevent others from reproducing [their] individual expression without [their] consent.”²¹ The third, however, has been the source of a great deal of confusion and litigation.²²

Most of the confusion over § 106(2) centers on the definition of the term “derivative work.” Section 101 defines the term as:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”²³

Despite this broad definition, however, as Melville B. Nimmer and David Nimmer note, the term derivative work is not applicable to “all works that borrow in any degree from pre-existing works.”²⁴ To the contrary, “[a] work is not derivative unless it has *substantially* copied from a prior work.”²⁵ Moreover, a derivative work may be found when an individual *adds* material to an existing work.²⁶

As Nimmer and Nimmer further state, to qualify as a derivative work “the additional matter injected in a prior work, or the manner of rearranging or otherwise transforming a prior work, must constitute more than a minimal contribution.”²⁷ As a rather extreme illustration of this point, the court in *Grove Press, Inc. v. Collectors Publication, Inc.*,²⁸ found that the roughly *forty-thousand* changes that the plaintiff made from the version of the book it copied to its version were “trivial.”²⁹ This was because the

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2000).

¹⁸ *Id.* § 106(1).

¹⁹ *Id.* § 106(3).

²⁰ *Id.* § 106(2).

²¹ Gorman & Ginsburg, *supra* note 128, at 13.

²² See 1 NIMMER & NIMMER, *supra* note 80, §§ 3.01-.07. Nimmer and Nimmer devote an entire chapter of their treatise to “Derivative and Collective Works.” *Id.*

²³ 17 U.S.C. § 101.

²⁴ 1 Nimmer & Nimmer, *supra* note 80, § 3.01.

²⁵ *Id.*

²⁶ See *id.* § 3.03(A).

²⁷ *Id.* Nimmer and Nimmer discuss numerous cases that evaluated whether certain “contributions to pre-existing works” were significant enough to constitute a derivative work. *Id.*

²⁸ *Grove Press, Inc. v. Collectors Publ’n Inc.*, 264 F. Supp. 603, 605 (C.D. Cal. 1967).

²⁹ *Id.*

changes made “consisted almost entirely of elimination and addition of punctuation, changes of spelling of certain words, elimination and addition of quotation marks, and correction of typographical errors . . . and displayed no originality.”³⁰ Thus, as Nimmer and Nimmer assert, the test for “determining the necessary *quantum* of originality is that of a ‘distinguishable variation’ that is more than ‘merely trivial.’ Any variation will not suffice, but one that is sufficient to render the derivative work distinguishable from its prior work in any meaningful manner will be sufficient.”³¹

One of the leading cases interpreting the required amount of originality is *Feist Publications, Inc. v. Rural Telephone Service*.³² In this case, the Supreme Court had “to clarify the extent of copyright protection available to telephone directory white pages.”³³ Here, Rural Telephone Service (“Rural”) sued for copyright infringement claiming that Feist Publications (“Feist”), “in compiling its own directory, could not use the information contained in Rural’s white pages.”³⁴ Thus, the Court had to determine whether the copyright Rural had in its white page directory “protect[ed] the names, towns, and telephone numbers copied by Feist.”³⁵

Writing for the Court, Justice O’Connor noted, “[o]riginality is a constitutional requirement.”³⁶ She went on to state that “[n]o one may claim originality as to facts.’ This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery.”³⁷ The Court then asserted that this was true for all facts, be they biographical, historical, scientific, or news related.³⁸ Thus, the question presented was whether Rural’s listing of the names, towns, and telephone numbers was sufficiently original to warrant copyright protection of those *facts*.³⁹

The Court determined that although there was “no doubt that Feist took from the white pages of Rural’s directory a substantial amount of factual information,”⁴⁰ because “[t]he selection, coordination, and arrangement of Rural’s white pages [did] not satisfy the minimum constitutional standards for copyright protection,”⁴¹ and therefore

³⁰ *Id.*

³¹ 1 Nimmer & Nimmer, *supra* note 80, § 3.03(A) (internal footnote omitted).

³² *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

³³ *Id.* at 342.

³⁴ *Id.* at 344.

³⁵ *Id.*

³⁶ *Id.* at 346.

³⁷ *Id.* at 347 (internal citation omitted). Borrowing an example from Robert Denicola, the Court then noted, “Census takers, for example, do not ‘create’ the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Census data therefore do not trigger copyright because these data are not ‘original’ in the constitutional sense.” *Id.* (citing Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 Colum. L. Rev. 516, 525 (1981)).

³⁸ *Id.* at 348.

³⁹ *See id.* at 344-45.

⁴⁰ *Id.* at 361. The Court stated, “At a minimum, Feist copied the names, towns, and telephone numbers of 1,309 of Rural’s subscribers.” *Id.*

⁴¹ *Id.* at 362.

lacked the required amount of originality, the use of the listings by Feist did not constitute copyright infringement.⁴² As such, with its decision in *Feist*, the Court further demarcated the line between derivative and nonderivative works, and thus, between potentially infringing and noninfringing works.

One interesting exception to the exclusive right to produce derivative works was carved out in 2005. With the Family Movie Act of 2005 (“Family Movie Act”)⁴³ Congress established a narrow exemption from infringement for “devices designed to sanitize scenes depicting sex and/or violence and/or profanity from the home viewing of motion pictures.”⁴⁴ As noted by Robert A. Gorman and Jane C. Ginsburg, movie directors and producers, citing “artistic integrity,” vehemently opposed the use of these devices, and they urged that the end products of these machines were “unapproved ‘clean’ versions.”⁴⁵ In the end, however, the various parties involved in the legal battle over their use settled and the enactment of the Family Movie Act was the resulting compromise.⁴⁶

Furthermore, it has been stated that “[t]oday’s copyright owners enjoy an unprecedented ability to restrict personal uses of copyrighted expression and to constrain subsequent author borrowing from existing works in the creation of new ones.”⁴⁷ Thus, now more than ever, it seems authors have the ability and the power to prevent others from borrowing, altering, or creating derivative works from their existing copyrighted works.

b. Remedies for Copyright Infringement

Section 501(a) of the Copyright Act states that “[a]nyone who violates any of the exclusive rights of the copyright owner as provided by §§ 106 through 122 or of the author as provided in § 106A(a) . . . is an infringer of the copyright or right of the author, as the case may be.”⁴⁸ This section also establishes that “the term ‘anyone’ includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity.”⁴⁹ Thus, it is clear that an individual can bring a suit against the government claiming copyright infringement. But what types of remedies are available to a copyright owner?

⁴² *Id.* at 364.

⁴³ Family Movie Act of 2005, Pub. L. No. 109-9, §§ 201-02, 119 Stat. 118, 223 (2005) (codified as amended at 17 U.S.C. § 110 (2006)).

⁴⁴ Gorman & Ginsburg, *supra* note 128, at 619. These devices, which could be “hooked up to a DVD player, recognize sex and violence in selected films for which the devices had been programmed, and allow the viewer to fast-forward through such scenes.” *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Netanel, *supra* note 143, at 294.

⁴⁸ 17 U.S.C. § 501(a) (2000).

⁴⁹ *Id.*

The Supreme Court has stated that copyright owners have “a potent arsenal of remedies”⁵⁰ available to them, and these are enumerated primarily in § 502 through § 505 of the Copyright Act.⁵¹ Section 502, however, describes what is generally considered to be the most valuable remedy to a copyright owner, that being injunctive relief.⁵² Injunctions have long been the most desired form of relief for copyright owners because often “compensatory relief will not adequately redress the injury”⁵³ caused by the infringer. Thus, § 502(a) states that a court “may, subject to the provisions of § 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”⁵⁴ The reference to “section 1498 of title 28” bars an individual from obtaining injunctive relief against the federal government.⁵⁵ And as will be discussed below, this prohibition may prove fatal to the copyright claims of criminal defendants like Kaczynski.⁵⁶

c. Prohibition Against Involuntary Transfers

Providing an additional layer of protection for copyright owners is § 201(e) of the Copyright Act, which explicitly forbids the “transfer of a copyright”⁵⁷ without the author’s consent.⁵⁸ This section states:

When an individual author’s ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.⁵⁹

Although Nimmer and Nimmer state that the original motivation for Congress’s enactment “of section 201(e) was to protect foreign authors— particularly dissident Soviet authors—against copyright laws of their homelands that would allow the author’s government to take over the copyrights of works the government might wish to suppress,”⁶⁰ it has become clear that this prohibition is “not limited to such acts by for-

⁵⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

⁵¹ *See* 17 U.S.C. §§ 502-05. Additional possible remedies are described in §§ 507-13.

⁵² *Id.* § 502 (2000). *See also* Gorman & Ginsburg, *supra* note 128, at 909.

⁵³ Gorman & Ginsburg, *supra* note 128, at 909.

⁵⁴ 17 U.S.C. § 502(a).

⁵⁵ *See* 28 U.S.C. § 1498 (2000).

⁵⁶ *See infra* Part V.C.4.

⁵⁷ “A ‘transfer of copyright ownership’ is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.” 17 U.S.C. § 101.

⁵⁸ *Id.* § 201(e).

⁵⁹ *Id.*

⁶⁰ Clark, *supra* note 28, at 213 (citing 3 Nimmer & Nimmer, *supra* note 80, § 10.04).

eign governments, officials, and organizations.”⁶¹ Thus, it is now settled that § 201(e) means precisely what it says, and thus, it forbids “*any* governmental body or other official . . . to seize, expropriate, transfer, or exercise rights of ownership”⁶² assigned to an author by the Copyright Act.⁶³

Further complicating the question of when a copyright may be transferred without its owner’s consent is § 201(d)(1), which states that “ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law.”⁶⁴ Thus, as Paul Goldstein notes, it may not always be clear whether a transfer of a copyright “is voluntary or involuntary for purposes of section 201(e).”⁶⁵ This confusion has been interpreted to mean that although “a transfer of ownership of copyright may be effectuated by ‘operation of law’ . . . such operation of law must be triggered by the express or implied consent of the author.”⁶⁶ As an example, Nimmer and Nimmer state that § 201(e) would not invalidate a “transfer[] of ownership pursuant to proceedings in bankruptcy and mortgage foreclosures, because in such cases the author, by his overt conduct in filing in bankruptcy, or hypothecating a copyright, has consented to such a transfer.”⁶⁷

Consequently, it has been suggested that the combined rights granted to authors by § 106 and § 201 would appear to conflict with Son-of-Sam laws, which limit what criminals can do with their literary works.⁶⁸ For although Son-of-Sam laws usually “do not forbid the sale of an author’s work,” they generally do mandate that profits go to victims, and this “deflates the sale and diminishes the monetary return to the author for his labor.”⁶⁹ Therefore, the right to sell “ceases to be exclusive” and thus, such Son-of-Sam laws would appear to conflict with the Copyright Act.⁷⁰ Perhaps, so too could the VWPA in situations where the government uses its powers to seize and sell literary works.

⁶¹ *Id.* (quoting 3 Nimmer & Nimmer, *supra* note 80, § 10.04).

⁶² 17 U.S.C. § 201(e) (emphasis added).

⁶³ *Id.* See also Clark, *supra* note 28, at 213-14.

⁶⁴ 17 U.S.C. § 201(d)(1).

⁶⁵ Paul Goldstein, Goldstein on Copyright § 5.1.6 (3d ed. 2006).

⁶⁶ 3 Nimmer & Nimmer, *supra* note 80, § 10.04. See also Clark, *supra* note 28, at 214.

⁶⁷ 3 Nimmer & Nimmer, *supra* note 80, § 10.04 (internal footnote omitted). See also Clark, *supra* note 28, at 214. Similarly, Goldstein asserts that “although copyright mortgage foreclosures might appear to constitute involuntary transfers,” Congress determined that this was not the case “on the ground that in executing the mortgage the author overtly and voluntarily ‘consented to these legal processes.’” Goldstein, *supra* note 192, § 5:21.

⁶⁸ See, e.g., Clark, *supra* note 28, at 211-17 (arguing that § 201(e) conflicts with Son-of-Sam laws).

⁶⁹ *Id.* at 212.

⁷⁰ *Id.*

3. The Impact of 28 U.S.C. § 1498(b) on Copyright Infringement Claims

Despite the potential conflict between Son-of-Sam laws and § 201(e) of the Copyright Act, other scholars claim—at least when it is a federal statute in question, as is the case with the VWPA—that 28 U.S.C. § 1498(b) (“Section 1498(b)”) ⁷¹ settles the dispute in favor of the government’s right to impinge on an author’s supposedly exclusive rights.⁷² As mentioned previously, Section 1498(b) addresses the rights that copyright owners have when the federal government infringes their copyright.⁷³ Indeed, Section 1498(b) establishes that “the exclusive action which may be brought for [copyright] infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement.”⁷⁴ Thus, it makes clear that a copyright owner has no right to injunctive relief against the federal government.⁷⁵

Therefore, as Roberta Kwall concludes, although § 201(e) might possibly be interpreted as forbidding the takings of copyrights by the federal government, such a reading would not comport with Section 1498(b).⁷⁶ This conclusion is highly relevant to any evaluation of whether a copyright owner’s rights can be impinged by the federal government’s power under a federal restitution statute like the VWPA, as it suggests that individuals could not enjoin the government from selling or otherwise infringing on their copyright, leaving a suit for damages as the only available relief.⁷⁷

⁷¹ 28 U.S.C. § 1498(b) (2000).

⁷² See, e.g., Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign’s Prerogative*, 67 TEX. L. REV. 685, 693-702 (1989).

⁷³ 28 U.S.C. § 1498(b).

⁷⁴ *Id.*

⁷⁵ See Kwall, *supra* note 199, at 753 (noting that the Copyright Act “explicitly provides for injunctive relief ‘subject to the provisions of section 1498 of Title 28’”).

⁷⁶ See *id.* at 695-703; Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, 539 n.70 (1998). Although Kwall’s primary focus was on issues pertaining to eminent domain, which are beyond the scope of this Note, the conclusions she reached are highly relevant to the copyright claims discussed here. See Kwall, *supra* note 199, at 695-703. Explaining why such an interpretation of the meaning of § 201(e) cannot be correct as it pertains to the government’s eminent domain power, Kwall stated that it is generally understood that the promotion of the arts and sciences [is] the primary purpose of the monopoly granted to copyright owners and . . . financial rewards to creators [is] a secondary consideration. This . . . suggests that the sovereign’s duty to promote the public welfare must take precedence over the specific property rights enjoyed by copyright proprietors

Id. at 697-98 (internal footnotes omitted).

⁷⁷ Kwall, *supra* note 199, at 702, 753-54. Kwall also cited a House Report discussing this issue which stated that “the reference to 28 U.S.C. § 1498 contained in § 502(a) ‘makes it clear that the bill would not permit the granting of an injunction against an infringement for which the Federal Government is liable under section 1498.’” *Id.* at 753 n.332 (quoting H.R. Rep. No. 94-1476, at 168 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5776).

Finally, Section 1498(b) makes clear that Congress explicitly “waived the federal government’s immunity from suit for copyright infringement by allowing the copyright owner to sue in the Claims Court for the ‘recovery of his reasonable and entire compensation as damages for such infringement.’”⁷⁸ Thus, the federal government cannot claim sovereign immunity as a defense to copyright infringement.⁷⁹

⁷⁸ *Id.* at 753 (quoting 28 U.S.C. § 1498(b)).

⁷⁹ *Id.* The question of whether a *state* can be sued for infringing an individual’s copyright is much less clear. *See* 1 Howard B. Abrams, *The Law of Copyright* § 13:35 (2007). In 1999, however, in the case of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), which dealt with patent infringement claims, the Supreme Court ruled that no infringement claim could be brought against a state government. *See* 1 Abrams, *supra*, § 13:35. Additionally, in 2000 the Fifth Circuit found that under the Eleventh Amendment, states “enjoy[] immunity from unconsented-to” copyright infringement suits. *Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000). *See also* 1 Abrams, *supra*, § 13:35. This issue, however, is beyond the scope of this Note.

IV. The Story of the Unabomber

A. A Brief History

In the words of Judge Reinhardt of the Ninth Circuit, “By the time of his arrest in a remote Montana cabin on April 3, 1996, Ted Kaczynski had become one of the most notorious and wanted criminals in our nation’s history.”¹ Beginning in 1978 and continuing for almost twenty years, Ted Kaczynski, or the “Unabomber” as he was dubbed by the Federal Bureau of Investigation (“FBI”) because his targets regularly were universities and airline carriers, conducted an ideologically driven mail-bomb campaign aimed at destroying “the ‘industrial-technological system’ and its principal adherents: computer scientists, geneticists, behavioral psychologists, and public-relations executives.”² In the end, three individuals were killed by Kaczynski’s bombs, and many others were injured.³

In 1995, Kaczynski made what some have called “the most extraordinary manuscript submission in the history of publishing.”⁴ At that time, he announced that he would stop his murderous ways if a major American newspaper agreed to print his manifesto, *Industrial Society and Its Future*.⁵ Both the *New York Times* and the *Washington Post* accepted Kaczynski’s offer, and thus, his lengthy manifesto, with its “dream . . . of a green and pleasant land liberated from the curse of technological proliferation,”⁶ was published, revealing to all “the utopian vision that had inspired Kaczynski’s cruel and inhumane acts.”⁷

One of the readers of *Industrial Society and Its Future* was David Kaczynski.⁸ He soon “came to suspect that its author was his brother Ted” who had been a mathematics professor at the University of California-Berkeley, and who had cut himself off from society nearly twenty-five years earlier.⁹ Reluctantly, David Kaczynski decided to inform the FBI about his suspicions “although he sought assurances that the government would not seek the death penalty and expressed his strong view that his brother

¹ *United States v. Kaczynski*, 239 F.3d 1108, 1120 (9th Cir. 2001) (Reinhardt, J., dissenting).

² *Id.* at 1120.

³ *Id.* at 1110 (majority opinion).

⁴ *Id.* at 1120 (Reinhardt, J., dissenting) (quoting William Finnegan, *Defending the Unabomber*, *New Yorker*, Mar. 16, 1998, at 52, 52).

⁵ *Id.* at 1120; Jay Robert Nash, *Terrorism in the 20th Century: A Narrative Encyclopedia from the Anarchists, Through the Weathermen, to the Unabomber* 276 (1998).

⁶ *Kaczynski*, 239 F.3d at 1120 (quoting Cynthia Ozick, *Dostoyevsky’s Unabomber*, *New Yorker*, Feb. 24, 1997, at 114, *reprinted in* Quarrel & Quandry 5 (2000)).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

was mentally ill.”¹⁰ Based on the information David Kaczynski provided, in April 1996 the FBI apprehended Ted Kaczynski.¹¹ When the federal agents searched his Montana cabin, they seized hundreds of items of Kaczynski’s personal property, which they believed had potential evidentiary value.¹² Soon thereafter, in spite of David Kaczynski’s “anguished opposition, the government gave notice of its intent to seek the death penalty.”¹³

¹⁰ *Id.*

¹¹ *Id.*

¹² *United States v. Kaczynski*, 416 F.3d 971, 972 (9th Cir. 2005).

¹³ *Kaczynski*, 239 F.3d at 1120.

B. Next Stop Ebay: the Case History Leading Toward the Proposed Internet Auction

The saga over what should happen to Kaczynski's writings and personal property has already dragged on for more than four years, and although the Ninth Circuit will likely get its second chance to rule on the matter in the near future,¹ the final chapter of this drama still looks a long way off. In the interest of clarity, and because the case history is quite complex and the issues have evolved over time, what follows is a synopsis of Kaczynski's case as it has worked its way through the courts.

1. The Criminal Proceedings

In 1996, the federal government charged Kaczynski with multiple counts involving the transportation or mailing of explosive devices with the intent to kill or injure.² From the start, Kaczynski adamantly opposed his lawyers presenting any defense that was based upon him being mentally ill or unstable.³ Instead, he wanted to put forth an argument that the crimes he allegedly committed "were a kind of self-defense against the 'intrusion' of industrial civilization into the wilderness of Western Montana."⁴ This difference of opinion on trial strategy proved to be a major sticking point between Kaczynski and his counsel, as his lawyers believed a mental illness defense was likely the only way to spare his life.⁵ As such, the trial court was legitimately concerned about the potential for "Kaczynski to use the criminal justice system 'as an instrument of

¹ See Kovalesski, *supra* note 1 (noting that Kaczynski stated that he will appeal the 2006 district court ruling).

² See *Kaczynski*, 239 F.3d at 1110 (majority opinion).

³ *Id.* at 1121 (Reinhardt, J., dissenting).

⁴ *Id.* at 1122.

⁵ *Id.* at 1121. Representative of just how bad the relationship was between Kaczynski and his attorneys, in one of his letters to the trial judge, Kaczynski wrote, "I would rather die, or suffer prolonged physical torture, than have the [mental illness] defense imposed on me in this way by my present attorneys." *Id.* at 1123.

self-destruction,” or “as a suicide forum.”⁶ Consequently, in 1998 “the judicial system breathed a collective sigh of relief when the Unabomber pled guilty.”⁷

When Kaczynski pled guilty to the numerous crimes he was charged with, he was not only sentenced to life in prison, but was also ordered to pay \$15,026,000 in restitution to certain victims of his bombings and their families.⁸ Kaczynski’s plea agreement had a disgorgement provision that stated:

The defendant agrees that he shall disgorge any monies paid in whole or in part to him or on his behalf, in return for writings, interviews, or other information disclosed by the defendant, including but not limited to access to the defendant, photographs or drawings of or by the defendant or any other type of artifact or memorabilia to the United States Probation Office for restitution or other distribution to the victims of the Unabomb events.⁹

Therefore, as the Ninth Circuit later noted, “a lien arose in favor of the government on all of Kaczynski’s property and rights to property, which will last until his restitution debt is satisfied.”¹⁰

2. The 2004 District Court Case

On June 26, 2003, Kaczynski filed a Rule 41(e) motion to request “the return of property seized as evidence of the Unabomb crimes.”¹¹ In support of his motion, Kaczynski argued that because the government would not return his property, it was infringing his “First Amendment right to express and disseminate information and ideas to

⁶ *Id.* at 1126.

⁷ *Id.* at 1127 (quoting Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 444 (2000)). Judge Reinhardt noted:

His attorneys had achieved their principal and worthy objective by preventing his execution. The government had been spared the awkwardness of pitting three experienced prosecutors against an untrained, and mentally unsound, defendant, and conducting an execution following a trial that lacked the fundamental elements of due process at best, and was farcical at worst. Judge Burrell, as noted, had narrowly avoided having to preside over such a debacle and to impose a death penalty he would have considered improper in the absence of a fair trial.

Id. at 1128.

⁸ *United States v. Kaczynski*, 416 F.3d 971, 972 (9th Cir. 2005); *United States v. Kaczynski*, 306 F. Supp. 2d 952, 953 (E.D. Cal. 2004), *vacated*, 416 F.3d 971.

⁹ *Kaczynski*, 416 F.3d at 972-73.

¹⁰ *Id.* at 973 (citing 18 U.S.C. § 3613(c) (2000)). The court mentioned in a footnote that as of June 2005, “Kaczynski ha[d] paid a \$650 special assessment, and the government received \$7,025 towards restitution by selling Kaczynski’s interest in his Montana land, but almost all of [his] \$15 million debt remain[ed].” *Id.* at 973 n.2.

¹¹ *Kaczynski*, 306 F. Supp. 2d at 953-54. Kaczynski requested that the court require the government to give “his papers to the University of Michigan’s Labadie Collection, which houses materials on radical, social and political movements.” *Kaczynski*, 416 F.3d at 973.

others.”¹² The government opposed the granting of this motion.¹³ The district court rejected the findings and recommendations of the magistrate judge who had previously handled the matter,¹⁴ and found “that the judgment lien of restitution [gave] the government a sufficient cognizable claim of ownership to defeat Kaczynski’s motion for return of property.”¹⁵ Further, the court noted that the disgorgement provision of his plea agreement barred him from profiting from his crimes, and stated that although “Kaczynski does not seek monetary profit, the effect of what he seeks would force the victims of his Unabomb crimes to use their property in a way that could preserve for posterity some evidence of the evils wrought by his facinorous Unabomber actions.”¹⁶

As to the First Amendment claim raised by Kaczynski, the court found that it lacked merit and “evidence[d] a misapprehension of the inquiry at issue,”¹⁷ which the court stated was “not whether Kaczynski has the right to communicate any idea, but rather whether equity supports his position that he can dictate what the government must do with liened property it lawfully possesses.”¹⁸ Kaczynski appealed this ruling.¹⁹

3. The 2005 Ninth Circuit Appeal

Kaczynski’s appeal raised numerous issues; however, only two of these are particularly relevant to this Note.²⁰ These are: (1) what should the government do with his writings, and tangentially, should the writings be valued at their precelebrity or

¹² *Kaczynski*, 306 F. Supp. 2d at 956.

¹³ *Kaczynski*, 416 F.3d at 973.

¹⁴ The magistrate “recommended that Kaczynski’s motion be granted in part, and deemed the government’s argument that it needed the property to satisfy the restitution order, but that the property should be appraised absent Kaczynski’s notoriety to prevent him from benefitting from his crime, ‘circular and confusing.’” *Id.* In addition, the magistrate stated that the government should “sell whatever property it desired for restitution purposes, and return the rest to Kaczynski.” *Id.*

¹⁵ *Id.* (citing *Kaczynski*, 306 F. Supp. 2d at 955).

¹⁶ *Kaczynski*, 306 F. Supp. 2d at 956. Further, the court stated that granting his motion would allow him to benefit from “his apparent endeavor to extol his criminal celebrity status” and this, the court said, equity would not allow. *Id.*

¹⁷ *Id.* at 957.

¹⁸ *Id.*

¹⁹ See *Kaczynski*, 416 F.3d at 973.

²⁰ A third issue raised by Kaczynski was whether the government could meet its statutory obligations by providing him with copies of his writings instead of the originals. See Brief of Appellant, *supra* note 15, at i. That issue, however, is beyond the scope of this Note.

postcelebrity value;²¹ and (2) does the First Amendment require the return of his writings?²²

As to the first issue, Kaczynski argued that the government must either sell his property at fair market value and deduct the proceeds from his \$15 million restitution debt,²³ or it must stand by its assessment that his property “would cost more to sell than it is worth,”²⁴ and thus, because it had no legitimate reason for keeping the property, return it to him.²⁵ While he would have preferred for the court to rule for the latter option, he did not dispute the government’s right to sell his writings as long as the fair market value was obtained.²⁶ Pointing to what he felt was Congress’s intent in enacting the VWPA,²⁷ Kaczynski also argued that the lien granted to the government “is not to give the government an excuse to retain property indefinitely for some arbitrary purpose” but instead, it is supposed to be exercised so that property can be sold and the proceeds of that sale can be deducted from the defendant’s restitution order.²⁸ Moreover, while the government asserted that equity required that the precelebrity value be used,²⁹ Kaczynski argued that the aim of the VWPA—namely to provide restitution to victims—required that the higher, postcelebrity value be used.³⁰

As for the second key issue, Kaczynski argued that “[t]he government’s refusal to return the papers for donation to the University of Michigan’s Special Collections Library is contrary to the First Amendment and the public interest.”³¹ Claiming that the First Amendment not only guarantees “a right to communicate information and

²¹ See *Kaczynski*, 416 F.3d at 974-76. At the center of this controversy was the government’s “newly proposed restitution plan” that it proposed during argument before the Ninth Circuit. *Id.* at 976. The government’s plan was “(1) to hold a private sale of Kaczynski’s property, (2) ascribe thereby a value to it, and then (3) deposit government . . . funds equal to that value in an account for the benefit of [his] victims and their families. The government would then keep Kaczynski’s property, to unknown ends.” *Id.* at 972. Kaczynski vehemently opposed the government’s “novel position that its restitution lien permitted it to simply hold the property and ‘credit’ a nominal value for the property towards the restitution order.” Brief of Appellant, *supra* note 15, at 10.

²² See Brief of Appellant, *supra* note 15, at i.

²³ Kaczynski argued that since the government had not expressed any intention of selling his writings for their fair market value, it had no overriding interest in retaining his property, and thus, all his property should be returned to him. See *id.* at 6-7.

²⁴ *Kaczynski*, 416 F.3d at 973.

²⁵ See Brief of Appellant, *supra* note 15, at 6-7.

²⁶ *Id.* at 10.

²⁷ Kaczynski argued that this was “to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant.” *Id.* at 11 (citing *United States v. Mills*, 991 F.2d 609, 611 (9th Cir. 1993)).

²⁸ *Id.*

²⁹ Brief of Appellee at 16-20, *Kaczynski*, 416 F.3d 971 (No. 04-10158), 2005 WL 516569.

³⁰ See Brief of Appellant, *supra* note 15, at 13-15. Kaczynski claimed this was true because if a public sale was held and his writings “were sold to the highest bidder, it would bring a far higher price because of [his] presumed celebrity status than it would if [he] had no such status.” *Id.* at 13-14.

³¹ *Id.* at 7.

ideas, but also a right to receive information,” Kaczynski argued that “there is a strong public interest favoring the return of the documents in question to the University of Michigan[]”³² In addition, amici curiae³³ argued that “[t]he freedom of expression guaranteed by the First Amendment ‘protects *both* a speaker’s right to communicate information and ideas to a broad audience *and* the intended recipients’ right to receive that information and those ideas.’”³⁴ Moreover, Kaczynski’s counsel asserted that “the government’s ever-changing position in this case indicates that its true purpose is to censor Kaczynski’s writings, and that it has no legitimate reason for not turning over the original source documents to the University [of Michigan’s] library.”³⁵

In its analysis of Kaczynski’s motion, the Ninth Circuit asserted that “[p]roperty seized for the purposes of a trial that is neither contraband nor subject to forfeiture should ordinarily be returned to the defendant once [the] trial has concluded.”³⁶ Further, the court rejected the government’s interpretation of its power under the VWPA, and found the government’s position that “it need not sell [Kaczynski’s] property, as it [was] statutorily permitted to enforce an order of restitution ‘by all other available and reasonable means,’” to be “untenable.”³⁷

The Ninth Circuit also held that the district court’s finding that Kaczynski’s property had negligible value was wrong.³⁸ The court pointed to the disgorgement provision that was part of his plea agreement and stated that while this agreement “clearly prevents Kaczynski from profiting from the property at issue, it also anticipates that [he] might be compensated (and have to disgorge money paid) for ordinary property transformed into ‘memorabilia’ by virtue of his notoriety.”³⁹ The court went on to state that although it is settled law that a criminal is not allowed to “profit from his crime,” that was not the situation presented by Kaczynski’s request.⁴⁰ To the contrary, the court

³² *Id.* at 16-17 (citing *Klendienst v. Mandel*, 408 U.S. 753, 762 (1972)). Kaczynski also claimed that “[t]he documents have significant social and historical value not only to the press and public, but also to academic researchers and social historians.” *Id.* at 17.

³³ On appeal, the Freedom to Read Foundation and the Society of American Archivists filed a joint amici curiae brief in support of Kaczynski’s appeal. *See* Joint Amici Curiae Brief of the Freedom to Read Foundation and the Society of American Archivists, in support of Appellant Theodore John Kaczynski and Reversal, *Kaczynski*, 416 F.3d 971 (No. 04-10158), 2004 WL 2758413 [hereinafter Amici Curiae Brief]. These groups were particularly concerned about being able “to receive the information transmitted only by Kaczynski’s original documents.” *Id.* at 11.

³⁴ *Id.* at 11-12.

³⁵ Reply Brief of Appellant at 14, *Kaczynski*, 416 F.3d 971 (No. 04-10158).

³⁶ *Kaczynski*, 416 F.3d at 974. The court pointed out that Kaczynski was “not seek[ing] the return of any property that constitute[d] contraband.” *Id.* at 974 n.4.

³⁷ *Id.* at 974 (quoting 18 U.S.C. § 3664(m)(1)(A)(ii) (2000)). The court further noted that “the government argued unequivocally that the property is of negligible value. To accept that appraisal is to conclude that the government did not meet its burden: property of negligible value is by definition not needed to satisfy the terms of a restitution order.” *Id.* at 975. The court stated that this “appraisal” was “flawed.” *Id.*

³⁸ *Id.* at 975.

³⁹ *Id.*

⁴⁰ *Id.*

asserted that any “revenue from the sale of Kaczynski’s property . . . would benefit not Kaczynski but the victims of his crimes.”⁴¹

Therefore, the Ninth Circuit held that the government’s plan regarding Kaczynski’s property was “inconsistent with the purpose of victim restitution, and with precedent specifying what must be done with a defendant’s property once it is no longer needed as evidence.”⁴² Notably, the court stated that “[s]imply sitting on an order of restitution is not a reasonable means of enforcing it.”⁴³ Perhaps, most indicative of the court’s disdain for the way in which the government had handled Kaczynski’s property was what was written in footnote eleven of the opinion, in which the court stated, “[T]he government flouts the VWPA by electing to squander property it possesses pursuant to a restitution order rather than selling it to bring in as much money as possible for these victims.”⁴⁴ The court also commented that what had been missing throughout the litigation was “the voices of the victims and their families.”⁴⁵

Thus, the court remanded the case “to the district court for the government to propose a detailed, written plan to dispose of the property in question in a commercially reasonable manner calculated to maximize the monetary return to Kaczynski’s victims and their families.”⁴⁶ Finally, the court offhandedly dismissed Kaczynski’s First Amendment claims, stating in a footnote simply, “[w]e decline to reach” those issues.⁴⁷

4. The 2006 District Court Case

On July 31, 2006, after a series of proposed plans from the government, objections to those plans from Kaczynski, and additional requests and objections from the victims

⁴¹ *Id.* Thus, the court held that there was no reason for “a negligible valuation” of the property, and additionally pointed out that “common sense suggests the property would be quite valuable to scholars, archivists, and, unsavory as that prospect might be, collectors.” *Id.* at 975-76.

⁴² *Id.* at 972.

⁴³ *Id.* at 976. For a detailed discussion of this important holding, see *infra* Part V.A.

⁴⁴ *Kaczynski*, 416 F.3d at 977 n.11.

⁴⁵ *Id.* at 977. Further, the court stated that although “the government purported to represent these [victims], we see nowhere in the record their viewpoints and desires regarding the enforcement of the restitution order, even though its very purpose is to provide financial compensation for their great losses.” *Id.*

⁴⁶ *Id.* at 972. The court also warned the government that if it “fails or refuses to provide such a plan within a reasonable period of time, or if its plan includes a finding of negligible value or results in a nominal, taxpayer-funded contribution to victim restitution, then the district court is directed to return Kaczynski’s property to him.” *Id.* at 977. Thus, it could be said that the court held that the government could not have its cake and eat it too.

⁴⁷ *Id.* at 972 n.1. Though these First Amendment claims were quickly disposed of by the Ninth Circuit, they will receive greater consideration in Part V.B of this Note.

who submitted claims for restitution (“Named Victims”),⁴⁸ the government submitted to the district court a new plan (“July 31 Plan”) that incorporated the various items the parties had previously discussed.⁴⁹ As part of this plan, the government decided to divide Kaczynski’s seized property into four separate categories: bomb-making materials, firearms, personal items, and writings.⁵⁰ The question of whether the July 31 Plan met the Ninth Circuit’s remand directive became the key issue for the district court to decide.⁵¹

The district court evaluated each element of the July 31 Plan and ruled on each one individually.⁵² First, it approved the government’s proposal for the Internet auction.⁵³ Then it approved the proposed sale of Kaczynski’s personal items via the Internet auction,⁵⁴ the proposed sale of Kaczynski’s firearms to the Named Victims for \$300 credited toward his restitution debt,⁵⁵ and the proposal “to exclude the bomb-making materials from the sale and to not return [that] property to Kaczynski.”⁵⁶ This left only the writings in question.

As part of the July 31 Plan, the Named Victims asked “that all of the remaining original writings be sold in redacted form.”⁵⁷ They requested these redactions in order “to protect their privacy and the ‘feelings and sensibilities of their loved ones,’ as well as to avoid the ‘painful conflict’ of ‘profiting from the sale of materials that identify and discuss the injuries of specific, named individuals.’”⁵⁸

In response to these requests, Kaczynski argued that “the sale of his original documents would violate the First Amendment.”⁵⁹ Additionally, Kaczynski contended that “regardless of whether the government may sell [his] original papers, the restitution lien

⁴⁸ See *United States v. Kaczynski*, 446 F. Supp. 2d 1146, 1149-51 (E.D. Cal. 2006). The Named Victims actually submitted their restitution claims “at the time of Kaczynski’s sentencing.” *Id.* at 1148 n.1.

⁴⁹ See *id.* at 1151. This new plan proposed that Kaczynski’s property would be sold via an Internet auction. *Id.* at 1150.

⁵⁰ *Id.*

⁵¹ *Id.* at 1152.

⁵² See *id.* at 1152-55.

⁵³ *Id.* at 1152-53.

⁵⁴ *Id.* While Kaczynski did not object to the proposed sale of his personal items, he did challenge the victims’ right to “credit bid” on items that went unsold. *Id.* The court, however, ruled that under California law, “credit bidding is an ‘available . . . means’ of executing [an] unsatisfied restitution order,” and thus, approved its use. *Id.* (quoting *United States v. Kaczynski*, 416 F.3d 971, 976 (9th Cir. 2005)).

⁵⁵ *Id.* at 1153.

⁵⁶ *Id.* at 1154. There was considerable disagreement, however, over what should be done with these materials, as the victims requested that they not be sold, and Kaczynski—who disputed their categorization as bomb-making materials—stated that they “must be either sold at the auction or returned to him unless ‘they constitute “per se contraband.”” *Id.* at 1153.

⁵⁷ *Id.* at 1154.

⁵⁸ *Id.* at 1155 (internal citation omitted).

⁵⁹ *Id.* at 1154. Kaczynski argued that an “[o]riginal is always better than a copy” and has “intrinsic historical and scholarly value that photocopies lack.” *Id.*

does not take away [his] literary rights to his papers.”⁶⁰ Finally, Kaczynski claimed “that if the original writings are included in the auction, the First Amendment prohibits the government from redacting any information from the documents.”⁶¹

In ruling on the writings, the district court made several findings, most of which went against Kaczynski’s contentions.⁶² The court held that “Kaczynski ha[d] not demonstrated what protected speech is contained in the originals that is not contained in the copies, or how a sale of the originals, when he possesses copies, implicates the First Amendment.”⁶³ Further, in response to Kaczynski’s claim that even if the government was able to sell his “original papers, the restitution lien does not take away [his] literary rights,” the court stated that the proposed “July 31 Plan only addresses the sale of the physical documents.”⁶⁴ Thus, the court left completely unaddressed the underlying copyright claims raised by Kaczynski.⁶⁵

Additionally, in response to Kaczynski’s claim that the First Amendment prohibited the redaction of any information in his original writings, the court stated that Kaczynski did not show how the proposed deletions “impair[] his ability to communicate his ideas or otherwise violate[] the First Amendment.”⁶⁶ Thus, adhering to the Ninth Circuit’s remand instruction, which reminded the district court to “not loose [sic] sight” of the fact that the restitution was awarded to the Named Victims, and thus, it is their needs that the government’s plan should serve,⁶⁷ the district court approved the July 31 Plan’s proposed sale of the original writings and “the proposal to redact the names of all the victims and their families, all recognizable descriptions of the victims and their injuries, and the names of intended victims.”⁶⁸ This is the most recent ruling in

⁶⁰ *Id.* at 1154 n.13.

⁶¹ *Id.* at 1154. Although the term “copyright” never appears in the court’s opinion, these final two arguments raised by Kaczynski could have been labeled as “copyright claims.” Further, while they were handled with great brevity by the court, *see id.* at 1154-55, a detailed exploration of these arguments raised by Kaczynski can be found in Part V.C. *infra*.

⁶² *See Kaczynski*, 446 F. Supp. 2d at 1154-55. The court first ruled on the relatively minor issue of whether the government could meet its statutory obligations by returning only copies to Kaczynski. On this issue, the court stated, “Although the government states it has provided Kaczynski with copies of all of his writings, Kaczynski asserts that he is missing some pages and that others are illegible. The government shall provide Kaczynski, through his designated recipient, with any page Kaczynski has not already received in readable form.” *Id.* at 1154 n.12. This issue, however, is beyond the scope of this Note.

⁶³ *Id.* at 1154 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293-94 n.5 (1984)).

⁶⁴ *Id.* at 1154 n.13.

⁶⁵ As will be illustrated later in this Note, this opinion provided an incomplete analysis of Kaczynski’s copyright claims. *See* discussion *infra* Part V.C.

⁶⁶ *Kaczynski*, 446 F. Supp. 2d at 1154-55.

⁶⁷ *Id.* at 1155. Any such plan should also take into account the “viewpoints and desires” of these victims. *Id.*

⁶⁸ *Id.* at 1154-55. As to the final element of the July 31 Plan—the proposal “to exclude Kaczynski’s writings that contain ‘diagrams and ‘recipes’ for making bombs’ from the auction”—although the court approved such an exclusion, it held that the government’s “request that these original writings not be

the ongoing legal battle. Kaczynski has stated that he will fight this decision on appeal back to the Ninth Circuit, but no new decision has thus far been delivered.⁶⁹

returned to Kaczynski [was] unsupported and contrary to the remand decision.” *Id.* at 1155. Thus, the court ruled that such original writings should be returned to Kaczynski’s designated recipient. *Id.*

⁶⁹ See Kovaleski, *supra* note 1.

**V. United States V. Kaczynski and
Beyond: What Are the
Government's Powers Under the
VWPA?**

Although the arguments made by the parties have evolved considerably over the course of the litigation, Kaczynski's case raises several interesting and important questions pertaining to the way in which the government's power under the VWPA interacts with the First Amendment and the Copyright Act. This part of the Note will analyze and attempt to provide answers to these unresolved questions.

A. The Rule 41(E) Motion

In order to prevail on a Rule 41(e) motion,¹ Kaczynski would need to show “that (1) he is entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either the seizure was illegal or the government’s need for the property as evidence has ended.”² Additionally, in *Mills*, the Ninth Circuit made clear “that a valid restitution order under the VWPA gives the government a sufficient cognizable claim of ownership to defeat a defendant’s Rule 41(e) motion for return of property, if that property is needed to satisfy the terms of the restitution order.”³ Thus, it seems clear that Kaczynski faces a severely uphill battle if he hopes to prevail on the basis of the Rule 41(e) motion alone. For although he would likely be able to meet the three basic requirements laid out above—he could likely show that he was entitled to possess much of his seized property, especially his writings,⁴ that the property was not contraband,⁵ and that the government no longer needed the property for evidentiary purposes—it seems apparent that based upon the Ninth Circuit’s holding in *Mills*, the government can defeat his claim. And given that Kaczynski’s seized belongings are his only assets that could be used to pay off his restitution debt, and given that the district court has approved the planned Internet auction, it seems clear that Kaczynski’s seized property “is needed to satisfy the terms of the restitution order.”⁶ Therefore, if Kaczynski hopes to prevail in his legal battle, it will likely have to be by challenging the validity of the VWPA itself.

¹ Fed. R. Crim. P. 41(g).

² *United States v. Van Cauwenberghe*, 827 F.2d 424, 433 (9th Cir. 1987).

³ *United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993).

⁴ The district court, however, did conclude that in light of federal prison regulations, “Kaczynski ha[d] not shown he [was] entitled to lawfully possess any of the items identified by the government as bomb-making materials.” *Kaczynski*, 446 F. Supp. 2d at 1154.

⁵ The Ninth Circuit had previously noted that Kaczynski was “not seek[ing] the return of any property that constitute[d] contraband.” *United States v. Kaczynski*, 416 F.3d 971, 974 n.4 (9th Cir. 2005).

⁶ *Kaczynski*, 416 F.3d at 974 (quoting *Mills*, 991 F.2d at 612).

B. Kaczynski's First Amendment Claims and Beyond

The facts presented in Kaczynski's case provide a unique opportunity to evaluate the interaction between the VWPA and the First Amendment. Therefore, in addition to analyzing the freedom-of-expression claims raised by Kaczynski, this Note will investigate the broader issue of whether the VWPA violates the First Amendment as well.

As noted previously, when a criminal's expressive work is involved, it is the Son-of-Sam laws that are usually implicated.¹ Kaczynski's situation, however, is different because the writings that the government now plans to sell were penned prior to his arrest and seized as property with potential evidentiary value. As a result, Kaczynski's writings have fallen under the government's restitution-enforcing power granted by the VWPA.² Therefore, as the government has been instructed to sell these writings so that Kaczynski's victims will receive at least some restitution, this case provides one of the most direct First Amendment challenges to the VWPA imaginable.

Nonetheless, the answer to the threshold issue of whether the First Amendment is even implicated here is not entirely clear. As the Supreme Court noted in *Clark v. Community for Creative Non-Violence*, “[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive.”³ Thus, the first question that needs to be answered is, is “speech” involved here? Although the district court held that the “issue is not whether Kaczynski has the right to communicate any idea, but rather whether equity supports his position that he can dictate what the government must do with liened property it lawfully possesses”⁴—thereby framing the issue as one dealing with property and not one dealing with speech—considering that “*handwritten . . . journals, diaries and drafts of his anti-technology manifesto*”⁵ are involved, it seems clear that speech is involved at least in the most basic sense.

¹ See discussion *supra* Part II.D.

² See discussion *supra* Part IV.B.

³ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

⁴ *United States v. Kaczynski*, 306 F. Supp. 2d 952, 957 (E.D. Cal. 2004), *vacated*, 416 F.3d 971 (9th Cir. 2005).

⁵ *Kovaleski*, *supra* note 1 (emphasis added).

Further, while an order of restitution is considered to be a lien in favor of the government on “all property and rights to property of the person” against whom the order of restitution was entered—thus confirming the government’s superior interest in the *property* it possesses liens against— there is no clear indication how the government’s interests in a defendant’s property are to be balanced against that defendant’s free speech rights under the First Amendment.⁶ Thus, the question of “whether the government has infringed [the] freedom of speech” must be answered.⁷ And this is quite a difficult and complicated inquiry.

Just as the government’s arguments have evolved over the course of the litigation, so too have Kaczynski’s as they pertain to the government’s alleged infringement of his First Amendment rights. Through the 2005 Ninth Circuit case, Kaczynski was very focused on getting the original versions (not copies) of his writings returned to him, and attempted to accomplish this by showing that the government was trying to censor the dissemination of his ideas,⁸ thus making an argument that sounded similar to one that an individual might make if he or she were claiming that the VWPA was a content-based regulation.⁹ Highlighting the fact that for years the government had done nothing with his property and had not even proposed selling it until the Ninth Circuit ordered the government to do so,¹⁰ Kaczynski attempted to show that the government was trying to keep his beliefs out of the “marketplace of ideas.”¹¹ To this effect, his counsel asserted, “[T]he government’s ever-changing position in this case indicates that its true purpose is to censor Kaczynski’s writings, and that it has no legitimate reason for not turning over the original source documents to the University [of Michigan’s] library.”¹² Thus, Kaczynski painted a picture of the government infringing on his speech by attempting to suppress it.¹³

Kaczynski’s censorship argument, however, was essentially rendered moot when the Ninth Circuit ruled that the government could not retain the writings indefinitely, and that it had to devise a “plan to dispose of the property in question in a commercially

⁶ 18 U.S.C. § 3613(c) (2000).

⁷ Chemerinsky, *supra* note 89, at 935.

⁸ See Reply Brief of Appellant, *supra* note 254, at 10-15.

⁹ See *supra* Part III.B.1.

¹⁰ See *United States v. Kaczynski*, 416 F.3d 971, 976 (9th Cir. 2005).

¹¹ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹² Reply Brief of Appellant, *supra* note 254, at 14. The government in response, however, asserted that while “the First Amendment protects Kaczynski’s right to convey his *ideas* to whomever is interested in them [it] does not give interested recipients of [his] ideas any rights to possession of [his] *property*.” Brief of Appellee, *supra* note 248, at 22-23 (internal footnote omitted). The government went on to state that “[t]he Amici have cited no authority or case law which gives them any claim to possession or ownership to the papers at issue.” *Id.*

¹³ See also Amici Curiae Brief, *supra* note 252, at 19 (stating “[t]he government’s position in this case is driven by its strong distaste for the idea that Kaczynski’s papers may be presented or perceived as political protest”).

reasonable manner calculated to maximize the monetary return to Kaczynski's victims and their families."¹⁴

Consequently, Kaczynski's arguments shifted during the 2006 district court case. There, Kaczynski argued that "the *sale* of his original documents would violate the First Amendment."¹⁵ He still based this argument primarily on his assertion that an "[o]riginal is always better than a copy,"¹⁶ but he also claimed that when First Amendment rights were involved, the government may take actions that limit speech interests only "when compelling government interests outweigh the free expression interests" implicated.¹⁷ Further, he stated "that if the original writings are included in the auction, the First Amendment prohibits the government from redacting any information from the documents."¹⁸ Thus, his claims evolved into two separate lines of attack: (1) the VWPA is overbroad because it gives the government too much power to infringe defendants' speech rights; and (2) the government's plan to redact portions of his writings constitutes an impermissible prior restraint.

The district court, however, found that "Kaczynski ha[d] not demonstrated what protected speech is contained in the originals . . . or how a sale of the originals . . . implicates the First Amendment."¹⁹ Thus, for the second time, a court ruled that Kaczynski had not satisfied the threshold requirement of proving that the First Amendment was implicated. Moreover, in so doing, the court indirectly found that the VWPA does not run afoul of the First Amendment. Nevertheless, if one were to assume that Kaczynski—or any other criminal defendant—*could* meet the threshold requirement and show that the VWPA did infringe the freedom of expression, how then would the law stand up to First Amendment analysis?

¹⁴ *Kaczynski*, 416 F.3d at 972.

¹⁵ *United States v. Kaczynski*, 446 F. Supp. 2d 1146, 1154 (E.D. Cal. 2006) (emphasis added).

¹⁶ *Id.*

¹⁷ Brief of Appellant, *supra* note 15, at 17 (quoting *United States v. Richey*, 924 F.2d 857, 859 (9th Cir. 1991)). Here, he claimed that "the government [could not] satisfy its burden of showing a 'compelling' reason why [his] personal papers and other seized documents should not be returned on his behalf for dissemination for review and study by academic scholars, historians, journalists, students, and members of the public." *Id.* at 18.

¹⁸ *Kaczynski*, 446 F. Supp. 2d at 1154.

¹⁹ *Id.* at 1154 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293-94 n.5 (1984)). As noted by amici curiae, however, "'manuscripts . . . that exist only in few or single copies,' such as Kaczynski's handwritten manuscripts, 'are often crucially important for research and teaching; at the same time, there is little debate about their value as physical objects.'" Amici Curiae Brief, *supra* note 252, at 8 (citing Stephen G. Nichols & Abby Smith, Council on Library & Info. Res., *The Evidence in Hand: Report of the Task Force on the Artifact in Library Collections* 10 (2001), available at <http://www.clir.org/pubs/reports/publ03/publ03.pdf>).

1. The VWPA as a Content-Neutral Regulation and Why It Passes Muster

In *Simon & Schuster*, the Supreme Court found New York’s Son-of-Sam law to be a content-based regulation because it blatantly “single[d] out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content.”²⁰ Therefore, the Court applied the strict scrutiny standard in evaluating the validity of the law, and although it found that New York had compelling interests “in ensuring that victims of crime are compensated by those who harm them,”²¹ and “in ensuring that criminals do not profit from their crimes,”²² it was not persuaded that New York “should have any greater interest in compensating victims from the proceeds of . . . ‘storytelling’ than from any of the criminal’s other assets.”²³ Thus, the Court held the Son-of-Sam law, which it found to be “significantly overinclusive” and not narrowly tailored to achieve its compelling interests, to be “inconsistent with the First Amendment.”²⁴

The Court’s holding in *Simon & Schuster* suggests that “the [New York] statute might have fared better if it had looked to *all* forms of assets held by the offender.”²⁵ Thus, considering the aims and objectives of the VWPA—which were “to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process”²⁶ and to “bring restitution . . . to the fore”²⁷—and the fact that the VWPA empowers courts to levy “restitution order[s] [that are] enforceable as . . . lien[s] on *all* of a defendant’s property,”²⁸ it seems that the VWPA might fare better than New York’s Son-of-Sam law. Further, considering that the VWPA deals with restitution, and considering that “[r]estitution is concerned with preventing unjust enrichment” about which there is “nothing necessarily expressive,” it seems the VWPA would almost certainly be deemed content-neutral, and thus, an intermediate level of scrutiny would be used in evaluating its validity.²⁹

²⁰ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

²¹ *Id.* at 118.

²² *Id.* at 119.

²³ *Id.*

²⁴ *Id.* at 121, 123.

²⁵ Sean J. Kealy, *A Proposal for a New Massachusetts Notoriety-for-Profit Law: The Grandson of Sam*, 22 W. NEW ENG. L. REV. 1, 11 (2000) (emphasis added).

²⁶ 128 Cong. Rec. 23,392 (1982).

²⁷ Fletcher, *supra* note 38, at 505.

²⁸ *United States v. Kaczynski*, 416 F.3d 971, 974 (9th Cir. 2005) (emphasis added). While one might argue that the government’s power to seize *all* of a defendant’s assets may seem overly broad, given the purpose of the VWPA—to compensate victims—this wide-ranging power is likely necessary to prevent criminals from being able to hide assets in obscure locales or in odd and congressionally unforeseen places.

²⁹ Meske, *supra* note 27, at 1020.

As such, assuming that the VWPA is a content-neutral law, the framework laid out by the Court in *United States v. O'Brien* needs to be applied in order to determine whether it violates the First Amendment.³⁰ Thus, analyzing the first prong, it seems clear that the government has the power to enact and enforce a law that compensates victims of crime in hopes of making those victims whole again. Second, in *Simon & Schuster*, the Supreme Court found that both the interests “in ensuring that victims of crime are compensated by those who harm them,”³¹ and “in ensuring that criminals do not profit from their crimes”³² were compelling, and as the VWPA shares very similar goals, it certainly furthers these substantial state interests. Third, the interest furthered by the VWPA, “preventing unjust enrichment, is grounded in equity, and there is nothing that necessarily links it to a criminal’s expressive rights.”³³ Finally, considering that Kaczynski is one of the first individuals to even raise the claim that the VWPA violates the First Amendment, and further, that the district court has *twice* ruled that First Amendment rights were not implicated, it appears that the VWPA will rarely restrict First Amendment freedoms.³⁴ Thus, the VWPA satisfies all four elements of the *O'Brien* test, and therefore, appears to be a permissible content-neutral regulation.

2. Why the VWPA Is Not a Prior Restraint

Kaczynski also made the claim “that if the original writings are included in the auction, the First Amendment prohibits the government from redacting any information from the documents.”³⁵ As discussed above, this resembles a prior-restraint claim, and although the district court did not find this argument persuasive, a thorough analysis of the issue seems warranted. As such, for purposes of this analysis, it will be assumed

³⁰ See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *supra* Part III.B.2. This framework lays out the four-prong test used for evaluating the constitutionality of laws “that on [their] face deal[] with conduct having no connection with speech, but in application incidentally burden[] free expression.” Meske, *supra* note 27, at 1019 (internal footnote omitted).

³¹ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

³² *Id.* at 119.

³³ Meske, *supra* note 27, at 1020. This prong of the test once again highlights the unique nature of Kaczynski’s situation. That *expressive* writings are even involved is quite an oddity, as generally, the liens that the government gets against criminal defendants through VWPA restitution orders are usually attached to more tangible assets such as homes, cars, and bank accounts, none of which would implicate First Amendment rights. See generally Diane M. Allen, Annotation, *Restitutorial Sentencing Under Victim and Witness Protection Act § 5 (18 U.S.C.A. §§ 3579, 3580)*, 79 A.L.R. FED. 724 (1986) (discussing a number of more usual cases involving restitution orders).

³⁴ Moreover, as the Supreme Court noted in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), “[s]o long as the means chosen are not substantially broader than necessary to achieve the government’s interest . . . the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” *Id.* at 800.

³⁵ *United States v. Kaczynski*, 446 F. Supp. 2d 1146, 1154 (E.D. Cal. 2006).

that the threshold requirement of showing that First Amendment rights are implicated has been met. Nonetheless, for the vast majority of criminals, a prior-restraint argument against the VWPA's validity would be baseless because there are very few situations where a restitution order, or even the government's power to enforce such an order, will prevent or censor speech.³⁶

Therefore, if one adheres to a literal interpretation of the holding in *Alexander v. United States*, in which the Court stated, "The term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur,'"³⁷ then Kaczynski's claim that the government's plan to redact potentially significant portions of his writings constitutes a prior restraint does not seem entirely baseless.³⁸ For, while the district court found that "Kaczynski fails to explain how alterations of the original physical documents . . . impairs his ability to communicate his ideas,"³⁹ there are some who argue that the deletion of all "recognizable descriptions of the victims and their injuries"⁴⁰ does in fact impede the channels of communication between Kaczynski and others.

In support of this claim, amici curiae argued in their 2005 brief to the Ninth Circuit that the American people have an intense "interest in understanding Kaczynski's perspectives on the problems of his time and his reactions to social conditions—all the more so since his actions, which from his viewpoint were actions of social protest, took a form that the public needs urgently to be able to understand and counteract."⁴¹ Thus, if the district court's approval of the planned redactions is upheld,⁴² then Kaczynski

³⁶ See, e.g., Meske, *supra* note 27, at 1021 (stating that even in the case of criminals who have sold their stories, "[c]ourts' use of restitution to require disgorgement of criminal authors' profits does not constitute an unconstitutional prior restraint. A claim of prior restraint by a criminal author would be inappropriate in this context. No censorship could be involved.").

³⁷ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

³⁸ As noted in the district court's 2006 opinion,

[T]he government, on behalf of the Named Victims, requested that certain information be redacted from the writings prior to the auction, specifically, the names of "all victims, regardless of whether they filed a restitution claim or not," "the names of their families," all "recognizable descriptions of the victims and their injuries," and the names of "intended victims."

Kaczynski, 446 F. Supp. 2d at 1150. Thus, it is probable that significant portions of Kaczynski's writings—and for some historians and for others with a twisted curiosity, some of the most interesting portions of his writings—will likely be deleted.

³⁹ *Id.* at 1155.

⁴⁰ *Id.* at 1150.

⁴¹ Amici Curiae Brief, *supra* note 252, at 21. Amici curiae also noted that "[t]he Department of Homeland Security itself recognizes the critical importance of understanding the behavioral and social aspects of terrorism. It recently announced a \$12 million grant to finance an academic center to study the subject." *Id.* (citing Press Release, Department of Homeland Security Announces \$12 Million Funding for Social and Behavioral Scientists to Study Terrorism (July 6, 2004), *available at* http://www.dhs.gov/xnews/releases/press_release_0454.shtm).

⁴² The district court's ruling was based in large part on the Ninth Circuit's remand directive that any planned sale needs to serve the interests of the victims and should incorporate their "viewpoints and desires." *Kaczynski*, 446 F. Supp. 2d at 1155 (internal citation omitted).

and the public would seemingly have a legitimate claim that the government is *forbidding* this potentially valuable communication. Therefore, since the Supreme Court has stated that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,”⁴³ this would likely be the most meritorious of Kaczynski’s First Amendment claims and would also be the most powerful line of First Amendment attack on the VWPA’s constitutionality.

As discussed above in Part III.B.3, however, “[t]he Court has been reluctant to characterize government actions as prior restraints even when they seem to share many of the characteristics of what has traditionally fit under this rubric.”⁴⁴ Moreover, if the Court’s holding in *Alexander*, where “[t]he majority’s view was that the government may seize the assets of businesses convicted of violating [a federal statute], and it is irrelevant if those assets are in the form of books and videos that are protected by the First Amendment,”⁴⁵ is at all representative of how it would handle a claim like Kaczynski’s, then it seems likely that although more meritorious than other First Amendment claims, Kaczynski’s prior-restraint argument is destined to fail as well. For, as the amount of alleged censorship in Kaczynski’s case is relatively minor—and it is hard to imagine a scenario involving another defendant that would entail any more significant censorship of expression—it is unlikely that any court would find that the government’s planned actions constitute an impermissible prior restraint.

In sum, it appears that Kaczynski’s First Amendment challenges to the VWPA and the government’s power thereunder are bound to fail. Moreover, this would likely be the case were *any* criminal defendant to raise these challenges. The threshold requirement of needing to show that the First Amendment is even implicated proves to be a formidable, and perhaps even an insurmountable barrier as it pertains to criminal defendants’ challenges to the VWPA. Further, even if it is assumed that Kaczynski or another defendant could satisfy that initial requirement, the above analyses suggest that they would get no farther.

More broadly, the VWPA withstands constitutional challenge on First Amendment grounds. Thus, it appears to be a valid government action. Although the VWPA definitely passes muster as content-neutral law, it is a much closer call when it is challenged as a prior restraint. In the end, however, despite the claims of amici curiae and Kaczynski, due to the rather minimal amount of censorship that the VWPA *might* impose and the Supreme Court’s past precedent, it seems most probable that the VWPA withstands this challenge as well.

⁴³ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

⁴⁴ Chemerinsky, *supra* note 89, at 919.

⁴⁵ *Id.* at 920.

C. Kaczynski's Copyright Claims and Beyond

Although it appears highly unlikely that Kaczynski could prevail on First Amendment grounds, could he possibly achieve better results arguing that the government's proposed actions conflict with the Copyright Act?¹ Based on the exclusive rights given to authors by § 106 of the Copyright Act² and the additional protection from involuntary transfers bestowed by § 201(e), it seems plausible that Kaczynski could make at least three separate copyright claims.³ Thus, the likelihood of Kaczynski succeeding by arguing that the government's planned auction infringes his § 106 exclusive rights to make and distribute copies of his writings, and to create derivative works, as well as his § 201(e) right to not have his copyrights involuntarily transferred, will be analyzed in this section.

At the outset, it should again be noted that pursuant to the VWPA, an order of restitution is considered to be a lien in favor of the government on “*all* property and rights to property of the person” against whom the order of restitution was entered.⁴ Further, neither literary rights nor any type of intellectual property rights are listed as being exempt from having liens levied against them.⁵ Thus, the government would likely argue that the list of exempted property is exhaustive and this would consequently leave criminal defendants like Kaczynski without the ability to protect their literary or creative works from the government's lien-enforcing power granted by the VWPA. Considering, however, that the provisions fail to mention intellectual property at all, and considering that simply lumping creative works and literary works in with

¹ This question refers only to the government's proposed actions pertaining to Kaczynski's writings, and not to any other seized property.

² See 17 U.S.C. § 106 (2000).

³ Kaczynski has not, however, raised all of these arguments. See discussion *supra* Part IV.B. Thus far, he has raised only two (not fully developed) copyright arguments, those being: (1) that “regardless of whether the government may sell [his] original papers, the restitution lien does not take away [his] literary rights to his papers,” *United States v. Kaczynski*, 446 F. Supp. 2d 1146, 1154 n.13 (E.D. Cal. 2006); and (2) “that if the original writings are included in the auction . . . the government [is prohibited] from redacting any information from the documents.” *Id.* at 1154. Admittedly, Kaczynski did raise the second of these two issues as a First Amendment claim; however, an argument could be made that it could also be categorized as a copyright claim. Further, this Note does not suggest that these are the *only* copyright claims that might be made; rather, these are the ones that seem most likely to succeed.

⁴ 18 U.S.C. § 3613(c) (2000) (emphasis added).

⁵ See 26 U.S.C. § 6334 (2000).

other more pedestrian and tangible forms of property would seemingly depart from this country's two-hundred-year tradition of categorizing copyright as "a unique kind" of property,⁶ this apparent omission appears deserving of a closer examination.

Therefore, since it is such an unusual occurrence for the VWPA to be the challenged statute in a case where a criminal's expressive work is involved, Kaczynski's case and the unique set of facts presented therein will serve as the primary focus in analyzing whether the VWPA conflicts with the Copyright Act.

1. The Right to Make and Distribute Copies

In the 2006 district court case, Kaczynski argued that "regardless of whether the government may sell [his] original papers, the restitution lien does not take away [his] literary rights to his papers,"⁷ and though the word "copyright" was not stated, this is the copyright claim that would be most likely to succeed. Given that he is the author of the "handwritten . . . journals, diaries and drafts of his anti-technology manifesto,"⁸ Kaczynski would, according to § 106(1), have the exclusive right to make copies of those writings.⁹ Thus, while even he conceded that the government might have the right to sell the papers themselves, that does not mean that the government necessarily has the right to sell the intangible copyrights. As discussed by Gorman and Ginsburg, although tangible items like the papers in question here "may be in the possession of many persons other than the copyright owner, and they may use the work for their own enjoyment . . . copyright restrains [those persons] from reproducing the work without the owner's consent."¹⁰ Consequently, Kaczynski is on his firmest copyright footing with this argument, which would appear to allow him to prevent the government from selling the right to make and distribute copies of his works, or prevent the eventual buyer of the physical papers from doing so.

In reality, however, as the right to copy and distribute copies of his writings would likely be a valuable asset—as there are likely many people who would pay for the chance to read published versions of his writings in order to get a glimpse inside his head¹¹—the government, and probably the victims seeking restitution, would likely prevail by arguing that this less tangible form of property should be auctioned off as

⁶ Gorman & Ginsburg, *supra* note 128, at 13.

⁷ *Kaczynski*, 446 F. Supp. 2d at 1154 n.13 (citation omitted).

⁸ Kovaleski, *supra* note 1.

⁹ *See* 17 U.S.C. § 106(1) (2000).

¹⁰ Gorman & Ginsburg, *supra* note 128, at 13.

¹¹ *See, e.g., Serial Killers*, *supra* note 19 (quoting David Schmid who states that Americans "gobble up endless hours of cable programming and films featuring [serial killers'] lives and deeds, and read hundreds of best-selling books about one serial killer after another" in hopes of learning as much as possible about such killers).

well in order to raise money to pay off his restitution debt.¹² This, however, would appear to run into conflict with § 201(e)'s prohibition against involuntary transfers of such rights.¹³

2. The Right to Create Derivative Works

A second copyright claim that Kaczynski could bring would be that the government's plan to redact portions of his writings would produce "derivative" versions of his originals, and therefore infringe his exclusive right under § 106(2). Section 101 states that a derivative work is "a work based upon one or more preexisting works, such as a[n] . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."¹⁴ Therefore, the government's edited versions could be considered an abridgement or a condensation of Kaczynski's originals. Moreover, there is little doubt that the edited versions would be considered transformed, or adapted. To qualify as a derivative work, however, "the additional matter injected in a prior work, or the manner of rearranging or otherwise transforming a prior work, must constitute more than a minimal contribution."¹⁵ When one considers that the roughly *forty thousand* spelling, punctuation, and typographical changes made by the plaintiff in *Grove Press, Inc. v. Collectors Publication, Inc.*¹⁶ were found to be trivial, and thus not worthy of a derivative-work label, it seems unlikely that the blacking out of victims' names would earn such a title.

Further, when the precedent established by the Supreme Court in *Feist* is applied to the facts presented in Kaczynski's case, a derivative-works claim looks even weaker. For there, the Court reaffirmed that "[o]riginality is a constitutional requirement" in order to have a copyright in a work.¹⁷ Consequently, although the Court found that it was obvious that Feist copied the names, phone numbers, and locations of hundreds of individuals directly from Rural's white page listings,¹⁸ because the Court found that

¹² See, e.g., Andrew Murr, *A Battle For O.J.'s Book*, Newsweek, July 30, 2007, <http://www.newsweek.com/id/32843> (discussing, albeit in a civil proceeding, the battle over who should get O.J. Simpson's *valuable* book rights). A tangential issue that is worth noting, but which is beyond the scope of this Note, is that the Copyright Act contains a "fair use" exception, which provides a defense to a claim of copyright infringement. See 17 U.S.C. § 107. Therefore, while it is true that there would likely be many people who would be willing to buy the originals or copies of Kaczynski's writings, students, professors, and others in academia would potentially be able to rely on the fair use doctrine and make copies of his writings in furtherance of their "scholarship, or research" without violating the copyright laws. *Id.*

¹³ See discussion *infra* Part V.B.3.

¹⁴ 17 U.S.C. § 101.

¹⁵ 1 Nimmer & Nimmer, *supra* note 80, § 3.03(A).

¹⁶ *Grove Press, Inc. v. Collectors Publ'n, Inc.*, 264 F. Supp. 603, 605 (C.D. Cal. 1967).

¹⁷ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

¹⁸ *Id.* at 361.

Rural’s white pages lacked the requisite level of originality,¹⁹ the use of the listings by Feist was not found to be copyright infringement.²⁰

Thus, would the government’s planned edits of Kaczynski’s writings have sufficient originality to warrant the labeling of the “sanitized versions of the materials”²¹ as copyright-infringing derivative works? Such a claim does not seem entirely frivolous, and although Kaczynski and others might appropriately argue that the deletion of names and descriptions of victims’ injuries is more significant than the mere typographical and spelling changes found trivial in *Grove Press*, when one considers the explicit statement of the Court in *Feist* that facts are not copyrightable,²² it seems likely that names and descriptions of injuries would fall into the uncopyrightable factual category.

Additionally, if one considers Congress’s underlying motivation for enacting the Family Movie Act,²³ which created an exception to the copyright owner’s exclusive right to make derivative works²⁴ that allowed parents to protect their children from the perceived evils of seeing sex and violence on television, it would not seem unreasonable that the government could use its power under the VWPA to delete the names and discussions of specific victims and their injuries from Kaczynski’s writings in order to avoid inflicting additional pain and heartache on those individuals,²⁵ for it is plausible that similar motivations to those that led Congress to give parents the right to protect their children from unnecessary harm would also motivate Congress to give the government the power to protect victims of crime. Therefore, the proposed deletions and edits of such factual material seem likely to lack the requisite degree of originality. Thus, overall, it is unlikely that Kaczynski would prevail on a derivative-works claim.

3. The Prohibition Against Involuntary Transfers

Of all the copyright claims that Kaczynski could raise, the one that is the most intriguing, and the one that highlights most clearly the potential conflict between the VWPA and the Copyright Act, is the claim that the government’s proposed sale of his writings would cause an impermissible involuntary transfer of his copyrights in

¹⁹ *Id.* at 362.

²⁰ *Id.* at 364.

²¹ Kovaleski, *supra* note 1.

²² *See Feist*, 499 U.S. at 347.

²³ Family Movie Act of 2005, Pub. L. No. 109-9, §§ 201-02, 119 Stat. 118, 223 (2005) (amended portions of 17 U.S.C. § 110 (2000)).

²⁴ 17 U.S.C. § 110(11).

²⁵ *Compare* Gorman & Ginsburg, *supra* note 128, at 619 (discussing the policy rationales for enacting the Family Movie Act), *with* *United States v. Kaczynski*, 446 F. Supp. 2d 1146, 1150, 1152 (E.D. Cal. 2006) (describing the concerns Kaczynski’s victims had about the proposed Internet auction). Admittedly, the Family Movie Act does contain an explicit statement that “[n]othing . . . shall be construed [from its enactment] to imply further rights under section 106 . . . or to have any effect on defenses or limitations on rights granted” to copyright owners. 17 U.S.C. § 110.

those works.²⁶ Section 201(e) of the Copyright Act explicitly forbids the transfer of a copyright without the author's consent, and it is settled that this prohibition forbids "any governmental body or other official . . . to seize, expropriate, transfer, or exercise rights" assigned to an author by the Copyright Act.²⁷

Therefore, it would appear that Kaczynski has a legitimate argument that the government's proposed sale of his writings would lead to such an involuntary transfer. As noted previously, however, "a transfer of ownership of copyright may be effectuated by 'operation of law' . . . [although] such operation of law must be triggered by the express or implied consent of the author."²⁸ Consequently, if the government proceeds with the proposed sale of Kaczynski's writings, the question would be whether Kaczynski could be found to have consented to such an operation of law. The government most certainly would argue as much, and in light of the fact that "transfers of ownership pursuant to proceedings in bankruptcy and mortgage foreclosures" have been approved,²⁹ it would seem that a transfer made in order to pay off a restitution debt owed crime victims would also be found valid. Further damaging to such a claim for Kaczynski is the fact that he *voluntarily* agreed to a plea bargain, which contained a disgorgement provision.³⁰ Thus, given that individuals who file for bankruptcy are deemed to have provided the requisite consent, it would seem that Kaczynski's acceptance of the plea deal that spared his life would also be viewed as consent enough to allow a court to permit the transfer of his copyrights.

An additional factor that weighs against his § 201(e) claim is the fact that aside from his seized property, Kaczynski has no assets but does have an outstanding restitution debt of over \$15 million.³¹ Therefore, although there is no indication that he ever officially filed for bankruptcy, he is for all intents and purposes bankrupt. Thus, it seems that the transfer of ownership in his copyrights in order to pay off some of that restitution debt is very analogous to the approved "transfers of ownership pursuant to proceedings in bankruptcy and mortgage foreclosures."³² Finally, considering that he is now in his midsixties and is currently incarcerated in a federal prison,³³ it is highly

²⁶ See Clark, *supra* note 28, at 211-17 (arguing that Son-of-Sam laws are likely to be in conflict with § 201(e) of the Copyright Act).

²⁷ 17 U.S.C. § 201(e) (2000) (emphasis added). See also Clark, *supra* note 28, at 213-14.

²⁸ 3 Nimmer & Nimmer, *supra* note 80, § 10.04. Nimmer and Nimmer further explained that a "transfer[] of ownership pursuant to proceedings in bankruptcy and mortgage foreclosures, because in such cases the author, by his overt conduct in filing in bankruptcy, or hypothecating a copyright, has consented to such a transfer," would be considered valid and would not violate the Copyright Act. *Id.* (internal footnote omitted). See also Clark, *supra* note 28, at 214.

²⁹ 3 Nimmer & Nimmer, *supra* note 80, § 10.04. See also Clark, *supra* note 28, at 214.

³⁰ In pertinent part, this provision stated, "The defendant agrees that he shall disgorge monies paid . . . to him . . . in return for writings . . . or any other type of . . . memorabilia . . . for restitution or other distribution to the victims of the Unabomb events." *United States v. Kaczynski*, 306 F. Supp. 2d 952, 955 (E.D. Cal. 2004), *vacated*, 416 F.3d 971 (9th Cir. 2005).

³¹ *Id.* at 954 n.1.

³² 3 Nimmer & Nimmer, *supra* note 80, § 10.04. See also Clark, *supra* note 28, at 214.

³³ See Kovaleski, *supra* note 1.

unlikely that Kaczynski will ever be able to earn an amount of income that would allow him to pay off any significant portion of his restitution debt. Thus, courts will likely find that auctioning the property that the government currently possesses, including the copyrights in his literary works, is the only way that he can attempt to pay off his outstanding restitution debt. Moreover, while a § 201(e) argument would *appear* to give Kaczynski a legitimate chance of succeeding, due to the implications of Section 1498(b), such appearances are deceiving.

4. Section 1498(b) and Why It Wins Out

Regardless of the theoretical validity of any of the copyright infringement claims raised by Kaczynski or any other defendant, Section 1498(b) will render all such claims against the federal government effectively meaningless. This is because Section 1498(b) establishes that monetary damages are the exclusive remedy available to an individual suing the federal government for copyright infringement.³⁴ Therefore, even if Kaczynski could prove that the government's power under the VWPA infringed his copyright, he would not be able to prevent the government from selling his writings or otherwise enjoin the government's actions, as he has no right to injunctive relief.³⁵ Moreover, an award of monetary damages would be entirely worthless to Kaczynski because such income would undoubtedly have to be given to his victims as restitution. This would also likely be the outcome in any case where the defendant owed victims restitution. Thus, this would present a very convoluted situation which, in the end, would result in the government essentially paying copyright infringement damages to the victims who were the intended beneficiaries of the government's original infringing acts.

In sum, there is almost certainly no copyright claim that Kaczynski or any other criminal defendant could bring that would allow for the preservation of literary rights. Independent of the effect of Section 1498(b), the claim that the government or a buyer could not make or sell copies of Kaczynski's writings would likely fail because that right would likely be deemed a valuable asset, which the court would determine should be auctioned off in addition to the physical papers in order to raise money to pay off his restitution debt. Further, the derivative-works claim would fail because the government's proposed edits do not have sufficient originality to warrant the labeling of the edited versions as infringing derivative works. Finally, although the government's power under the VWPA appears to conflict with § 201(e)'s prohibition against involuntary transfers of copyrights, due to Kaczynski's voluntary acceptance of his plea deal and due to Section 1498(b)'s explicit prohibition against obtaining injunctive relief against the federal government, such an argument would likely fail as well. This illus-

³⁴ 28 U.S.C. § 1498(b) (2000).

³⁵ Therefore, Kaczynski would not be able to achieve his primary objective for suing the government in the first place, which was to secure the return of his writings so that he could donate them to the University of Michigan. *See* Brief of Appellant, *supra* note 15, at 4.

trates the underlying reality that although there does appear to be a potential conflict between § 201(e) and the government's power under the VWPA, due to the broad lien-enforcing powers that have been given to the federal government³⁶ and due to the operation of Section 1498(b), defendants like Kaczynski have no ability to prevent the government's actions.

³⁶ *See, e.g.*, 18 U.S.C. § 3613(c) (2000).

**VI. Victims Still Being Victimized:
the Policy and Moral Issues
Kaczynski's Case Raises**

Kaczynski's case highlights a number of unresolved questions that face the criminal justice system in this country. It not only illustrates the serious tension that still exists between the rights of defendants and victims, but also the tension that exists between the interests of different groups of victims. Moreover, this case affords Americans the chance to once again seriously consider the current state of American culture, how the country treats crime victims, and whether the VWPA system is the best option available.

A. Defendants’ Versus Victims’ Rights: the Balancing Act Continues

Perhaps most notably, Kaczynski’s case brings to the fore the question of how the rights of victims should be balanced against the constitutionally guaranteed rights of criminal defendants. This is a difficult question that does not appear to have an easy answer. For, as Kaczynski’s case evidences, while the aims of the VWPA—namely to ensure that victims of crime “receive at least the same considerations and protections which are currently extended to the accused”¹—are clear-cut in theory, they can be exceedingly hard to apply in practice.²

Further, how exactly did Congress expect to give victims the “*same* considerations and protections”³ as defendants? Whereas the rights of defendants were considered so fundamental so as to be enshrined in the U.S. Constitution,⁴ historically there existed no equivalent for victims.⁵ Therefore, there was little historical precedent or even legislative history upon which lawmakers could rely, making it unclear how equivalent considerations and protections for victims were to be established.

Even the legislative history behind the VWPA provides little guidance as to what specific “considerations and protections” Congress intended to provide victims. Comments from the Senate during the debate over the VWPA are particularly illustrative of this lack of precision. As Senator Heinz, one of the VWPA’s cosponsors, stated, “[The VWPA] will not take away the grief nor erase the memory of those already victimized by crime. But [it] would be a first step toward insuring more humane, respectful treatment of victims by a system that is supposed to help them.”⁶ Equally vague were the comments of another one of the VWPA’s supporters, Senator Mathias, who stated that

¹ 128 Cong. Rec. 26,809 (1982) (statement of Sen. Heinz).

² See, e.g., *supra* Part IV.B. The legal battle over what to do with Kaczynski’s seized property has raged since 2004 and it looks as though it will continue for some time to come. As noted previously, a ruling from the Ninth Circuit was needed to get the government to even propose a sale of the property. See *United States v. Kaczynski*, 416 F.3d 971, 971 (9th Cir. 2005). Moreover, Kaczynski’s victims still have not received *any* restitution awards. See *supra* note 229 and accompanying text.

³ 128 Cong. Rec. 26,809 (1982) (statement of Sen. Heinz) (emphasis added).

⁴ See, e.g., U.S. Const. amend. VI (right to assistance of counsel); U.S. Const. amend. VII (right to jury trial).

⁵ Slavin & Sorin, *supra* note 8, at 507.

⁶ 128 Cong. Rec. 23,395 (1982) (statement of Sen. Heinz).

“this legislation . . . will provide victims and witnesses with a wide range of protections generally unavailable to them now, and it does so in a manner fully consistent with the constitutional rights of criminal defendants.”⁷ Yet, as Mathias went on to discuss, this “wide range of protections” amounted to: (1) requiring that a “victim impact statement” be part of the file provided to the sentencing judge; (2) establishing that it is “a Federal offense to intimidate or retaliate against victims of Federal crimes”; (3) empowering federal judges to be able “to order restitution as part of the sentence”; (4) requiring that “guidelines for the fair treatment of crime victims and witnesses” be created by the Attorney General; (5) making the government liable civilly when an individual suffers a bodily injury at the hands of a “dangerous person” who was either released prematurely or escaped from federal custody due to the government’s gross negligence; and (6) mandating that the Attorney General “recommend legislation restricting the ability of a Federal felon to reap financial gain from the publication of his memoirs . . . or in any other way capitaliz[e] on the notoriety of his crime.”⁸ Thus, while the VWPA created some tangible victims’ rights, such as the right to make an impact statement and the right to receive restitution, there were few enumerated rights and much was delegated to other policymakers to develop later.

In 2004, twenty-two years after the VWPA was enacted, Congress passed the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act (“CVRA”),⁹ and this codified several rights that the victims of crime are now guaranteed in the U.S. criminal justice system. Although the CVRA significantly expanded upon the rights created by the VWPA and is a further step toward increasing the responsiveness and sensitivity to victims’ needs,¹⁰ it illustrates the shortcomings of victims’ rights in general. Whereas a criminal defendant *will* get

⁷ *Id.* at 23,397 (statement of Sen. Mathias).

⁸ *Id.*

⁹ 18 U.S.C. § 3771(a) (2000). This provides in pertinent part:

(a) Rights of crime victims.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.

Id.

¹⁰ See Slavin & Sorin, *supra* note 8, at 507 (discussing lack of sensitivity to needs of victims and witnesses).

and likely benefit from “the right to a speedy and public trial”¹¹ and “the right of trial by jury,”¹² and will “have the Assistance of Counsel for his defence,”¹³ among other guaranteed, tangible rights, even though victims are now guaranteed many rights under the CVRA, there is a much greater lack of certainty that they will benefit from them. How much good does the “right to be reasonably protected from the accused”¹⁴ do for the husband of a rape victim? How much good does “[t]he reasonable right to confer with the attorney for the Government in the case”¹⁵ do for the minor son of a man killed in a drive-by shooting? Further, as the Kaczynski case illustrates, how valuable is “[t]he right to full and timely restitution”¹⁶ when the defendant is destitute, as is often the case?¹⁷

Overall, it is true that all victims’ rights laws are going to face these types of problems. Such shortcomings are inherent when the goal of a law is essentially unattainable. For, while the VWPA and the CVRA are positive developments, they will rarely (if ever) be able to fulfill their underlying goal of attempting to make crime victims whole again.

¹¹ U.S. Const. amend. VI.

¹² U.S. Const. amend. VII (as long as the amount in controversy is more than twenty dollars).

¹³ U.S. CONST. amend. VI.

¹⁴ 18 U.S.C. § 3771(a)(1).

¹⁵ *Id.* § 3771(a)(5).

¹⁶ *Id.* § 3771(a)(6).

¹⁷ See Goldscheid, *supra* note 56, at 180 (stating that most commentators agree that “offenders frequently are unavailable or have inadequate resources” to pay restitution).

B. Is the Vwpa System Working?

Kaczynski's case also provides an interesting opportunity for the American public to reconsider and evaluate the way in which the criminal justice system treats and attempts to compensate victims. During congressional debate on the VWPA, one of the statute's lead sponsors stated, "I recognize that [the VWPA] is not the final answer to all the problems victims face after the crime. However, I, do see this legislation as the most important step the Federal Government can take to begin the process of rebalancing the scales of justice."¹ Has this been achieved? Twenty-five years later, have the appropriate additional steps been taken to serve the interests of the victims that the VWPA was enacted to protect?

Although the benefits provided by legislation like the VWPA and the CVRA, such as the victim's right to collect restitution, are valuable resources, there are many restrictions and barriers that often prevent individuals from being able to take advantage of such rights.² For instance, as discussed by Goldscheid, some programs restrict awards of restitution to victims who are "innocent," and also demand that victims "facilitate[] law enforcement prosecution efforts."³ Thus, this requires that victims not only report the incident to the police, but also requires them to cooperate with law enforcement officials throughout the investigation of the crime and during any subsequent prosecution.⁴ This can be a serious obstacle to overcome for victims who do not trust the police in general or who fear that the perpetrator of the crime will retaliate against them.⁵ Moreover, victims often have to take the additional proactive step of filing an application in order to receive compensation.⁶ Finally, as Goldscheid notes, these impediments fall especially hard on minorities, immigrants to this country, and victims of sexual and domestic violence, even though these are already the victims who often do not report crimes due to their fear, trauma, shock, and shame.⁷ Thus, while restitution programs are undoubtedly useful and valuable resources for crime victims, it is clear

¹ 128 Cong. Rec. 23,395 (1982) (statement of Sen. Heinz).

² Goldscheid, *supra* note 56, at 188-89.

³ *Id.* at 189.

⁴ *Id.*

⁵ *Id.* at 192.

⁶ *Id.* at 189. These types of requirements pose significant challenges because they often require victims "to take time off from their jobs to participate in the frequent calls of the criminal justice system." *Id.* at 193-94.

⁷ *Id.*

that reforms are needed in order to allow these programs “to more effectively fulfill their goals of helping victims recover from crime.”⁸

⁸ *Id.* at 194. For a detailed discussion of possible reform measures and the shortcomings of the current victim restitution system in general, see *id.* at 180-95.

C. Victim A Versus Victim B: Another Battle to Consider

Another important question raised by Kaczynski's case is how should the rights and interests of victims be balanced against those of *other victims*? For instance, how should courts and the criminal justice system balance the rights of victims who do not wish to be compensated financially for their losses against those who do want to receive restitution? Neither the VWPA nor the CVRA is able to clearly answer this question. In fact, the CVRA states that when "the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in [the CVRA], the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings."¹ Thus, this again shows the impermanent nature of a victim's rights. Courts are therefore instructed to decide on a case-by-case basis how to include a victim's rights in a trial—always making sure that doing so does not "unduly complicate or prolong the proceedings" for the defendant, the government, and all else involved.² This does not seem to live up to Congress's goal for the VWPA to ensure that victims "will receive at least the same considerations and protections which are currently extended to the accused."³

Additionally, the difference of opinion exhibited by Kaczynski's many victims illustrates the serious flaws inherent in the VWPA/CVRA system. Although the central purpose of the government's proposed auction of Kaczynski's property is to raise money for the victims of his bombings, not all of his victims support the idea of an auction.⁴ In fact, of his over twenty victims, only four, the Named Victims, have chosen to receive restitution.⁵ Moreover, all of the Named Victims "were initially reluctant to agree to the auction, fearing it could ghoulishly generate more notoriety for him and further publicize their pain."⁶ Some, however, "were equally horrified by the prospect of Mr. Kaczynski reclaiming his writings."⁷

¹ 18 U.S.C. § 3771(d)(2) (2000).

² *Id.*

³ 128 Cong. Rec. 26,809 (1982) (statement of Sen. Heinz).

⁴ See Kovaleski, *supra* note 1.

⁵ *United States v. Kaczynski*, 446 F. Supp. 2d 1146, 1148 n.1 (E.D. Cal. 2006).

⁶ Kovaleski, *supra* note 1.

⁷ *Id.* In the words of Gary Wright, who is one of the Named Victims, and who stated that it was very hard for the Named Victims to agree on how to respond to the government's auction plan, "How

Taking an entirely different stance is another one of Kaczynski's victims, David Gelernter.⁸ A computer science professor at Yale University, Gelernter is *not* seeking restitution from Kaczynski.⁹ Moreover, in a letter he sent to the district court, Gelernter stated that it was his hope that Kaczynski's "property will be destroyed, or (if need be) sealed for a century at least and then made available at no charge to scholars of depravity."¹⁰ Thus, just as Kaczynski and the government are divided over what should be done with his property, so too are the very individuals who are supposed to derive some benefit from that property.

How are courts supposed to balance these competing interests? For now, victims like Gelernter who explicitly chose not to apply for restitution and who would rather be left alone to deal with their pasts and not have their stories told time and time again in public still have to suffer through the stress, humiliation, and heartache of having Kaczynski's writings sold to the highest bidder. This presents serious difficulties which no current crime victims' legislation appears capable of adequately addressing.

do you take four people and try to come to an agreement when they have been wronged in different ways and are in different stages of healing with different types of losses?" *Id.*

⁸ *See id.*

⁹ *See id.*

¹⁰ *Id.*

D. Murderabilia and You: What Does This All Say About American Culture?

What does Kaczynski's case say about American culture in general? What does it say that a federal court has interpreted the VWPA to mean that the government *must* sell the personal items¹ and writings of a convicted serial killer via an Internet auction to an expectedly eager audience?² Additionally, while all agree that Kaczynski's writings would be the featured items if the government's proposed Internet sale takes place, there is something particularly disturbing about the prospect of some of Kaczynski's other personal items being sold.³ In theory, perhaps he used the "[p]liers/vise grip,"⁴ the "[w]elding mask,"⁵ or the "[s]even large drill bits"⁶ to fashion the mail bombs that injured or even killed his victims. Or perhaps it was the "[g]rinding wheels,"⁷ the "[m]etal files,"⁸ or the "[f]orging pliers"⁹ that were used to arm the devices he mailed to his victims. Yet, these have all been approved for sale with the understanding that there will be buyers ready to snap up all of these *collectibles*.¹⁰ Is this in the best interests of victims like David Gelernter? Is this truly going to "serve the needs of victims"¹¹ or is this merely going to serve the macabre interests of American consumer culture?

If an Internet auction of Kaczynski's property is the process that Congress and the federal courts believe best serves his victims' interests, would they feel the same way had Kaczynski's method of killing been different? What if instead of having used those

¹ See *United States v. Kaczynski*, 446 F. Supp. 2d 1146, 1148-55 (E.D. Cal. 2006).

² See *United States v. Kaczynski*, 416 F.3d 971, 976 (9th Cir. 2005). As Judge Hawkins of the Ninth Circuit noted, "Indeed, common sense suggests the property would be quite valuable to scholars, archivists, and, unsavory as that prospect might be, collectors." *Id.* See also *Usborne*, *supra* note 1 (stating that "at least five websites that hold homicide-related auctions" exist, and citing one "auction aficionado[']s]" estimates that Kaczynski's journals could be worth \$1000 each, and his hairbrush \$500).

³ See *Kaczynski*, 446 F. Supp. 2d at 1155-64 (detailing a list of all the items of Kaczynski's property that were seized by the government and will potentially be sold at auction).

⁴ *Id.* at 1155.

⁵ *Id.* at 1156.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See *United States v. Kaczynski*, 416 F.3d 971, 976 (9th Cir. 2005).

¹¹ *Fletcher*, *supra* note 38, at 522.

tools to make mail bombs Kaczynski had used them to stab his victims to death? Would Congress and the courts still believe that the VWPA required the sale of those items of murderabilia in order to serve the victims' interests? This seems unlikely. But where is the line drawn?¹² The VWPA/CVRA system does not answer this question, and it unfortunately leaves victims like Gelernter to be "repeatedly insulted and hurt" instead.¹³

Another issue worthy of some reflection is that early on in its legal battle with Kaczynski, the government argued that his property had "negligible value" and should be valued at its precelebrity valuation.¹⁴ Though the government based its argument on the idea that a criminal should not be allowed to profit from his crimes, such a stance—as the Ninth Circuit found—runs contrary to the restitution-providing purpose of the VWPA, as it ensures that the victims would not receive the higher postcelebrity value.¹⁵ This illuminates a rather perverse oddity that arises due to the implementation of victim-restitution statutes.

As Kaczynski's case illustrates, the victims of notorious or famous criminals *might* be—as sick as it sounds—in a better position in terms of the likelihood of actually receiving restitution than the victims of criminals who are not famous. For, while it is likely that the perpetrators of the crimes will be essentially destitute and unable to pay any restitution order from their own assets,¹⁶ it would appear that due to consumers' interest in murderabilia there is a chance that the sale of the property or story of a famous (or infamous) criminal could raise a significant amount of money, and thus, provide victims of such criminals with more in restitution.

¹² An additional hypothetical example (though one that admittedly suffers from complex jurisdictional and international law problems) which further illustrates the contradictions and complexities inherent in the selling of criminals' property in order to raise money for victims' restitution is as follows: what if it was the victims of the Holocaust being discussed, and thus, instead of the Unabomber's, it was the personal property of Nazi soldiers that was going to be sold at auction? As such, what if instead of Kaczynski's "[b]lue scarf," "[g]reen canvas U.S. Army backpack," and "tan duffel bag" that were seized by federal agents from his Montana cabin, *Kaczynski*, 446 F. Supp. 2d at 1156, we were talking about Nazi-issued scarves, backpacks, and duffel bags that were seized by U.S. military troops as they liberated concentration camps in Europe during World War II? Would we want the federal government auctioning off these items in an attempt to raise money for the Holocaust victims or their families? Would we think that such a government sanctioned—or even *mandated*—sale of Nazi murderabilia was the way to best serve the victims' interests? Almost certainly not; however, this is the situation with Kaczynski.

¹³ Zitter, *supra* note 30, at 362-72.

¹⁴ See *Kaczynski*, 416 F.3d at 974.

¹⁵ *Id.* at 975-77.

¹⁶ See Goldsheid, *supra* note 56, at 180 n.58.

E. Possible Solutions to the Remaining Problems

Given that suitable answers to the tough questions raised by cases like *Kaczynski*'s have thus far proven to be beyond the scope of Congress and the federal courts, it seems fair to say that there are no quick fixes or magic remedies. Solving these issues, however, is of the utmost importance if this country hopes to ever achieve the goal set forth by the VWPA of creating a criminal justice system that truly protects and respects the interests of crime victims. As reforms appear to be needed, perhaps inroads could be made by making changes to the VWPA itself.

For instance, a significant issue that emerged from *Kaczynski*'s legal battle is that although the government has broad discretion in how it may enforce a restitution order, “[s]imply sitting on an order of restitution is *not* a reasonable means of enforcing it.”¹ This rule, which seems logical and straightforward, should be added as an explicit limit on the government’s power under the VWPA.² Illustrating the need for such an amendment, in its battle with *Kaczynski*, the government failed to acknowledge such a limitation on its power for roughly two years, and it was only at oral argument before the Ninth Circuit in 2005 that the government first proposed doing *anything* with *Kaczynski*'s property.³ Such delays in processing seized property diminish the effectiveness of the VWPA as they force victims to wait longer for reimbursements, and they squander additional governmental resources by becoming the focal point of lengthy litigations.⁴

Another issue that *Kaczynski*'s case illuminates is the need for a dialogue to take place to discuss what rights this country believes individuals must give up when they are convicted of crimes. More specifically, a discussion should take place to answer the question of whether individuals who are convicted of crimes and who have restitution debts levied against them should be required to potentially forfeit their literary and free speech rights as part of their punishment. Such a conclusion is the one that this Note predicts will occur in *Kaczynski*'s case and it is the outcome that would likely befall any convicted criminal who faced a large restitution order and who did not have other significant assets. And yet, this severe potential quashing of constitutionally

¹ *Kaczynski*, 416 F.3d at 976 (emphasis added).

² See 18 U.S.C. § 3664(m)(1)(A)(ii) (2000). This would likely be the portion of the VWPA in need of amendment.

³ *Kaczynski*, 416 F.3d at 976.

⁴ See, e.g., *supra* Part IV.B.

protected rights takes place as a result of the operation of statutes that do not even mention this possibility or free speech rights, literary rights, or intellectual property.⁵ Thus, now that Kaczynski's case has unearthed these questions, the American people and Congress should take the time to consider them and answer them directly.⁶

⁵ See 18 U.S.C. § 3613(c); 26 U.S.C. § 6334 (2000).

⁶ Other specific reforms to the VWPA/CVRA system have been advocated by a number of groups, and this Note supports the recommended reforms discussed in *New Directions*, *supra* note 37, at 336-51.

VII. Conclusion

In the end, the current legal battle between Ted Kaczynski and the federal government is essentially being fought over what will become of a few reams of papers. As trivial as that may sound, this case has brought to light a number of important questions, the answers to which will affect many more than just the man better known as the Unabomber. And while this legal battle provides many more questions than answers, what does seem clear is that the government will prevail.

Further, it seems apparent that the VWPA withstands First Amendment challenges to its validity. Regardless of whether it is considered a content-neutral regulation or a form of prior restraint, the VWPA almost certainly does not run afoul of the free speech guarantees of the Constitution. Moreover, in Kaczynski's case, it is unlikely that the threshold requirement of showing that First Amendment rights are implicated is even met.

This case also provides the rare opportunity to analyze the interaction between the VWPA and federal copyright law. Despite the numerous challenges Kaczynski might make against the VWPA and the government's powers thereunder, he will not triumph. For, although the language of § 201(e) of the Copyright Act and its prohibition on involuntary transfers of copyrights would seem to control, that is not the case. Instead, the language of Section 1498(b),⁷ which limits individuals' remedies in copyright infringement suits against the federal government to monetary damages, and the wide-ranging lien-enforcing powers granted to the government under the VWPA⁸ will trump all of Kaczynski's copyright claims and will similarly prove fatal to the copyright claims of all defendants who, like Kaczynski, owe restitution to the victims of their crimes. This highlights the need for discussion regarding the question of whether convicted criminals who have restitution debts levied against them should be required to potentially forfeit their literary and free speech rights as part of their punishment.

Moreover, what makes Kaczynski's case so relevant is that in addition to all the constitutional and copyright questions it conjures up, it also highlights a number of unresolved issues that face the criminal justice system in this country. Serious questions remain as to how the rights of criminal defendants should be weighed against those of victims, and as to how the rights of some victims should be balanced against those of other victims. Despite the victims' rights movement's significant achievements, these issues have not been adequately resolved. Finally, Kaczynski's case should serve as an opportunity to renew discussions about how the criminal justice system can be improved to better serve the interests of victims, and as a chance for Americans to seriously evaluate the current state of American culture.

⁷ 28 U.S.C. § 1498(b) (2000).

⁸ See 18 U.S.C. § 3613(c).

A critique of his ideas & actions.



Michael B. Norman
The Unabomber Strikes Again
An Investigation Into Whether the Victim and Witness Protection Act of 1982
Violates the First Amendment or Conflicts With the Copyright Act of 1976
September 2008

southerncalifornialawreview.com. Volume 81, Number 6 of the Southern California
Law Review.

www.thetedkarchive.com