

Ted Kaczynski's Diary (Law Review Preview)

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Fall, 1997

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The Theodore Kaczynski case strikes close to home for me. Like the accused Unabomber, for the past 15 years I have kept a personal and intensely private diary — which, like Kaczynski, I have always called a “journal” or “memory book.” Also, like the accused Unabomber, I live a fairly reclusive life in a rural, relatively unpopulated region of the United States. And, like Kaczynski, I am no fan of technology; among other things, I’m constitutionally allergic to word processors, and I am hand writing this with a ballpoint pen, on lined, yellow legal pad pages, in my hammock, in my backyard, beneath a flawless, steel-blue Vermont sky.

And, as anyone familiar with my previously published writings will know, my lengthy professional experience as a capital postconviction public defender between 1983 and 1987 has made me an opponent of capital punishment as a *legal system*. As I attempted to explain in my ... book DEAD WRONG, I call my writing “passionate scholarship.” Also as set out in DEAD WRONG, in 1995 I decided that I could no longer in good conscience participate in the capital postconviction legal system. While writing DEAD WRONG and its successor, “CRAZY JOE” SPAZIANO, I remained acutely aware of Murray Kempton’s statement that “a man’s spirit can be marked most clearly in its passage from the reform to the revolutionary impulse at the moment he decides that his enemy will not write his history.

My final disclaimer concerns the nature of the crimes with which Theodore Kaczynski is *charged*: mail bombs that killed people. I emphasize the word *charged* because, as of this writing, that’s all it is — an indictment. The law presumes Mr. Kaczynski innocent. So do I.

Still, the Unabomber — as opposed to Theodore Kaczynski — case is one that causes me personal anguish. As a general matter, I am personally neither soft on crime nor criminals. In particular, I possess a special fear and loathing of people who send bombs through the U.S. mail. The reason this is so is no secret...In 1989 a man I loved as a father was murdered by just such a mail bomb.”*

*[“ A few days before Christmas, 1989, a racist coward with a grudge mailed a shoebox-sized bomb to federal appellate Judge Robert S. Vance. The bomb, which detonated in the kitchen of Judge Vance’s home on the outskirts of Birmingham, Alabama, killed him instantly...When I graduated from law school in 1982, my first job was as Judge Vance’s law clerk. Judge Vance, a genuine hero of the civil rights wars of 1960s Alabama, became much more than a boss to me; he was mentor, confidante, personal and professional role model. I would have taken a bullet for him...” *Capital Punishment Is A Curse Upon the Living*, Michael Mello, Rutland Daily Herald (November 5, 1997).]

In this essay we shall suggest that the contents of Theodore Kaczynski’s diary are entitled to absolute protection from governmental intrusion — regardless of how much probable cause the government possesses, and regardless of how many procedurally valid search warrants the government obtained. In other words, the Constitution marks out an inviolate zone of privacy into which the government may not intrude, regardless of the government’s compliance with the procedural requirements (i.e. they had both

probably cause and a search warrant). Given the present personnel on the United States Supreme Court, this inviolate zone of privacy has only one possible occupant: the private diary of a citizen-accused, in which the diary includes inculpatory information the government characterizes as “confessions” and wants to use against the citizen-accused’s capital trial in federal court. The jurisprudential basis for this inviolate zone of privacy is the 1886 case of *Boyd v. United States*.

The Kaczynski capital prosecution presents an issue of federal constitutional law as breathtakingly simple as it is jurisprudentially fundamental. Has the time come for *Boyd* to be overruled? Or, put another way: Is *Boyd* dead and, if so, ought the Supreme Court give this landmark case a decent burial? In the small pantheon of decisions in constitutional criminal procedure that can truly be called “landmark,” *Boyd* was the first and arguably the greatest — at least as foundationally important as *Miranda v. Arizona*, *Gideon v. Wainwright*, *Bram v. United States*, and *Palko v. Connecticut*.

For all the cultural chatter about “defining moments,” the Kaczynski prosecution genuinely is one. Declaring *Boyd* dead, in the context of a private diary in a capital prosecution in federal court, will be a judicial act of transcendent significance to all Americans — and not only to those of us who keep diaries...

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“*Boyd v. United States* [is] a case that will be remembered as long as civil liberty lives in the United States.”

Louis Brandeis (1928)

Between the creation of the Republic and its Bicentennial in 1976, the prevailing rule was that “the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony...In *Boyd*, the Supreme Court held that “any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime” violated the Fifth Amendment...

...The Boyds won because of the conjunction — the intimate relation,” as the *Boyd* Court put it — between the Fourth and Fifth Amendments: What the government was trying to do was use the Boyds’ words (their property, and therefore their *selves*) against them. The *Boyd* Court explained:

“We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the “unreasonable searches and seizures” condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man “in a criminal case to be a witness against himself,” which is condemned in the Fifth Amendment, throws light on the question as to what

is an “unreasonable search and seizure” within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms.”

...At the core of the *Boyd* Court’s graduated zones of privacy is the inviolate zone of privacy that decided the Boyd’s dispute and thus provides the holding of the case. Into this inner sanctum of citizen privacy the government may not intrude, ever. No matter how much probable cause. No matter how many warrants. This inviolate zone of privacy is protected by the “intimate relationship” between the Fourth and Fifth Amendments. The Boyd’s invoices fell within this zone. so would their diary. So, we believe, would Theodore Kaczynski’s diary...

[Quoting from *In re Grand Jury Proceedings*, 1980]

“...the policies underlying the Fifth Amendment proscription against compelled self-incrimination support protection of an accused from having to produce his private papers. One well recognized policy stems from “our respect for the inviolability of the human personality and of the right of each individual ‘to a private enclave where he may lead a private life’...” The Fifth Amendment ‘respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.’ The Fifth Amendment in its self-incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.

Nor are these expressions of allegiance to the concept that a man ought not to be compelled to produce his private papers for use against him in a criminal action without relevance to modern American society. Our society is premised on each person’s right to speak and think for himself, rather than having words and ideas imposed upon him. This fundamental premise should be fully protected. Committing one’s thoughts to paper frequently stimulates the development of an idea. Yet, persons who value privacy may well refrain from reducing thoughts to writing if their private papers can be used against them in criminal proceedings. This would erode the writing, thinking, speech tradition basic to our society.

But it is not the policies of privacy alone which underlie our refusal to permit an accused to be convicted by his private writings. We believe that the framers of the Bill of Rights, in declaring that no man should be a witness against himself in a criminal case, evinced ‘their judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling

contribution to his conviction, was more important than punishing the guilty...”

[end of quote from *In re Grand Jury Proceedings*, 1980]

...The Court has never expressly overruled *Boyd*. Nor, when confronted with a case that would leave the justices no avenue of escape — a case in which, for the Court to rule in the government’s favor it would have to overrule *Boyd* once and for all — do we believe the Court would or should do so.

Ted Kaczynski’s diary is that case. If any vestige remains of *Boyd*’s zone of inviolate privacy, then the sole occupant of that tiny zone is the diary of a citizen the federal government wants to use as the basis of sending him to death row...In case after case, the Supreme Court has narrowed and narrowed *Boyd*’s core zone of inviolate privacy. But the diary issue — the core of the core, so to speak — has never been before the Court...

[We now skip to the section of the article regarding the nature of diaries]

“Diary in Fact — Diary in Form”

Mary Chestnut’s book *A Diary From Dixie* is an extraordinary document — in its informal department, a masterpiece...”

Edmund Wilson (1972)

[The] Diary is more genuinely literary than most Civil War fiction.

C. Vann Woodward (1981)

What is a diary? why do people keep them?

To understand the continued viability of *Boyd*, the question of what counts as a diary becomes an issue of some doctrinal and jurisprudential importance. For Theodore Kaczynski — and for all of us who call our diaries “journals” or something other than the magic word “diary” — the issue is of profound significance.

Like many of us, Ted Kaczynski called his diary a “journal.” Does this label matter? And what is a diary anyway? We shall address the latter issue first.

The word “diary” descends from the Latin *diarium* meaning daily allowance. The word first appeared in 1581: “Thus most humbly I send unto yor good Lo this last weeks Diarye.” The word was first used in its modern sense, conveying the uniquely personal nature of diaries in 1791: “We converse with the absent by letters, and withourselves by diaries.”

In literature, the word denotes “a day-to-day record of the events in a person’s life, written for personal use and pleasure, with little or no thought of publication.” Diarists record to fashion their lives in letters, secretly, lest anyone know them quite. Nellie

Ptaschkina writes, “[My diary] is a record of my thoughts and feelings. It was the wish to write them down that gave me the idea of this diary...” Emily Carr: “Yesterday I went to town and bought this book to enter scraps in...to jot me down in, unvarnished me, old me.” A diary is her confessor and confessional. It alone receives her purgation, lest she betray herself or another.

The diaries St. Augustine and of Jean Jacques Rousseau are naturally entitled *Confessions*, and others, though not necessarily in title, have declared their entries their shrifts. Katherine Mansfield: “I should like this to be accepted as my confession.” Florida Scott-Maxwell: “[My diary] is more restful than conversation, and for me it has become a companion, more a confessional.”

Yet every confession is not truth. Like the people who write them, diaries are loaded with contradictions, equivocations, and even lies. Marie Bashkirtseff: “I find [my diary entries] full of vague aspirations toward some unknown goal. My evenings were spent in wild and despairing attempts to find some outlet for my powers.” Kathe Kollwitz: “Recently I began reading my old diaries...I became very depressed. The reason for that is probably that I wrote only when there were obstacles and halts to the flow of life, seldom when everything was smooth and even...I distinctly felt what a half-truth a diary presents.” Fyodor Dostoyevsky: “But there are other things which a man is afraid to tell even to himself, and every decent man has a number of such things stored away in his mind...A man’s true autobiography is almost an impossibility...man is bound to lie about himself.” George Bernard Shaw: “All autobiographies are lies. I do not mean unconscious, unintentional lies: I mean deliberate lies. No man is bad enough to tell the truth about himself during his lifetime...And no man is good enough to tell the truth to posterity in a document which he suppresses until there is nobody left alive to contradict him.”

Diaries record what alone out of her life the diarist keeps unto herself. Naturally then toward diaries is felt a companionship not extended to other objects or even persons. Anne Frank: “I hope I shall be able to confide in you completely, as I have never been able to do in anyone before, and I hope that you will be a great support and comfort to me.” And: “[To prepare to go into hiding] Margot and I began to pack some of our most vital belongings into a school satchel. The first thing I put in was this diary...memories mean more to me than dresses.”

Anne Frank’s decision to carry her diary into hiding also demonstrates the kernel of terror a diarist conceals which would explode should someone profane her secrecy. Emily Carr: “I used to write diaries when I was young but if I put anything down that was under the skin I was in terror that someone would read it and ridicule me, so I always burnt them up before long.”

The question why diarists write is entwined with the questions why writers write — and why anyone writes. Perhaps the existentialist poet Rainer Marie Rilke, in his *Letters to a Young Poet*, put it best: “Can you avow that you would die if you were forbidden to write? Above all, in the most silent hours of your night, ask yourself this:

Must I write?" That, we believe, in the end is why writers write and why diarists keep diaries. It is why Anne Frank kept her journal in the face of the Third Reich...

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Migrations to Solitude

[The issue is] how tightly the Fourth Amendment permits people to be driven back into the recesses of their lives by the risk of surveillance.

Anthony Amsterdam (1974)

"We Americans are the tell-all type," Shari Roan wrote recently in the *L.A. Times*. "No longer bound by the prudish mores of our ancestors, or even by the manners of our parents' generation, we talk and talk about the most intimate details of our lives." We confess on "Sally and Ricki or Oprah," and we "write autobiographies that make readers blush and publishers wealthy."

Not all of us. Not the authors of this essay. And not Ted Kaczynski.

Boyd, to the extent that it remains the law of the Constitution, must compel the rule that the intersecting commands of the Fourth and Fifth Amendments forbid the Government to seize a person's diary for use as an incriminating "confession." The Supreme Court's progressive dismemberment of *Boyd* has not yet killed *Boyd* completely or made this last inner sanctum totally unfit for *Boyd's* habitation. Whether the Court would finally put *Boyd* out of its misery or prolong this miserable remainder of it — if and when confronted with this issue — is anybody's guess. Certainly the question, properly preserved, is a potential candidate for certiorari.

Like *Boyd* itself, this essay has stressed the "intimate relation" between the Fourth and Fifth Amendments. We have also suggested that, in the case of a personal diary, there might as well be an intimate relation between the First, Fourth and Fifth Amendments. Finally, at the risk of allowing this essay to begin to resemble a constitutional grab-bag opinion written by Justice Douglas, we suggest one, final intimate relation: the Eighth Amendment's guarantee against cruel and unusual punishment.

Specifically, we believe that the doctrinal formulation of the Eighth Amendment's constitutional frame of reference resonates here. According to the United States Supreme Court, a government practice offends the Eighth Amendment if it offends the "evolving standards of decency that mark the progress of a maturing society." For our government to kill Ted Kaczynski on the basis of confessions in his diary would do exactly that, we believe.

On June 26, 1997, as we were completing a first draft of what became this essay, the United States Supreme Court issued its Magna Carta for free expression on the internet. The Court struck down, on First Amendment grounds, the Federal Communications Decency Act outlawing smut on the Information Superhighway leading into the Twenty-First Century. The Court's impassioned defense of First Amendment values of free expression was a fitting way in which to usher in the *fin de siecle*. The First Amendment thus would enter the next century with the most modern forms of technologically-enhanced communication intact.

By contrast, the Ted Kaczynski diary case harkens back to a *fin de siecle* different in the forms of free expression than today but not really so different in substance and no different at all in importance. When *Boyd* was decided in 1886, Americans who wanted to record their innermost fears and hopes and desires and fantasies and hatreds wrote them into diaries, touching pen to paper. The computer keyboard has, for many Americans, replaced the handwritten diary, as e-mail, fax machines and the Internet have replaced the U.S. mail for many, if not most Americans.

Many, but not all. Some of us — including the authors of this essay — still write in our diaries in longhand, in part because we fear and loathe the depersonalization that comes with computers, in part because the tactile dimensions are part of the fun in putting fountain pen to paper, and in part for reasons we can't explain and shouldn't have to.

But, regardless of whether the diary is created by Waterman ink or IBM LaserJet, the basic human impulse of an American citizen to record his or her most intimate thoughts — safe in the knowledge that their government cannot later use their private words as a basis for sending them to death row — is essentially the same. The technology doesn't matter. The mysterious need to *write* — for one's self or one's chosen intimates or for strangers, is what matters. It is something at the heart of what it means to be an American. This is no different today than it was in 1886...

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The Ted K Archive

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Fall, 1997

Vermont Law Review (Vol. 22:000,
1997).<www.web.archive.org/.../www.paranoia.com/unapack/legal/diaries.htm>
This is only an excerpt, the full essay can be found at this special collections archive:
<[www.archives.albany.edu/description/catalog/
apap287aspace_c4e63251e4127514e2a1e2f4c3d71170](http://www.archives.albany.edu/description/catalog/apap287aspace_c4e63251e4127514e2a1e2f4c3d71170)> or possibly by contacting
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