The Non-Trial of the Century

Representations of the Unabomber

Michael Mello

Fall 1997

Contents

Introduction: "Cold As a Lizard and ambitious as Lucifer"

> *Where shall we expect the approach of danger? Shall some trans-Atlantic giant step the earth and crush us at a blow? Never. All the armies of Europe and Asia could not, by force, take a drink from the Ohio River, or make a track on the Blue Ridge, in the trial of a thousand years. If destruction be our lot, we ourselves must be its author and finisher. As a nation of free men, we will live forever— or die by suicide.*
>
> Abraham Lincoln, 1837

A. "The Unabomber's Pen Pal"[1]

I want to thank Steven Keel, and the folks with the Daniel Webster Legal Society and the McSpadden Public Issues Forum, for inviting me to speak this evening. Thanks as well to the Thurlow Gordon family for creating and endowing this lecture series, in which I am honored to participate. And I want to thank all of you for showing up. Following my remarks, there will be time for questions and, I hope, answers. And feel free to ask questions as I go along. I think this would work better if it were interactive, but, as I have no seating chart, I'm afraid I can't call on folks.

Ten winters ago, a man I loved as a father was murdered by a mail bomb: A few days before Christmas 1989, a racist coward with a grudge against the federal judiciary mailed a shoe-box-sized bomb to federal appellate judge Robert S. Vance. The bomb detonated in the kitchen of Judge Vance's home on the outskirts of Birmingham, Alabama. His assassin now lives on Alabama's death row, and although I have spent a large portion of my life as a lawyer defending death row prisoners, when Judge Vance's killer is executed, part of me will cheer.

Judge Vance is the only person I loved who was murdered. I worked as Judge Vance's law clerk for the year following my graduation from law school in 1982. He was far more than a boss, however; In the years following my clerkship I came to rely upon his wisdom, guidance, and experience. By the time of his death he had become my friend and my father in the law. I was too distraught by his killing to attend the funeral. I bought the plane tickets, but I couldn't force myself to use them. I mourn him every day. I miss him every day. I pray for him every night.

I mention Judge Vance's murder because I want to be clear that I harbor a special venom in my heart for people who kill by sending bombs through the U.S. mails. That's what the Unabomber did. For nearly two decades, the Unabomber set, and mailed, increasingly deadly bombs. Judge Vance, and the mailbomb that murdered him, are never far from my mind whenever I think or write about the Kaczynski

[1] I was dubbed "The Unabomber's Pen Pal" by *The National Law Journal's* Marcia Coyle.

case. Every aspect of my thinking about the Unabomber case was influenced, in some immeasurable way, by the fact and the means of Judge Vance's murder.

Some reporters and reviewers of my book about the Unabomber case have suggested that I am Theodore Kaczynski's friend—that I chose to write about his case because I like him. Let me set the record straight. My *only* sympathy for Kaczynski is as a capital defendant who was denied his day in court. Indeed, my book isn't a polemic on why Kaczynski's constitutional rights were violated. In my book, I'm not making an argument; I'm telling a story. And I make clear in my book that I believe the protagonist—Theodore Kaczynski—is a murderer who committed crimes of unspeakable brutality. And, because of how my judge was killed, the Unabomber's crimes hit very close to home for me.

I want to be clear at the outset that my opinion is that Theodore Kaczynski is guilty.[2] Based solely upon the public record in the case—and not upon anything Kaczynski has said to me in our private correspondence—I believe Kaczynski is the Unabomber. He killed those three people. He injured those twenty-three others. He tried to bring that airliner down. Theodore Kaczynski did all those things.

Early on in my extensive correspondence with Kaczynski—which I'll get to in a moment—I put the questions of guilt or innocence for the bombings off limits. So I never asked—and I requested that Kaczynski not tell me—whether he was guilty. I did this, in part, because his guilt or innocence was not germane to my book. I told him that, based on the public record, I would say in the book that I believed he was guilty. Except for a *proforma* objection, Kaczynski never tried to persuade me that he wasn't the Unabomber, although one writer, Robert Graysmith, argues that Kaczynski did not commit two bombings attributed to the Unabomber.[3]

Actually, my don't-ask-don't-tell-don't-pursue approach to Kaczynski's guilt was motivated by a desire to protect Kaczynski; Our communications were not protected by privilege, and I didn't want any Kaczynski inculpatory statements to me to be discoverable later on by the prosecution. I've been a capital defense lawyer for a hell of a lot longer than I've been an author, or whatever it is that I am right now, and to ask Kaczynski whether he was guilty went against every defense-lawyer instinct in my body.

The public record suggests that, had Kaczynski gone to trial for the Unabomb attacks, he almost certainly would have been found guilty. The prosecution's case against him—a case built largely on the Unabomber's own words in his own writings—was by most accounts overwhelming. However, there was no trial. After weeks of increasingly bitter struggle with his lawyers over control of the defense, Kaczynski pleaded guilty.

---

[2] Kaczynski asked me to include in my book a statement that lie objects to my belief that he is the Unabomber, and I did so. And, for whatever it might be worth, I include Kaczynski's objection here ;ts well.

[3] *See generally* ROBERT GREYSMITH, UNABOMBER: A DESIRE TO KILL (Berkeley Pub. Group 1998).

The plea was attractive to the prosecutors because the judge had already committed so much reversible error that any murder conviction and any death sentence would have been reversed on appeal. Thus, a lengthy and expensive trial would have been for naught and the prosecutors would be back where they were at the time Kaczynski pled guilty. Also, the Janet Reno Justice Department was taking a lot of heat—from the *New York Times,* among others—to resolve the Kaczynski case by guilty plea. And all trials are risky; a jury *could* have acquitted Kaczynski, or at least there could have been a hung jury, also requiring a retrial. Under the terms of the guilty plea, the prosecutors would know for certain that the Unabomber would never again breathe free air—-that he would spend the rest of his natural life in a maximum-security federal prison.

During the process of pleading guilty, Kaczynski acknowledged that he was the Unabomber responsible for a series of bombings between 1978 and 1995 throughout the United States. He was called the "Unabomber" because the first bombs targeted universities and airlines. The Unabomber sent or set a total of sixteen bombs that killed three people and injured twenty-three others in his alleged seventeen-year career. After the anonymous attacker's 35,000-word manifesto on the ills of modern industrialization and technology was published in June 1995 by the *Washington Post* and *New York Times*,[4] Kaczynski's younger brother David began to suspect him and eventually turned him in to the police. The brother's divided soul—David Kaczynski, after turning Theodore in, fought to save his brother from a death sentence— is a variation of a story as old as Cain and Abel.

In their sentencing memorandum, the prosecutors in the Unabomb case described the swath of death and destruction Kaczynski cut across the American landscape. This document, which is available on the Internet at the *Sacramento Bee* web site, should be required reading for anyone who might be inclined to minimize the harm caused by the bombing campaign, or to romanticize or glorify the bomber himself. I want to read from a portion of the prosecution's sentencing memo:

> *Gilbert Murray*
>
> Gilbert Murray was a Marine Corps veteran of the Vietnam War and a graduate of the University of California, Berkeley. A lifelong forester, he was the president of the California Forestry Association when, on April 24, 1995, he was killed at age 46 by a package bomb sent to his office by Kaczynski. The bomb so badly destroyed Gil Murray's body, that his family was allowed only to see and touch his feet and legs, below the knees, as a final farewell.
>
> Gilbert Murray left behind a wife, two sons, a family who loved him, and many friends, colleagues, and co-workers. His wife, Connie, was introduced

[4] *See generally* Robert D. McFadden. *Mail Bomber Links an End to Killings to His Manifesto.* N.Y. Times, June 30. 1995, at A) ("[A] serial mail bomber has delivered to the New York Tinies and The Washington Post a 35,000 word mani testo catling tor revolution against what he says is a corrupt industrial society.")

to Gil by her best friend, Jan Tuck, Gil's sister, when she was 16 years old. Connie and Gil began dating a few months after they met. The following year, Gil enlisted in the Marine Corps, and the two were married when Gil returned from his tour of duty in Vietnam, According to his wife, Connie, Gil "was in love with this Earth" and felt that he had been entrusted with a small patch of it to safeguard and protect. He was known as a voice of calm and reason in a highly contentious field and a man who worked hard to build bridges between differing camps. Above all, he was a dedicated father and husband, a man who "treasured" his family.

Together Connie and Gil raised two sons, Wil and Gib. Wil was 18 at the time of Gil's murder; Gib was just two weeks past his 16th birthday. Gil was always active in his sons'lives. Hetaught them to ski at an earlier age, watched and coached them in athletic leagues, and when they were in High School, went to their basketball, baseball and football games, even re-scheduling meetings to attend. At Gil's funeral, Wil told the congregation that his father was "the greatest man I ever met. He loved my mom, my brother and me more than life itself. He was always there for us. We always came first." For Connie Murray, her deepest regret comes from the realization that each of her sons will never know their father on an equal footing, as one adult to another.

Shortly before Gil Murray's death, his son Wil had been accepted to Cornell University where he had been recruited for the football team. There was much discussion in the family over whether they could afford to send their son to an Ivy League school which did not offer athletic scholarships. On the Sunday before Gil died, the Murray family met and decided that they would find a way to finance the education. One of the last images that Connie had of her husband was his throwing out all the catalogues for other schools that had accepted Wil. Gil was murdered the next day. Left without the family's provider, and emotionally unable to be far away from home at such a difficult time, Wil could not attend Cornell.

Thomas Mosser

Thomas Mosser was a Navy Veteran of the Vietnam war and worked for the public relations firm of Burson-Marsteller, for 25 years. He had recently been promoted to general manager of the parent company, Young and Rubicam, Inc., and had been away on a business trip. On December 9, 1994, he returned home to his family in New Jersey. Earlier that day, the postman delivered the package that had been mailed to him by Kaczynski. Thomas Mosser's wife, Susan, brought the package inside the house and placed it on a table by the front door. The package lay unopened overnight

in the Mosser home only a few feet from where Thomas' daughters played with their friends.

The following day, December 10, was meant to be a special day for the Mosser household. It was the unofficial commencement of the holiday season, a time when Thomas devoted all of his time to his family, and the day when the family had planned to go out together to buy a Christmas tree. That morning, Thomas took the mail that had accumulated during his trip, including the package sent to him by Kaczynski, into the kitchen to open. His wife and 15-month-old daughter, Kelly, joined him, while another daughter, Kim, slept in her room nearby. Seconds before Thomas opened the package, Kelly scurried out of the kitchen and Susan followed her. Thomas opened the package; the ensuing blast drove shrapnel into his body, leaving a gaping hole in his head, opening up his body, and piercing his organs with nails. He died at age 50, on the floor of his own home, his wife at his side trying in vain to aid and comfort him.

Thomas Mosser left behind a wife, a son, three daughters, a family that loved him, and many friends, colleagues, and coworkers. The Christmas season is always a painful reminder of their loss. Last year, Kelly, who had only been 15 months old when her father was murdered, returned from Sunday school with a question for her mother. "Is God coming back from heaven?" she asked. When told God would indeed return, Kelly asked, "Could he bring Daddy back with him?"

Hugh Scrutton

Hugh Scrutton was a native of Sacramento and a graduate of the University of California, Davis. He had traveled the world, devoted time to art, literature, and gardening, and at age 38 was running his own computer rental business in Sacramento. Around noontime on December 11, 1985, he stepped out of his business and walked into the parking lot behind his store. There he stopped to try and pick up what looked like a wooden plank with nails protruding from it laying on the ground. In reality, the object was a bomb that Kaczynski had disguised and planted outside his store. Hugh Scrutton's simple act of courtesy, trying to remove what looked like a potential hazard to others, cost him his life. Kaczynski had rigged the concealed bomb to detonate when it was moved, and when Hugh started to lift the wood, the bomb exploded severing his right hand and driving shrapnel deep into his heart. He died at age 38, in the parking lot of the business he had only recently started, with a co-worker and a caring passerby trying desperately to save him.

Friends recall Hugh as a man who embraced life, a gentle man with a sense of humor who had traveled around the world, climbed mountains, and stud-

ied languages. He cared about politics, was "fair and kind" in business, and was remembered as "straight forward, honest, and sincere." He left behind his mother, sister, family members, a girlfriend who loved him dearly, and a circle of friends and colleagues who respected and cared for him.

The survivors

Other individuals narrowly survived Kaczynski's attacks. Charles Epstein, a professor of pediatrics and a renowned researcher in prenatal disorders, was maimed and injured when, in the quiet of his family home, he opened the carefully disguised package bomb that Kaczynski had mailed to him. A husband and father, accomplished musician, as well as a physician who has dedicated his life to healing others, Dr. Epstein suffered permanent injuries to his hand, arm, face, and hearing. Dr. Epstein underwent weeks of emergency and reconstructive surgery, as well as medical treatment that continues to this day.

David Gelernter, a professor of computer science, was maimed and injured in his office at Yale University, when he too opened a package bomb sent to him by Kaczynski. Dr. Gelernter narrowly escaped death with the explosion, surviving only because he managed to stagger down five flights of steps and across a street to a nearby medical clinic where he was rushed to the trauma unit of a local hospital. A husband and father, as well as a noted teacher and writer, Dr. Gelernter suffered permanent injuries to his hand, arm, body, and sight. Dr. Gelernter underwent weeks of emergency and reconstructive surgery, as well as medical treatment that continues to this day.

Numerous other individuals were injured by Kaczynski's bombs. Gary Wright was injured by the bomb Kaczynski planted in the parking lot of a Salt Lake City computer store. He suffered lacerations and puncture wounds to his face, hands, arms, shoulder, and legs, and underwent surgery to remove shrapnel. Nicklaus Suino, an assistant to Professor James McConnell at the University of Michigan, was hospitalized when he opened the package bomb Kaczynski mailed to McConnell. John Hauser, then an Air Force Captain and graduate student at U.C. Berkeley, was seriously wounded by a bomb Kaczynski planted in a university computer room. John Hauser suffered permanent injuries, ending his career as an Air Force pilot and his dream of becoming an astronaut, and underwent weeks of surgery to repair the damage from the blast. Diogenes Angelakos, who died last year from cancer, was a distinguished Professor at U.C. Berkeley when he was injured by a bomb Kaczynski planted in a break room on the U.C. Berkeley campus. He was hospitalized and underwent surgery, suffering permanent injuries to his hand. Janet Smith was injured

> when she opened a package bomb Kaczynski mailed to the professor she worked for. She was hospitalized and underwent surgery for her injuries. Percy Wood was the President of United Airlines when he was injured in his family home by a book bomb Kaczynski mailed to him. He was hospitalized and underwent surgery for injuries to his hand, legs, and face. Eighteen passengers and crew members were treated for smoke inhalation when the flight of their passenger airliner was aborted by a fire started by one of Kaczynski's bombs in the cargo compartment. John G. Harris was a student at Northwestern University when he was injured by a disguised bomb placed in a university work room by Kaczynski. Officer Terry Marker was injured while examining the contents of a concealed bomb Kaczynski had left in a University campus parking lot.
>
> Many people were placed directly in harm's way by Kaczynski's bombs. Only chance prevented the death and injury of many of the victims' family members and co-workers, such as the wife and daughters of Thomas Mosser and Gilbert Murray's colleagues at the California Forestry Association. Many of Kaczynski's bombs were left in heavily trafficked areas—the parking lot behind Hugh Scrutton's store, the student workrooms at Berkeley and Northwestern—and easily could have killed or injured many others.
>
> The harm Kaczynski brought about is not limited to the physical injuries he inflicted. By his actions, Kaczynski forced family members and co-workers to witness the slaying or wounding of loved ones, friends, and colleagues. In addition, while hiding behind an alias, Kaczynski intimidated individuals and the public with letters, threatening two noted scholars for pursuing academic research, taunting one of the men he had maimed, bringing the nation's air traffic to a standstill on a holiday weekend by a threat to bring down a jetliner, and coercing newspapers into publishing his turgid theories on society's shortcomings. His acts of terrorism deprived countless individuals of their sense of security in their homes, workplaces, and communities.[5]

And for what? For what did Gilbert Murray, Hugh Scrutten, and Thomas Mosser die? The Unabomber's manifesto tells us why: They were killed to draw attention to the Unabomber's neo-Luddite, anti-technology, pro-environmental politics. They died so Theodore Kaczynski could extort newspapers into publishing his 35,000-word screed. Well, it didn't really work. Few people read, and fewer people remember, the ideas set out in the manifesto.

In other words, they died for nothing. Karin Sheldon and any one of the teachers in the Environmental Law Center at Vermont Law School have had more influence on

[5] Government's Sentencing Memorandum. United Slates v. Kaczynski, C.R. No. S-96-0259 GEB (E D. Cal. May 4. 1998). *available at* <www.courttv.com>.

saving the environment than Theodore Kaczynski's bombs and manifesto. One person did read Kaczynski's manifesto: Ted's brother, David. He read it and, in an act of consummate courage, turned his brother in to the FBI. Had David not turned in his brother, I believe the bombings, killings, and maimings would have continued.

The media presence at the Unabomber's non-trial was massive. Seventy-five news organizations set up a center dubbed "Club Ted" near the Sacramento courthouse where the trial was to have been held. Media tickets to the courtroom went for $5,000 a pop.

The mainstream media, despite its saturation and generally excellent daily coverage of Kaczynski interaction with the criminal justice system, largely bought into Kaczynski's lawyers' spin on the epic struggle between Kaczynski and his lawyers over control of the defense. In particular, the daily press—which did not have access at the time to the court records upon which I rely—accepted (I) that Kaczynski was in fact a paranoid schizophrenic; (2) that his lawyers acted properly in raising a mental illness defense regardless of their client's vehement objections; and (3) that Kaczynski himself, not his lawyers, should be held responsible for the disruption of his trial. The chaos into which Kaczynski's trial plunged was blamed on the defendant's alleged manipulation of the judicial process, rather than on his lawyers' ultimately successful manipulation and control of their client.

I believe this popular wisdom is wrong on all counts. First, I do not believe that Theodore Kaczynski was a paranoid schizophrenic. More precisely, I do not believe the existing public record supports a conclusion that Kaczynski was suffering from any serious or organic mental illness, much less that he was so mentally ill that his lawyers' hostile takeover of the Unabomber defense was justified. The daily press largely bought into the portrait of Theodore Kaczynski as a paranoid schizophrenic whose profound mental illness prevented him from seeing that a mental illness defense was his only real defense. I am not criticizing the daily press; The reporters did the best job possible with the scanty facts available to them. However, because I have access to transcripts of the closed-door meetings between Kaczynski, his lawyers, and the judge, I am able to present a fuller picture of the Unabomber and his lawyers. That picture convinces me that Theodore Kaczynski was unquestionably competent to stand trial and, therefore, was competent to make important decisions about his case. I believe that Kaczynski understood exactly what he was giving up in foregoing a mental health defense. And for him it was worth it, even though it virtually guaranteed a death sentence—which also was acceptable to him.

Second, I do not believe that Kaczynski's lawyers had any legitimate right to force their mentally competent client to stake his life on a mental illness defense. So long as he followed their instructions, the Unabomber's attorneys never doubted that lie was mentally competent to stand trial. The fact that Kaczynski was mentally competent to stand trial meant that Kaczynski was competent—and constitutionally entitled—to make important decisions about his defense: how to plea, whether to testify, whether to appeal, and whether to raise a mental illness defense. Given Kaczynski's decision months before trial that a mental illness defense was unacceptable to him, his lawyers

were ethically obligated to either (a) honor their competent client's wishes, or (b) withdraw as Kaczynski's attorneys in time for another defense lawyer—one willing to follow his client's instructions—to take over the Unabomber's defense, and to do it at a time that gave the new lawyer time to prepare for trial.

Third, I believe that Kaczynski's lawyers, not Kaczynski himself, were responsible for disrupting the trial.[6] In the months leading up to the trial, Kaczynski's lawyers kept him uninformed about the defense they planned to raise. By the time Kaczynski figured out what his lawyers had planned, it was too late for him to change lawyers or, the judge ruled, to represent himself. Cornered by his lawyers and the judge, Kaczynski had only two ways to prevent his court-appointed lawyers from portraying him as a madman: to kill himself or to plead guilty. On the eve of his capital trial, Theodore Kaczynski made a suicide attempt. Then, failing suicide, Kaczynski was left with only one way to prevent his lawyers from portraying him as mentally ill. He pled guilty.

I want to emphasize that I am not taking Kaczynski's word on any of this. My analysis—tonight and in my book—of the Unabomber's non-trial are based on court records and documents, some of which were provided to me by Kaczynski, but most of which I obtained independently of him. While I occasionally mention things Kaczynski wrote to me, these are in the nature of asides; My analysis and conclusions do not depend on taking Kaczynski at his word. Indeed, I deleted Kaczynski's letters from my book because I did not trust him as an information source.

What happened between the Unabomber and his lawyers raises foundational issues of law, ethics, and public policy. I believe that legal scholars are obligated to write about such important issues, even when such research takes them to places that make them uneasy. For reasons set out elsewhere, I have reached a point in my life where I do my own thinking and writing without regard to party lines articulated and enforced by self-appointed guardians of the One True Faith of Capital Punishment Opposition. I was exiled from the abolition movement for my last book. *Dead Wrong: A Death Row Lawyer Speaks Out Against Capital Punishment*[7] and my Unabomber book will not endear me to the head of that church's congregation or to its Articles of Faith. So be it.

Nietzsche once wrote that the best thing that ever happened to his intellectual development was when he was fired from his university faculty position; no longer did he need to be concerned with the internal doctrinal disputes of the elect, but was liberated to blaze his own trails. Likewise, my excommunication from the community of death workers has been liberating. I will continue to write where the research takes me, even when, as here, it takes me into territory I might rather avoid.

---

[6] In my book. I trace in some detail the chronology ot'events leading to the meltdown of the Unabomber defense team. See *generally* Michael Mello, The United States Versus THEODORE John Kaczynski: Ethics, Power and the Invention of the Unabomber (Context Books 1999).

[7] Michael Mello, Dead Wrong: A Death Row Lawyer Speaks Out Against Capital Punishment (Univ, of Wisconsin. Pr. 1998).

I certainly detest the Unabomber's crimes. I don't share the Unabomber's willingness to use violence or the view that technology's problems require such a drastic and lethal response. I do feel strongly about something that most other Americans do not worry about too much—capital punishment. I can identify with a "voice in the wilderness" more easily than I can identify with the content of the cry, or its specific call to action. I also like and respect Kaczynski's public defenders tremendously. I have much in common with them. As an opponent of capital punishment, I'm squeamish about setting out a factual argument that could invalidate Kaczynski's guilty plea and expose him again to capital punishment. Yet none of these reasons have struck me as persuasive grounds not to write about the Unabomber trial. William Finnegan, writing in *The New Yorker,* was dead right that "Kaczynski's quietly fierce performance [at his trial] raised fundamental questions about a defendant's right to participate in his own defense, the role of psychiatry in the courts, and the pathologizing of radical dissent in the courts and the press,"[8]

Ultimately, I wrote the book because it addresses important issues of law, ethics, and psychiatry, and because I saw no intellectually legitimate reason *not* to write it. But maybe this last is a cop-out. The fact is, I have a deep ambivalence about the Unabomber case. The issues of law, ethics, and public policy raised by the Unabomber case are important to me—and, they are important to me for the very same reasons I feel ambivalent about the Unabomber, The issues that concern me are discussed in the Unabomber manifesto, with its arguments about the problems associated with paternalism and modern modes of socialization.

I would prefer to be speaking and writing about nearly any other case. I'd rather write about Ted Bundy again. The courts, the media, and the public have closed the book on the Unabomber case. I should do the same.

But it's not that simple, not for me anyway. Our government wanted to execute Theodore Kaczynski. I oppose capital punishment with a ferocity that matches Kaczynski's hatred of technology. Over a period of four years in the mid-1980s, I was a capital public defender in Florida, and since then f have devoted much of my professional energy and time writing and speaking against the death penalty as a legal system.

Also, I must confess to recognizing something of myself in parts of Theodore Kaczynski, although certainly not in the murderous parts. Like Kaczynski, I have devoted a substantial portion of my life and passion to a cause many Americans view as doomed, if not crazy: the abolition of capital punishment. Like Kaczynski, a while back I gave up big-city life and moved to a rural area (for me, it was Vermont), and I live there semi-reclusively. Like Kaczynski, I have kept a private diary for years.

To my surprise, I found myself agreeing with many ideas in the Unabomber's manifesto when it was published in *The Washington Post.* Like Kaczynski, I worry about technology's encroachments upon privacy and other cherished American freedoms. For me, the right to be left alone is a fundamental aspect of being an American. Some-

[8] William Finnegan, *Defending the Unabomber,* New Yorker, March 16, 1998, at 54.

what like Kaczynski, I have mixed feelings about the mixed blessings of technology (I am writing these words with pen and paper in the hammock in my backyard, below a flawless blue Vermont sky), and I am cheerfully clueless when it comes to computers. Unlike the Unabomber, my problem with technology lies with those who use it; the same science that made possible the miracles of manned space flight also made twentieth-century nightmares like the Holocaust and nuclear weapons.

There is one more thing I share with Kaczynski. I treat "experts" in forensic psychiatry (and law) with some skepticism. This skepticism comes from long experience as a capital defender, working with mental health experts on behalf of my condemned clients, trying (and often succeeding) to sculpt their professional opinions and reports in ways helpful to my purposes as an advocate for my death row clients. Like the legal profession, the mental health profession has its own rules and conventions that have little to do with the complex reality of human experience and action. Reality is too large a thing for any single profession to grasp in full, and the reductionism of both law and psychiatry explain human behavior only at the cost of oversimplifying it.

As I've said, my only sympathy for Kaczynski is informed by his status as a capital defendant who was cheated by the justice system and by his own public defenders, and *not* as a fellow traveler in his views about violence or technology. But I *do* share his ideas about autonomy, freedom, and privacy—and that's why I'm interested in the moral, ethical, and legal issues raised by his case. This story is about the interaction of two ideologies with irreconcilable differences.

My professional background and experience as a former capital public defender affords me a certain insight into the war that developed between Kaczynski and his lawyers. For a long time, my job was to read trial transcripts—and to read between the lines of those transcripts—and then develop a narrative of what was really going on in the court proceedings and behind the scenes. To distill an accurate narrative from a massive trial record, particularly in a case that didn't go to trial, one must know the language of the law and be steeped in the chess-like world of short-term trial tactics and long-range legal strategy inhabited by the actors who made that record. Based on the extensive court files in the Kaczynski case, I think I have a fairly complete picture of what his lawyers did and why they did it. In their court filings, the lawyers explained in some detail why they seized control of the Kaczynski defense. The existing record is more than sufficient to allow examination of those reasons.

The Unabomber case is fascinating on any number of levels: the genuinely brilliant mathematics-professor-turned-Montana-hermit-serial-bomber had a Harvard degree at age twenty and was a rising star at the University of California at Berkeley, which boasted one of the world's top mathematics departments; the Cain-and-Abel dimension of the case which carries with it the conflicting loyalties that David Kaczynski owed to his family and his responsibility to society; then there is Kaczynski's pro-freedom and anti-technology politics, the "reason" for the bombings, and the defense he wanted his court-appointed attorneys to raise against the capital murder charges. My guess is that Kaczynski wanted the defense to be based on the political ideology articulated

in the 35,000-word manifesto that he forced *The Washington Post* and *The New York Times* to publish in 1995.[9]

With that bit of background, I want to discuss three things this evening. First, I'll describe my somewhat odd pen pal relationship with Theodore John Kaczynski, the Unabomber. Second, I'll explore whether the Unabomber is mentally ill, which for myself, I believe he is not. Finally, I'll try to articulate why, although I oppose capital punishment, I have been helping him in ways that might well get him executed.

I have spent virtually the entirety of my professional life fighting capital punishment as a legal system. Yet, for several months I have aided Unabomber Theodore Kaczynski's efforts to invalidate his guilty plea and life sentence, win a new trial, and receive his day in court—even though I am convinced that, at the conclusion of any such trial, Kaczynski would almost certainly be sentenced to death and executed. This evening I will attempt to explain why I am helping a person achieve—and if I were Kaczynski's lawyer I would zealously advocate—something I have spent my professional adult life opposing—execution.

The reason Kaczynski pleaded guilty, he maintains, was not because he was afraid of the death penalty, but rather because it was the only avenue left to him to avoid having to sit in court, day after day, listening to his own lawyers portray him, to the jury and the world, as a madman. That was simply unacceptable to him.

It was also unlawful. Kaczynski was mentally competent to stand trial. From this follows that he was mentally competent to make the important personal decisions about his case: whether to plead guilty or not guilty, whether to testify, whether to appeal, and whether to stake his life on a mental illness defense.

Thankfully, I have never been Theodore Kaczynski's lawyer; I merely was his informal, pro bono legal advisor. However, but for a minor fortuity of timing, I might well have been. When Theodore Kaczynski first wrote to me in July 1998, I had already begun writing a book about the Unabomber non-trial. The book meant that I had a conflict of interest—-that I could not serve as his attorney without jumping through a bunch of hoops.

The first letter from the Unabomber arrived out of the blue. One morning early last July, the letter just showed up in my law school mailbox in Whitcomb House. It was in a white, legal-sized envelope, addressed to me, in his neat, tight handwriting, in black ink, with Kaczynski's name and return address in the upper left-hand corner. My initial instinct was that the letter was a gag engineered by one of my friends from my days of doing deathwork in Florida. But the envelope, and the letter it contained, seemed authentic. I recognized his handwriting, and the envelope contained all the appropriate prison-stamps, such as the date the letter arrived and left the prison mail room.

Kaczynski wrote to me last summer because, seven months before that, while his non-trial was going on in January 1998, I had published a couple of newspaper op-ed

[9] *See* Theodore Kaczynski, *Industrial Society and Its future.* Washington t'OST. Sept. 19. 1995.

pieces questioning whether Kaczynski's lawyers and judge were about to deny him his day in court.[10] How Kaczynski learned about these op-ed pieces, and how he got my address, I have no idea. But there it was: Kaczynski asked for copies of my two op-ed pieces.

I wrote back, saying that I was willing to correspond with him, but that he needed to understand two things up front. The first was the book and the fact that I couldn't be his lawyer. The second was Judge Vance's murder by mai I bomb.

After writing Kaczynski about my book and my judge, I fully expected never to hear from Theodore Kaczynski again. But I did hear back again, and soon. In a fairly snappish letter, Kaczynski responded to a point I had made in my writings I had sent him. I had written that Kaczynski considered John Brown—the slavery abolitionist whose 1859 raid on the federal arsenal at Harper's Ferry, Virginia, and his subsequent execution, galvanized Northern public opinion on the eve of the Civil War—his historical antecedent. Kaczynski curtly wrote me that he most decidedly did *not* consider John Brown his historical role model. This prompted me to curtly reply that, as a John Brown student, I was happy not to compare Kaczynski with that abolitionist hero. Once again, I expected not to hear from Theodore Kaczynski again.

Yet again, however, Kaczynski responded: This time with a conciliatory letter offering to fact-check my book. That was a year and about seventy-five letters ago.

The correspondence began almost solely about my book, but it soon turned to Kaczynski's legal hopes. In the early Fall of last year, Kaczynski asked me to try to find him a lawyer to represent him on a motion to vacate his guilty plea. I agreed, not realizing how hard that would be. I had an easier time finding a lawyer for Ted Bundy than I did for Ted Kaczynski.

As Fall wore on, and as I was unable to find the right lawyer for the Unabomber, it began to look as though I'd come up empty. So Theodore Kaczynski asked me to work on a Plan B—to draft a motion attacking the guilty pleathat Kaczynski would file on his own ("pro se," as it's called in the law trade). I agreed to write a draft, and three VLS students—Jason Ferrièra, Ingrid Busson, and Rich Hentz—stepped forward to help. These three students volunteered their time—a lot of their time—to this project. No money. No class credit. No institutional recognition from the law school. These students worked their tails off on this project. Although not lawyers yet themselves, these three exemplified the best in the profession, the calling they were about to enter. I've never been prouder of law students.

Thus, we worked on two fronts. I still searched for a good lawyer—a seasoned lawyer with the experience and expertise to do the job right. And the students and I researched and wrote a draft motion that Kaczynski could file in the event that no lawyer could be found.

[10] On January 15, 1998, I published one such op-ed piece in the *Rutland Herald* newspaper which is reprinted in full in Appendix A.

In December 1998, both efforts reached a culmination of sorts. I found Kaczynski a lawyer, Richard Bonnie of the University of Virginia, one of my old law school professors. And we finished the draft pro se motion. I sent the draft to Kaczynski and to his new lawyer with a huge sigh of relief, confident that Kaczynski was in good legal hands.

But it wasn't meant to be. As Kaczynski describes in his motion to vacate his guilty plea, on April 3rd, three weeks before the filing deadline, the lawyer I had recruited backed out of the case. It was too late for a new lawyer to come in; given the delays in the U.S. mails, it was also too late for Kaczynski to run a draft past me or another lawyer. So he wrote the motion himself. He dusted off the draft motion my students worked so hard on; he hand-wrote a 123-page motion, and he filed it late last month. On page two of his motion, Kaczynski wrote:

> ACKNOWLEDGMENTS
>
> I would like to thank Professor Michael Mello, of Vermont Law School, and three law students who worked under his direct supervision, Ingrid Bussom, Jason Ferreira, and Rick Hentz, without whose generous, *pro bono* assistance I could not have prepared this petition. I emphasize strongly that Professor Mello and his students are in no way responsible for the defects of this petition. Owing to certain circumstances, I was obliged to prepare this petition in great haste within a period of little more than two weeks. Consequently, I was not able to take full advantage of the ideas and legal information with which Professor Mello and his students had previously provided me, nor was I able to submit this petition to them fortheir criticisms...[11]

Our draft was designed to be a safety net of sorts, for Kaczynski to use if he had no lawyer. And so he did.

When the District Court denied Kaczynski's motion to set aside his guilty plea, I telephoned the prison to give him the bad news. Kaczynski's prison counselor agreed with me that it would be better for Kaczynski to hear the news from me rather than hearing it on the 6:00 news. Before we spoke, Kaczynski had not heard that he had lost in District Court. As always, he took it in stride, and we spent most of the conversation discussing where to go from there; to appeal to the Ninth Circuit. At Kaczynski's request, I drafted an application for permission to appeal. That concluded my involvement in Kaczynski's litigation.

Soon after Kaczynski's case reached the Ninth Circuit, I resigned as his informal, pro bono legal advisor. I resigned because we had, shall we say, "creative differences" about how the appeal ought to be pursued. I continue to wish him well on his appeal, and to hope that the Ninth Circuit will do justice in his case.

---

[11] *See* Defendant's Motion to Vacate Guilty Plea at 2, United States v. Kaczynski. No. CR-S-96–259 GEB, 1997 WL 741193 (E.D. Cal. Doc. 1997).

Soon thereafter, with thudding predictability, Kaczynski denounced me—as he has ended up denouncing virtually everyone who tries to help him—as "unethical" to the Dean of Vermont Law School and, presumably, to others. Oh, well. It doesn't break my heart that the *Unabomber* thinks I'm "unethical." I think he's evil.

My involvement in the Kaczynski case is now concluded. Our working relationship had reached a natural end point and because I had provided him with the tools necessary for him to do what he wants to do—to represent himself on his appeal.

Kaczynski and I remained in touch, by letter and by phone, for more than a year since he first contacted me. The stack of materials he sent me is two feet tall and runs more than 2,000 pages. We have exchanged about 150 pieces of mail and spoken by phone several times. We've never met; I had no desire to meet him.

Through my correspondence and telephone conversations with Kaczynski, I have come to know him, in a manner of speaking. Like all humans, he's complex. But, more than most people I know, Theodore Kaczynski is a study in contradictions. He's very smart, in a linear, mathwhiz sort of way, and he can on occasion be piercingly insightful, although he also has blind spots the size of small planets. He can be witty and charming, when that serves his purposes, aiid he can also be arrogant, patronizing, condescending, petty, and cruel,

Kaczynski is, to borrow Sam Houston's remark about Jefferson Davis, "cold as a lizard and ambitious as Lucifer,"

Like most psychopaths I've encountered in my travels as a capital defense lawyer, Kaczynski is wildly manipulative of people. He is the most selfish person I've ever known. He is a control freak. He has an almost total lack of empathy for others, including the victims of his crimes. As a source of information, I found him unreliable and untrustworthy—he tends to take things out of context and to distort the obvious meaning of others—and, for that reason, I decided against using in my book his letters to me, notwithstanding his written permission for me to do so. When he critiques the writing of others, he focuses on niggling, inconsequential, and ultimately trivial matters while failing to engage the real substance ideas or writing with which he disagrees.

Like many prisoners with far too much free time on their hands who represent themselves in court, Kaczynski has a superficial and naive understanding of legal reasoning, ethics, and litigation. He may be able to recite the codes and cases, but he doesn't get what they *mean,* and he doesn't know how to use them. He's basically tone deaf. Effective litigation is all about subtlety and nuance—not Kaczynski's strong suits—and writing a good brief is as much an art as a science. He is obsessed with copyright law, and he wants to sue nearly everyone who he feels have used his words without his permission. That would be quite a sight, I think—the *Unabomber* suing someone for *copyright* infringement. And Kaczynski isn't even perceptive enough to see the irony here.

His obsession with copyright infringement reflects his tremendous concern about his public image. He's fixated as Nixon was with rehabilitating his public image, to correcting perceived "lies" others have said about him; he has even written a book to

that end, tellingly and pretentiously (if inaccurately) titled *Truth versus Lies.* (The alleged "liars" are Kaczynski's brother and mother, the media, etc, and guess who the "truth" teller is?).[12] He desperately tries to control what people say or write about him. Unfortunately, his attempts to control and manipulate the public conversation about himself and his case often backfire, because those attempts are so heavy handed and clumsy, because people don't like to be manipulated, and because Kaczynski is skilled at antagonizing other people unnecessarily.

I'm glad I had the contact I did with Kaczynski. My book is far more complete and stronger because of the documents he provided me, and, as a *quid pro quo,* I'm glad that I was able to help him with his case. I'm also glad it's over, glad that malignant presence is out of my life. I'm reminded of a passage by Patricia Cornwell, describing an FBI profiler: "He had, in fact, spent long hours with the likes of Theodore Bundy ... in addition to the lesser black holes who had sucked light from the planet earth... It almost made him physically ill to absorb the poison of these men and endure the attachments they inevitably formed with him. Some of the worst sadists in recent history regularly wrote letters to him, sent him Christmas cards, and inquired after his family... In exchange for information, he did the only thing that not one of us wants to do. He allowed the monster to connect with him."

B. Larry King Live, Teledentistry, and the CIA

Writing about a celebrity serial killer has been an adventure. I have met some interesting media folks; unfortunately, I have been more or less brain dead with exhaustion at the time. *Good Morning America* called at 6:00 one morning, and said they wanted me on the following morning, at 8:00. I said great. While preparing to drive to Manchester Airport (abut an hour-and-a-half drive from home in Wilder), *Inside Edition* called: They *had to* interview me that morning, at the law school in South Royalton. I said fine, but I had to leave for Manchester no later than 2:00. They said they'd be there by noon. An hour later, they called back to say their camera crew had been delayed flying into Boston. They said they'd be at the law school by 1:00. I said I didn't think so.

They missed me by five minutes. *Solnside Edition* took film of my law school mailbox, the artwork on my office door, the Green Mountains, and the law school bell tower.

Meanwhile, I was marooned at Manchester Airport because, among other reasons, President Clinton's plane was there. Clinton was in for a fund raiser, and the airport was in turmoil.

---

[12] My understanding of Kaczynski's book. *Truth versus Lies* Is it], is based on the book manuscript Kaczynski sent to me in August 1998. Hopefully, the book will receive a hard edit before it is published. However, the hardest edit cannot save Kaczynski's book from it's central defect: Kaczynski only mentions the bombings in passing, and then only coyly ("Assuming I am the Unabomber," he writes at one point). Personally, the only reason I d buy a book by iht Unabomber is to learn why he sent the bombs. I really don't care about the adolescent sibling rivalry among the Kaczynski brothers.

Ironically, I missed one plane by minutes because I was detained at a security checkpoint; my bag had to be searched because I had not packed it myself (my wife had); it was ironic because such heightened security was a result of the Unabomber's terror campaign (I was relieved that the security officer who searched my bag didn't notice the letter to me from the Unabomber, which *Good Morning America* had asked me to bring along as a prop). Flight after flight was delayed, then canceled. Finally, I got the last plane out to LaGuardia.

Because *Good Morning America* wanted me to stop in that night for a pre-interview interview, I didn't reach the hotel until 1:00 a.m. Five a.m. wake up call, a cab to the studio, and I was there, in body, if not quite all in mind.

While dozing in makeup, a promo came on the TV monitors; host Charlie Gibson saying, "The Unabomber has a friend." In the make-up chair next to mine, a *20/20* reporter muttered, "who gives a shit?" I couldn't agree more, and I told her so (without identifying myself).

The interview itself lasted all of *4%* minutes, an eternity when a dozen TV cameras are trained on you. Afterwards, I got to meet and visit with Tony Randall and Jack Klugman for about half-an-hour in the green room (which is actually beige).

I also was half asleep when I interviewed with *Larry King Live,* flights were canceled due to fog in Boston, and I ended up on a 6:00 a.m. flight for a noon interview in D.C. The coolest thing about being on *Larry King Live* was that they let my mother sit in (I'm especially grateful to producer Bobby Grossman for making this happen). They sent a limo to fetch us, and my mom "moot-courted" me on the limo drive from her home in Virginia to King's studio in D.C.; her questions were better and harder than King's, which is often the case in moot courts. The *Larry King Live* people gave her a tour of the operation, sat her right behind the camera during my interview, and introduced her to King—whom she watches every night-after the interview. I was on the show with Joe McGinniss, one of my favorite writers, and we had a chance to chat in the green room before going on.

I was also able to be with my mother on August 14, when my fifteen minute interview aired on *Larry King Live* (along with Joe McGinniss, Jackie Collins, and Lady Catherine Meyer). My mother and I watched the show along with a group of her wonderful women friends. As we watched, I realized that I remembered next to nothing of the interview itself; during the taping, the fifteen minutes seemed to blow by in a heartbeat; watching, it seemed endless.

I know it's fashionable to be blase' about being interviewed by the likes of Larry King and *Good Morning America,* but I have to confess it was a hoot. It was fun, in a frenetic, mind-clearingly-panicky sort of way. The hosts were we 11-prepared. They asked good questions, and they gave me a chance to answer. They were gracious and down-to-earth. The whole experience was fun. I'm not sure I'd want to do it again, and I sure wouldn't want it to become a regular part of my life, but once was fun.

The downside of writing about a celebrity criminal is that it brings all the nuts and groupies out of the woodwork. For instance, I received this letter from a guy in Wyoming who claimed Kaczynski recruited him into the CIA:

> Dear Professor Mello,
>
> How happy I am to read from Associated Press reports that you have been in written communications with Ted Kaczynski. PLEASE READ AND DO NOT DISREGARD THIS LETTER, I BEG OF YOU! Just ask Ted if he can relate to it, or not, if that's not too much trouble.
>
> Ted was a classmate of mine in German Language Training at the Defense Language Institute at Monterey, CA, in 1975. I have read occasional reports that he has claimed connections to the CIA, which have been discounted as part and parcel of the FBI brand of him as supposedly "Paranoid Schizophrenic."
>
> I can verify that he was an Intelligence Operative. Simply put, he did something wrong, messing around with mail bombs in some issue that included his brother, got caught, turned, and exploited for Intelligence purposes. His mother is one of those Munchausen's By Proxy types, I do believe, with great influence over his brother. Ted was then to take credit, I believe, for real, untraceable, foreign-source terrorist bombings by individuals who had no connections to each other. "Cells." But who would use similar methodology, driving the FBI nuts trying to find them.
>
> Stealing the thunder from actual terrorist organizations whose known agenda was to create seemingly mindless terror and chaos in our country.
>
> Ted was, in fact, the man who approached me to recruit me to work for the CIA at the University of Hawaii Library in about 1973. He was also the "Caretakeri' of a house where I'd rented a room in Kailua, Hawaii, where a "Senator from Texas" would visit, and would share the adjoining bedroom for operative reasons with a high-ranking individual. Such core "Smoke and mirrors" illusions culminate these days in the suppressed story of White House GS-12 Military Intelligence Officer Linda Tripp's allegations regarding former CIA Dir. Covert Ops George Bush and his purported "Long standing friendship" with Secretary Benson.
>
> Ask him what he's got against marinated eel, ask him what he does with loud music and swinging watches. Ask him why I had to answer the phone, one day.
>
> That having been said, let me stick to the basic facts: He was there, I was there, there are military witnesses to that; As well as what would certainly be an open homicide case in California; He had also been used as an operative in the utilization of myself, and he obeyed the orders given

him to do so. To wit, he passed on certain "Orders" to me while at DLI as an intermediary from the above very high-ranking CIA Intelligence Officer. A sort of buffer, if you will.

Ask Ted what the first dialogue of our German Training was in those newly reissued textbooks. He would reply that it had to do with Unter Dem Brandenburger Tor, a seeming impossibility for US soldiers at the time.

Our classroom was an unusual mix, consisting of a West Point Lieutenant, his wife, two Special Forces Sergeants, a Marine Gunny, and myself. Our teacher's husband was found dead and mutilated and were suspected foreign agents. There's a whole story behind this, which I have tried to get published, a novel I call *SAPPHIRE,* but such is not the point.

That Ted is what he claims to be, is. There is a decided coverup by Janet Reno of his actual story which must be brought to light, I have written him directly, and I don't believe the letters are getting through.

Ted was caught, he probably agreed to serve as an operative instead of going to prison in exchange fora commuted sentence, the typical methodology, and that deal with the Federal Government should be honored. I do believe that his self-imposed imprisonment in his tiny cabin had to do with that "Sentencing," and that deal. Certainly, he "Did his time," and is not deserving of the death penalty as Clinton's Janet Reno would have it. More importantly, his words of truth deserved to be heard.

As forensic evidence, I ask you to ask him what the significance of his three, old, manual, military typewriters, are. I believe I could independently verify what that would be.

I'd love to have a letter from him, if he would write me. "Wie geht's? War es nicht schoen, auf dem Weissen, 'Brathendlen und Bier?'" Hey, Ted, "Get it together" as from one who has endured much the same as you have. You're not the only political persecutee in the USA, today, God knows. Let us get the word out as to the actual, long-term, operative, truth.

And Ted is certainly brilliant if not well understood for his mathematically-based political theories. He tried to explain them to us at DLL But just ask him what the story of "Schwanstueke" and standing in the rain is all about.

Sincerely Yours, sir, and I hope you do write or call back.

/s/_____

Former US Army Ml Analyst E-5

cc: Investigative Journalists

I received mail from a chap in Texas who's certain that Kaczynski sent the bombs because he was receiving orders through his dental work. (I told this one that, no, I had no idea who Kaczynski's dentists were.) There were the people who assured me they could *prove* that Kaczynski was also the Zodiac killer. There was the astrologer who needed to know the precise moment Kaczynski was born. There was the prisoner who sent me a series of letters he had written—letters adorned with electric-yellow highlighting and red underlining and margin notes—claiming to prove a connection between Kaczynski and the Columbine school massacre. There was the self-titled "forensic theologian" who assured me he could demonstrate that Theodore Kaczynski's real problem was demonic possession. And so on.

Then there were the parasites—fortune and publicity hounds—obscure and insignificant people who saw Kaczynski as their meal ticket out of their ordinary, dull lives. Gary Greenberg is one of these. Greenberg, a psychologist who wants to be a writer, glommed onto Kaczynski hoping to exploit the Unabomber's celebrity to advance his own nascent career in letters. But Greenberg overplayed his hand, was dishonest with Kaczynski, was caught, and was banished from what Greenberg calls "The Kingdom of the Unabomber." When Kaczynski caught on to Greenberg's duplicity, Greenberg blamed everyone but himself for the falling-out with the Unabomber. Then this laconic hack of low cunning published a long essay, in an obscure journal, whining about how unfairly he was treated by Kaczynski. (In his laughably inaccurate and self-serving 23,000 word jeremiad—almost as long as the Unabomber manifesto, but not as well written and far less honest and interesting—Greenberg blames me and others for his problems with Kaczynski.)

But for every enraged dome-head like Greenberg, there were honorable writers like Alston Chase, Tom Nadau, John Howard, Derrick Jenson, Michael Colby, and Shay Totten. My role in the Unabomber story introduced me to a few bottom-feeders and loonies, but it introduced me to many more fine folks. If the former was the cost of the latter, it was a price I was glad to pay.

C. "How Could You Work as an Advisor to the Unabomber?"

By now at least some of you must be wondering: "Why did this Mello character help this serial killer, this killer whom even Mello believes is guilty? Why would he and his law students help this ratbag? Why would he choose to write a book about an obviously guilty defendant who dodged a death sentence?" These are fair questions, and I would like to try to answer them.

I helped the Unabomber because, sixteen years ago, I took an oath when I became a member of the Bar. I took an oath that, as a lawyer, I would never refuse to represent a person because he or she was unpopular, or even hated—I would never turn a person in need of my services away because my community or my peers or my friends loathed what my client had done: that, in the words ofthe old muckraker's slogan, I would represent people in need of my services "without fear or favor."

All lawyers take some version of this same oath. Many attorneys do not really take it seriously, as I learned during my effort to find the Unabomber a first-rate, experienced lawyer. But I do. I've tried to live my life as a lawyer according to that oath—working on behalf of people in need of my services "without fear or favor." That has led me to work for some people who have done some of the worst, most hideous things imaginable to their fellow human beings: serial killers, rapists, child killers, cop killers, and mass murderers.

In the end, I helped the Unabomber because he needed legal assistance—and because attorney after attorney I approached to do the job turned him down. He needed legal assistance because, in my opinion, his guilty plea was illegal. And because he needed the help of an experienced attorney to prove it.

I don't care about Theodore Kaczynski, the man. Theodore Kaczynski isn't my friend. And I'm not his lawyer, his confidante, or his friend. I hate his crimes—and "hate" isn't a word I toss about freely. I don't care about Kaczynski personally; to me, he's a low-rent terrorist, a killer, and a sociopath. The case isn't about Kaczynski—-it's about issues larger than Theodore Kaczynski.

The law says that criminal defendants have a constitutional right to selfrepresentation. Kaczynski's judge denied him that right. The law also says that guilty pleas must be voluntary. This one wasn't. The law is clear that guilty pleas must be voluntary; they cannot be coerced. And Kaczynski's was coerced—by his own lawyers and the judge.

Theodore Kaczynski's guilty plea was the result of pincer-like constraints on his ability to make rational, sensible and constitutional choices about his own case. On the one hand, his own court-appointed lawyers insisted on portraying Kaczynski as a madman. On the other hand, the judge denied Kaczynski his constitutional right to fire those lawyers and represent himself.

Each of these errors by the judge—allowing Kaczynski's court-appointed lawyers to force a mental illness defense on Kaczynski against his will, and denying Kaczynski's constitutional right to fire those lawyers and represent himself—constituted reversible error. And you don't need to take my word, or Kaczynski's for it. The *prosecutors* made these arguments powerfully in their pre-trial motions. Heck, in the Ninth Circuit Kaczynski doesn't even need to file a brief—he only needs to file the prosecution's own pre-trial motions. The modern precedents are all there, in the prosecutions own papers.

But the most interesting historical precedent is John Brown[13]—the antislavery abolitionist radical whose failed raid on the federal arsenal at Harper's Ferry, Virginia in

[13] One of the best parts of researching the parallels between John Brown's trial and the Unabomber trial was visiting Harpers Ferry (now in West Virginia), the Brown home in Lake Placid. New York, and the battlefields of Gettysburg and Sharpsburg (called Antietum in the North).

Although Gettysburg wasn't really germane to my Brown/Unabomber research. I found myself strangely drawn to that hallowed ground. Many strands of my own history converge at Gettysburg, where Pickett's Virginians (where I was reared) met Stannard's Vermonters (where I live now) on the

1859 galvanized Northern public opinion on the eve of the Civil War. Like Kaczynski's lawyers, Brown's lawyers had a powerful argument that their client was insane—there was a long history of insanity in Brown's family. An insanity defense for Brown would have played well in antebellum Virginia: Folks would have liked nothing better than to dismiss Brown's attempt to foment slave insurrection as the product of a diseased mind. However, like Kaczynski, Brown adamantly refused to raise an insanity defense—an insanity defense that would likely have saved his life.

But, unlike Kaczynski's lawyers, Brown's lawyers honored their client's wishes and refrained from staking Brown's life on an insanity defense. Brown's statement in court, just before his death sentence was imposed, is one of the greatest pieces of oratory in American literature. And Brown's execution lit the fuse that ignited the Civil War a year later—a war that resulted in the abolition of slavery.

I want to be clear that I am not equating the Unabomber with John Brown. John Brown was fighting one of the most evil institutions our nation has ever produced—chattel slavery, the ownership of some Americans by other Americans. Slavery was intrinsically evil; technology isn't. Brown's targets were guards at a federal armory; the Unabomber's targets were innocent civilians with only a tangential role in the technology he hated. Brown used the occasion of his sentencing to give a speech that is a landmark in American literature; Kaczynski used his to complain about his prosecutors. In short, the Unabomber is no John Brown.

Any comparisons of technology, or any other modern day social ills, with North American slavery make me squeamish, for the same reasons that comparisons with the Holocaust do. Slavery is different. It is difficult for me to imagine that as recently as the middle of the last century, some Americans owned other Americans as property: that people were property—a concept enshrined into law by the United States Congress and given the constitutional imprimatur by the United States Supreme Court, and indeed the United States Constitution itself. It is difficult for me to imagine that the issue of ownership of human beings was ever treated as an *issue* of public policy in this nation—like issues of taxation—and that serious people made serious arguments, in Congress and elsewhere, that slavery was anything other than unalloyed evil wherever it existed, and especially evil in these United States of America, founded on the Declaration of Independence and the Bill of Rights. It is difficult for me to believe that my beloved South, where I was reared and that produced the great Army of Northern Virginia and the general Lee who commanded it-—fought a bloody war to retain slavery.

As a host of Brown biographers have noted, Brown truly saw African-Americans, and treated African-Americans, as fully equal to himself. Brown genuinely cared for the people he was fighting to free—and he cared with a depth almost unheard of in his own time and which is sadly rare in ours. W.E.B. Dubois put it best: "John Brown worked not simply for Black men—he worked with them; and he was a companion in their

---

third day. and where Chamberlain's Mainers (where I vacation as often as possible) saved Meade's army from being Hanked, and crushed, at Little Round Top on the second day.

daily life, knew their faults and virtues, and felt, as few white men have felt, the bitter tragedy of their lot."[14] Perhaps Theodore Kaczynski felt as deeply for technology's victims, but his cause, and the way he went about fighting for it, do have the arid feel of a mathematical theorem.

John Brown killed because he loved the African-American. Theodore Kaczynski killed because he hated the world.

There is yet another important difference between Kaczynski and Brown, which concerns the relative clarity with which the two men sought martyrdom. Stephen Vincent Benet captured, I think, the sense of fatalism that overtook Brown even before the raid began: He must have known it would fail unless he withdrew his small force from the town post-haste.[15] He waived at least three opportunities to avoid capture, as well as the possibility of escape from custody after he had been apprehended.[16] In short, Brown seemed to want to be captured and, once he was behind bars, he wanted to be executed. By contrast, Kaczynski applied tremendous effort to avoid detection by law enforcement, and he showed every sign of hating his brother for turning him in. Brown sought martyrdom; Kaczynski did not.

D. Why the Unabomber Case Matters

Kaczynski wants his day in court, but that's not why we should give it to him. We should give Kaczynski his day in court because it is in *our* interests to apply the law equally. The credo etched in the entrance of the U.S. Supreme Court is "equal justice under law." If we allow constitutional corner-cutting to deny Kaczynski his day in court, then that same corner-cutting can be—and has been—used to send innocent people to the Death House. I can't help but think of that lovely passage from Robert Bolt's *A Man For AH Seasons:*

> Sir Thomas More: The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal...
>
> William Roper: So now you'd give the Devil benefit of law! ...
>
> More: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Roper: I'd cut down every law in England to do that!
>
> More: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—Man's law, not God's—and if

[14] W.E.B DuBois. JOHN Brown (Preface) (1909).

[15] *See generally* Stephen Vincent Benet, John Brown's Body (1928) (describing John Brown's attack on Harpers Ferry).

[16] *See id*

> you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then?[17]

We should also give Kaczynski his day in court because that's the best way to decide, once and for all, that he's the Unabomber. Now, Kaczynski can—and has—claimed that his "Confessions" in pleading guilty were unreliable because they were coerced. He remains able to coyly suggest that he's not really guilty and, unfortunately, his coerced guilty plea allows him to do this credibly. Only a jury verdict of guilty will remove this cloud of guilt over whether he is the Unabomber.

In other words, we shouldn't do it for him. We should do it for ourselves and our law.

In the end, Kaczynski will probably lose his appeal. Undoing a guilty plea is always an uphill struggle, especially in a high-profile serial murder case such as this one. The judicial system breathed a collective sigh of relief when the Unabomber pled guilty. It is unlikely that judges will relish the idea of reopening this particular book. And it doesn't help that Kaczynski is representing himself on the appeal. As a litigator, the Unabomber is a very good assistant professor of mathematics.

I have known from the outset—and I told Kaczynski from the outset—that, after expending enormous amounts of time and energy on the appeal, he would probably lose; the statistics on success rates for motions to invalidate guilty pleas compel this conclusion. Still, notwithstanding the odds, I devoted hundreds of hours to his case. Why?

I did it because I firmly believe that some fights are worth fighting, even if the odds of success are long. I always tell my law students to choose their battles carefully, and then fight them to win. Theodore Kaczynski the man isn't worth fighting for. The legal, jurisprudential, and ethical issues in his case are. This was a good fight, even though it was for an evil man.

When I was a Florida capital public defender to the early- and mid-1980s, that notion—that we were fighting a good fight, even though we were going against long odds—was one of the things that kept me going (along with caffeine and fast food). That's another thing I tell my law students (since many of you are pre-law, I don't fee| bad about giving you this unsolicited advice): Many, many lawyers hate their soulless jobs, but I loved my job in Florida. The pay was a joke; the hours were endless; the psychic toll of representing people most of your peers, friends, and family thought were garbage was exhausting; the work was emotionally annihilating. But the job satisfaction was off the charts. Never underestimate the value of being able to look in your bathroom mirror, at the end of a long day of work, and liking whom you see staring back at you in the reflection. Anyway, end of career guidance session.

It's hard to feel much sympathy for Kaczynski. I don't. It's hard to care about him. I don't. But we should care about our law. If guilty people like Kaczynski can be denied

[17] Robert Bolt, A Man For All Seasons 65–66 (Vintage International Ed. April 1990) (1960).

a day in court then innocent folks can, too. If the law can be warped and deformed to convict the guilty, then it can be manipulated to convict the innocent. Illinois just released its twelfth innocent person from death row within the past year.

My search for a lawyer for Kaczynski was driven by the fact that he needed a lawyer to vindicate his basic constitutional rights. But my search was driven by something selfish, as well: I wanted to find a lawyer for Kaczynski, because otherwise I would have had to help him.

And I didn't want to help this man who killed by sending bombs through the U.S. mails. But, when the lawyer I'd recruited bailed out, the choices for Kaczynski became only two: either I'd help him, or no qualified lawyer would. I decided to help him.

My belief that Kaczynski's basic rights were violated when his trial lawyers forced him to stake his life on a mental illness defense is grounded in my belief that Kaczynski was mentally competent to choose whether or not to raise such a defense. I would now like to discuss the issue of Kaczynski's alleged paranoid schizophrenia, of whether Kaczynski was a *mad* bomber, or simply a bomber.

I. Is Theodore Kaczynski A Paranoid Schizophrenic?

> *I firmly believe that, before many centuries more, science will be the master of man. The engines he will have invented will be beyond his strength to control. Someday science shall have the existence of mankind in its power, and the human race commit suicide by blowing up the world.*
>
> Henry Adams, April 11, 1862 (after the Battle of Shiloh)

A. Battle of the Experts: "My Shrinks are Better Than Your Shrinks"

The Unabomber is many things. He is a clear-eyed, coldly methodical killer who, over a very long period of time, destroyed human lives with the clinical detachment of a Nazi scientist. He is an assassin. He is a coward, who killed at a distance and then crowed about his "experiments" in his diary. He is cruel, and he sent taunting letters to at least one of his surviving victims. He is petty, and he snarled up the nation's air travel one Christmas—by sending a phony bomb threat to the Los Angeles Airport—for the hell of it, or perhaps because he was jealous of the publicity being given to Timothy McVeigh (now Kaczynski's prison-mate) for the Oklahoma City bombing. He is either a terrorist or a man driven to kill out of petty hatred and revenge over perceived wrongs; in either case, he is a psychopath, and, like most psychopaths, he has no remorse and no sense of responsibility for what he did—his only regret is getting caught. He is breathtakingly narcissistic, egocentric, vain, and manipulative—and he

is now working to ensure his "place in history," because he flatters himself to think he's entitled to one. A survivor of the Unabomber argues powerfully that he is evil.

Theodore Kaczynski is all these things, but he is not crazy, in my view. If, as I believe, Kaczynski is the Unabomber, then he did crazy, homicidal things—he exhibited crazy behavior—but he is not crazy, at least not in a way that matters to the law. We know Kaczynski was mentally competent to stand trial—even his own defense lawyers acknowledged that again and again.

I want to address the questions: Was Theodore Kaczynski suffering from any serious or any organic mental illness? Was he, as his lawyers claimed and the media believed, a paranoid schizophrenic? If so, might his mental illness have led a reasonable jury to spare him from execution for his crimes? If he was disablingly mentally ill, was his illness of a kind to significantly impair his ability to make an informed decision to veto his lawyers' determination to raise a mental illness defense? Specifically, was he too crazy to choose whether or not to stake his life on a mental illness defense? And what actual evidence is there to support his lawyers' claims—in the media and in court—that their client was a madman?

I think the media and the public decided Theodore Kaczynski was crazy the moment they saw that first photo of him right after his arrest—dirty, disheveled, matted hair, scraggly beard. In that photo, he *looked* crazy, and that's all it took to transform the near Luddite Unabomber into the mad hermit. All Kaczynski's family and lawyers needed to do was build on that first snapshot of him, to reinforce the notion that, because Kaczynski *looked* crazy when he was arrested, he must *be* crazy.

It is often impossible to prove a negative—in this case, that the Unabomber is not a paranoid schizophrenic. However, I do not believe I have the burden of proving that Theodore Kaczynski is not a paranoid schizophrenic. Rather, I believe the burden of proof resides with those attempting to prove that this most methodical terrorist, who succeeded in eluding the largest and most expensive manhunt in the history of American law enforcement, does in fact suffer from paranoid schizophrenia. In my opinion the proponents of the mad bomber argument have not met their burden of proof: They have not rebutted the baseline presumption that the intellectually brilliant, Machiavellian, cold-as-ice terrorist is, in fact, a paranoid schizophrenic.

Theodore Kaczynski's defense attorneys have said, and the media came to believe, that Kaczynski suffered from paranoid schizophrenia. Paranoid schizophrenia is an incurable, disabling disease associated with delusions and feelings of persecution. The illness is characterized by a preoccupation with one or more delusions, or with frequent hallucinations related to a single theme.

Not all terrorists are madmen. The line dividing the political defendant and the clinically paranoid defendant can be difficult to draw. In my experience, capital defense lawyers, driven by the needs of advocacy, and not professionally trained in the art/science of psychiatric medicine, are not especially good at knowing where to draw that line among their own clients. Thus, the lawyers must rely upon—while advocating on behalf of their clients with—mental health experts. But in my experience these

mental health experts are not much better than the lawyers in drawing the line between paranoia and political beliefs—particularly when, as with the Unabomber, that political ideology is harshly dismissive of the soft science of psychiatry itself.

Based on available public information, the evidence that Theodore Kaczynski suffers from paranoid schizophrenia, or any other actual, serious mental illness, is surprisingly flimsy—unless anti-technology politics, a willingness to kill for them, and a reclusive lifestyle all add up to mental illness. The central facts in Kaczynski's "diagnosis" by the psychiatrists retained by his court-appointed defense counsel were his anti-technology politics and the crimes themselves. In short, because Kaczynski hated technology enough to kill, and because he had chosen to live reclusively in one of the most physically beautiful places in America, he must be mentally ill.

In early January 1998, the *New York Times* ran an op-ed piece that began: "Theodore J. Kaczynski, the hermit standing trial on charges that he is the Unabomber, *has told his defense team* that he believes satellites control people and place electrodes in their brains. He himself is controlled by an omnipotent organization which he is powerless to resist, *he told his lawyers."*[18] According to William Finnegan's excellent *New Yorker* article, these lines in the *Times* were a "collage of fragments from various sources pasted together to produce remarks that were never made, and, if they had been made, would almost certainly have been shielded by the attorney-client privilege."[19] The attorney/client privilege is one problem here.

A more fundamental problem is that "there is no credible evidence that [Kaczynski] hears voices, has hallucinations or is 'out of touch with reality'— unless reality is defined as having conventional social and political views," Finnegan wrote.[20] Sure, Kaczynski *may* suffer from some form of schizophrenia; "mental health *is* a continuum."[21] "But [Kaczynski] is nowhere near any clinical extreme,"[22] as his lawyers' misleadingly implied during the non-trial, and as Kaczynski's lead defense counsel continues to assert even after the trial.

Although Kaczynski reportedly refused to cooperate fully with the forensic psychiatrists retained by his lawyers, those defense experts characterized Kaczynski as "a high-functioning paranoid schizophrenic. Medically speaking, that would place him at the least-ill end of the spectrum of schizophrenia, *where obvious symptoms are often absentf* Finnegan wrote.[23] What "really indicated"[24] such a diagnosis for Kaczynski? Why? Kaczynski's "systemized paranoid delusions."[25] And what were those delusions?

---

[18] Michael Cooper. *Trial and Errar; The Client's A /ways Right. Even if He's Not, N.Y. Times.* January 4, 1998, § 4, at 5.

[19] *See* Finnegan, *supra* note 8.

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.*

"Anti-tech no logy...His view of technology as the vehicle by which people are destroying themselves and the world."[26]

The psychiatrists hired by the defense attorneys also didn't think much of Kaczynski's lifestyle in the Montana, high country where, in 1970, he bought 1.4 acres of land, built a simple cabin there (heated by woodstove and without electricity or plumbing). He planted a large garden, hunted deer and rabbits, and gave some of his vegetables to his neighbors. Kaczynski claimed that he had made a reasonable lifestyle choice in leaving the high-stress world of the Berkeley math department to pursue a simpler life; in 1970, such migrations back to the land were not uncommon.

Nor in the 1990s either, it would appear. In fact, it is fair to state that there is a mainstream movement, a widely-felt need, to reconnect with nature, unplug, simplify, and nurture that within us which is organic, natural, and animal. The great outdoors. Adventure travel, extreme sports, outdoor athleticism—been there, done that. The desire to head outside and get back to nature is illustrated by the vehicles we drive (sport utility vehicles go offroad); the vacations we take (today you can buy your way to the summit of Mt. Everest); a renewed fascination for the nature-centric cultures of the First Nations peoples (as evidenced, for example, by the popularity of such films as *Dances With Wolves, Last of the Mohicans, Geronimo: An American Legend, Incident at Oglala, Thunderheart, Black Robe,* etc.); and celebration of the rural lifestyle. Even the latest manifestation of daily life-changing technological progress—the Internet—is rife with examples and declarations of this movement.

A quick search of the Internet reveals such sites as *Homesteading,* which is aimed at "[p]eople who enjoy the land and want to participate in a more wholesome, less 'instant/ automated' life-styles [sic]."[27] Homesteading is defined as "encompass[ing] the pioneer spirit and a desire to both 'get back to nature' and be more self-sufficient."[28]" The *General Homesteading Organizations* site lists no less than twenty-five homesteading organizations throughout the United States.[29]

The rural lifestyle is celebrated in such journals as *Country Connections,* which steps beyond mainstream country-life-oriented publications and "presents] creative, hopeful alternatives in the areas of lifestyle, politics, culture, community, ecology and ethics. Topics [include] moving out of the city to a simpler life." In fact, for those in need of assistance for the move to a small town, there is *Small Town Bound*—perfect for the "urbanite seeking to improve [his/her] quality of life." One need not go on-line, however, to discover such a book, as it has been featured on *The Oprah Winfrey Show* and *Today,* and in *Time.*

There are also sites for those seeking to live a more simple lifestyle. For example, the *Simple Living Network* provides "[t]ools for those wanting to live a more conscious,

---

[26] *See id.*

[27] *Homesteading* (visited Jan. 22,2000) <http://www.public.usit.net/ddtan7homesiea.htm>.

[28] *Id.*

[29] *See General Homesteading Organizations* (last modified Mar. 20, 1997) <www.homestead.org>.

simple, healthy and earth-friendly lifestyle."[30] One publication advertised at this site, *Voluntary Simplicity: Toward a Way of Life That Is Outwardly Simple, Inwardly Rich,* describes the simplified lifestyle as living more purposefully, unburdened with needless distractions, and in "a way of being in which our most authentic and live self is brought into direct and conscious living."

Those suffering from a spiritual and psychological disconnect with the natural world may find relief at such sites as *Ecopsychology On-Line*[31] and *IGC* (the Institute for Global Communications).[32] The Ecopsychology Institute's on-line library includes essays such as *The Psychological Benefits of Wilderness,* which notes that "[t]he healing effect of wilderness is one of the most intensively researched areas of ecopsychology. Search any psychological database under the headings of 'nature,' 'emotions,' 'psychology,' 'wilderness,' and you will find hundreds of entries."[33] The IGC site provides links to text such as *Balance with Nature,* which declares, "[t]he essence of this crisis is that we are out of balance with nature. We need to find ways within our personal lives, and within our institutions to restore that balance with the natural world."

Perhaps the weakness of relying on Kaczynski's choice to live in a primitive cabin in the wilds of Montana as proof of mental illness is best articulated by Virginia Postrel. She writes:

> This argument is very, very interesting. It says that someone who writes lucidly, who cared for himself for two decades with virtually no outside aid, and who articulates the planning of his crimes and the reasons behind them cannot possibly be sane simply because he lives in the way popular, respected, best-selling environmental theorists say we should all live.[34]

If this aspect of Kaczynski's lifestyle choice differs from the current widespread theme of "getting back to nature," it does so only in degree, not in kind.

The defense psychiatrists didn't see it that way. One wrote in her report that Kaczynski's private diary undermined his claim that his move to Montana was a choice: "The explanations for his chronic social isolation ... were clearly contradicted by Mr. Kaczynski's writings that document his despair over both his inability to establish normal human relationships and his inability to comprehend why he has been unable to do so,"[35] A fair translation of this circular psychobabble might be: He was shy, bril-

---

[30] *The Simple Living Network* (visited Jan. 22,2000) <http://www.s1net.eom/l maincover.htm>.

[31] School of Arts, Letters and Social Sciences, California State University Hayward. *Ecopsychology On-Line* (visited Jan. 22, 2000) <http://isis.csuhayward.edu/ALSS/ECO/index/htm>.

[32] Institute of Global Communications, *ige online* (visited Jan. 20, 2000) <www.igc.org>.

[33] Garrett Duncan. *The Psychological Benefits of Wilderness* (visited Jan. 20, 2000) <isis.csu.hayward.edu>.

[34] *See* Virginia Postici *Let's Pretend; The Pageant Masquerading as Environmental Debate.* Reason, Mar. I, 1998.

[35] Finnegan, *supra* note 8. Ì have not seen Kaczynski's journals in their entirety, and must trust that the diagnostician's interpretation is based in fact. The record thus far points to the fact that it is probably not.

liant, lonely, sad, and (here is the important part, the part where expert opinions are necessary) these qualities somehow add up to mental illness. Only a uniquely American professional arrogance, and a breathtaking lack of empathy and respect for worldviews different from one's own, could equate a desire for solitude (Rilke comes to mind) and a return to nature (Thoreau comes to mind) with mental illness. In eastern cultures, the solitary sage is a figure of respect and the manifestation of courage. Rilke wrote that the best way we can show love for other people is to become "guardians of one another's solitude," and Thoreau urged Americans to "simplify, simplify."[36] Buddhists, for example, frequently spend long hours in silent contemplation.

In a way, it is unsurprising that mental health experts did not react well to the Unabomber or his manifesto. Both the Unabomber and his manifesto are sharply critical of modern psychiatry and its practitioners. Unlike writers such as psychiatrist Thomas Szaz, Kaczynski does not believe that mental illness is a "myth."[37] Kaczynski is acutely aware of the limitations of psychiatry in describing and explaining the full complexity of human behavior and motivations. Kaczynski argues (correctly, in my view) that a society's notions of mental illness—and mental wellness—are intimately connected to that society's values, norms and mores: Like our laws, our definitions of craziness reinforce the values we deem normal and good. In this Kaczynski is not terribly radical (and in fact his understanding of how psychiatry works is far more impressively sophisticated and perceptive than my summary here demonstrates).

Echoing Michael Foucault, the Unabomber wrote in his manifesto: "The concept of 'mental health' in our society is defined largely by the extent to which an individual behaves in accord with the needs of the [technological] system and does so without showing signs of stress."[38] In his diary, Kaczynski wrote of his fear that his bombing campaign against technology would be dismissed as the work of a "sickie," noting—correctly, I think—that "many tame, conformist types seem to have a powerful *need to* depict the enemy of society as ... sick." In another diary entry, Kaczynski wrote: "If I succeed in killing enough people, the news media may have something to say about me when I am caught or killed. And they are bound to try to analyze my psychology and depict me as 'sick.'" He also noted the Soviet practice of labeling dissidents as mentally ill.

The mental health experts retained by the defense lawyers would respond that Kaczynski is simply "in denial" about his mental illness. In the *Through the Looking Glass World* of forensic psychiatrists who specialize in "unawareness of illness"—and Kaczynski's lawyers hired one of these, a psychologist named Xavier Amador who contacted and offered his services to the accused Unabomber—Kaczynski's very contempt for psychiatry and the idea that he's mentally ill is itself viewed as expert evidence

[36] *See* Rainer Maria Rilke, Letters to a Young Poet (1908). *See also* Henry David Thoreau, Walden (1959 ed.).

[37] *See.* e.g., THOMAS SZAZ, M.D., THE MYTH OF MENTAL ILLNESS (1974).

[38] I should note that I have never seen Theodore Kaczynski's diary, in whole or in part.

that he is indeed mentally ill. Because he denies he's mentally ill, he must in fact be crazy.

It is also useful to bear in mind that the alleged diagnoses of the forensic psychiatrists retained by Kaczynski's lawyers have never been subjected to the crucible of cross-examination or any other form of adversarial testing. I wonder how Kaczynski's experts would have stood up under cross-examination by the prosecution. Certainly they would have been challenged. For example, the defense experts diagnosed Kaczynski a paranoid schizophrenic based on the Minnesota Multiphasic Personality Inventory (MMPI) test. But a prosecution neuropsychologist found that "since schizophrenia or a 'predisposition to schizophrenia' cannot be diagnosed based on MMPI findings, [the defense's psychologists'] interpretations are erroneous."[39] Dr. Phillip Resnick, a psychiatrist retained by the prosecution, analyzed Kaczynski's diary. In the diary, Kaczynski wrote: "I intend to start killing people."—suggesting perhaps that Kaczynski had a rational agenda for his lengthy bombing campaign. Resnick reportedly wrote in his report that Kaczynski "may have rationally concluded that if he were labeled mentally ill, his political anti-technology agenda would be denigrated ...It is possible that Mr. Kaczynski is not suffering from a severe mental illness and does not want to be unjustly labeled as mentally ill."[40] Still, Resnick continued, it is "also possible that Mr. Kaczynski is mentally ill and lacks insight into his illness."[41]

Another psychiatrist for the prosecution, Dr. Park Dietz, had also read Kaczynski's journals and reviewed Kaczynski's neurological testing. However, where the defense experts saw "schizophrenia" in the neurological testing, Dietz saw "geek." Dietz explained that Kaczynski's diaries are "full of strong emotions, considerable anger, and an elaborate, closely-reasoned system of belief about the adverse impact of technology on society. The question always is: Is that belief system philosophy or is it delusion? The answer has more to do with the ideology of the psychiatrist than with anything else."[42]

To be sure, the prosecution's experts were reported to have been hampered by Kaczynski's refusal to cooperate with them. Potential defense experts also were said to have been hampered by Kaczynski's noncooperation. Kaczynski himself claims, with documentary support, that he hampered no one unreasonably.

The conclusions of the forensic mental health experts retained by the defense and prosecution can, to some extent, be dismissed as partisan. Good defense lawyers (and Kaczynski's lawyers were very good) know how to select mental health experts who will give the lawyers the diagnosis they want.

---

[39] John T. Kenny, Ph D.. ABPP. Analysis of Neuropsychological Testing of Theodore J. Kaczynski, Dec. 29. 1997.

[40] Declaration of Phillip Resnick, M.D., United States v. Kaczynski, No. CR.-5-96-259 GEB. 1997 WL 741193 (E.D. Cal. Doc. 1997).

[41] *Id.*

[42] Declaration of Park Dietz, M.D., United States v. Kaczynski, No. CR-5-96-259 GEB, 1997 WL741193(E.D. Cal. Doc. 1997).

Dr. Sally Johnson cannot be so easily dismissed. In January 1998, the judge in the Unabomber case put the trial on hold and ordered Theodore Kaczynski to be examined by Dr. Johnson. Kaczynski cooperated with Dr. Johnson's exam.

After five days of studying Kaczynski, Dr. Johnson concluded that he was mentally competent to stand trial.[43] She also made a *provisional* diagnosis that Kaczynski was a paranoid schizophrenic. (The daily press missed that Dr. Johnson's diagnosis was *provisional.)* However, like the defense experts. Dr. Johnson's findings were based on her conclusion that Kaczynski's political ideology was a delusion rather than a philosophy. Dr. Johnson's analysis reveals more about the values, blind spots, and cultural and intellectual biases of her profession than it reveals about Theodore Kaczynski's mental health.

B. The Circumstantial Evidence: The Recluse, the Cabin and the Manifesto

Had the Unabomber case gone to trial, the prosecution's experts would have tried to undermine the defense's experts. In the "battle of the experts" that almost certainly would have occurred at Kaczynski's trial, the jury would likely have relied on their own common sense wisdom in deciding whether Kaczynski was crazy, and, if so, how crazy. Then, the jury might well have looked to the circumstantial evidence of Kaczynski's sanity or its absence.

For example, the Unabomber's lawyers placed great emphasis on Kaczynski's reclusive lifestyle in rural Montana. His cabin in Montana was defense counsels' Exhibit A that their client was crazy; the lawyers even had the cabin transported to Sacramento so they could show it to Kaczynski's jury. But what the lawyers didn't plan to show the jury was the context in which the cabin—and Kaczynski—existed.

Context is everything. The place where Theodore Kaczynski bought his land and built his home "is strikingly beautiful, a mountain woodlands near Stemple Pass, just west of the Continental Divide. Cougars, bobcats, elk and the occasional grizzly bear roam the high country. The Blackfoot River runs through it like a dagger, carrying cutthroat, rainbow and brook trout," wrote the *New York Times.*[44] In winter, "the snows lay deep and silent."[45] In summer, "the sun was molten gold, and the rain tapped softly on shingles and gently bent the branches of the trees."[46]

Here was a place to build a home.

---

[43] See Sally C. Johnson, M.D., Forensic Evaluation of Theodore J. Kaczynski, Jan. 16, 1998, *available at* <http://www.courttv.com/tnal/unabomber/documents>.

[44] Robert D. McFadden, *Prisoner of Page: From a Child of Promise to the Unabomb Suspect,* N Y.TiMES.May 26, 1996, § I, at I.

[45] *Id*

[46] *Id.*

Kaczynski built a one-room cabin. It was set back on a dirt road, about 1/4 mile from the nearest neighbor. Kaczynski's home had a storage loft and a dugout cellar. The house didn't need electricity, because Kaczynski obtained a wood stove.

Kaczynski's lawyers made much of the fact that Kaczynski's cabin was small. However, other folks in Kaczynski's tiny Montana town explained to me the economics of why this was so: The smaller the living space, the less there is to heat during the brutal—and long—Montana winters. And Kaczynski's cabin wasn't much smaller than John Brown's home in Lake Placid, New York, and Brown lived there with his wife and ten children.

In this setting Kaczynski would have his solitude—not unlike others who live in the region. "Aside from his taste in books and his rarely displayed articulateness, the usually unwashed Kaczynski did not raise eyebrows around Lincoln, where many people live secluded lives."[47] Where Kaczynski lived—and where I live now, for that matter—a desire for solitude is not considered terribly odd.

He would also have self-sufficiency. He baked his own bread. He grew potatoes, parsnips and other vegetables in his garden. For a year or so after coming to Montana, Kaczynski made his own candles. Later, he used something resembling a "slut lamp" fueled with deer fat or paraffin.

To me, living in rural Vermont—"ground zero of the back-to-the-land movement of hippie times," according to *the New York Times*—none of these things seem to indicate mental illness.[48] I don't live off the power grid (as Kaczynski did), but I know people who do, and I didn't move to Vermont for my modest house any more than Kaczynski moved to Montana for his cabin. I moved here for the mountains and the skies and the trees and the rivers and the air and the solitude. Especially the solitude. There are only about 500,000 people in my adopted state ("more cows than people," according to the bumper stickers), and I haven't met most of them.

The people who knew Kaczynski best, his neighbors and acquaintances in Montana, did not think he was mentally ill. According to a *Time* magazine article published in late October 1997, Becky Garland, forty-one, who befriended Kaczynski and who owed Garland's Town and Country Store, said, "I can't imagine anybody saying he's insane ...You might say that anyone who makes mail bombs is insane. But insane by law? I don't think he was that." Her sister, who "knew Ted didn't have much of a childhood," "felt he was normal when he came to town." So did Dan Rundell, who loaned Kaczynski a bicycle and got a tour of Kaczynski's garden irrigation system in return: "I always thought that he acted, for a person who was a recluse, well within the bounds of society. He always seemed a little jumpy. But I put that down to the fact that he was not a social person." Similarly, Jack McCabe, owner of a hotel where Kaczynski stayed thirty-one times since 1980, reportedly said "Ted Kaczynski never

---

[47] *Id*

[48] Carey Goldberg, *Even in Vermont, the Ardor for Wood Stoves has Cooled,* N.Y. Times, Nov 30, 1998, at Ai.

bothered me any. I figured he was some rancher from up in Lincoln [Montana] who wanted to get away to the big town for a day or two. Lots of them did."

But perhaps no person claims to have known Kaczynski better than Chris Waits, Kaczynski's neighbor in Lincoln. Waits knew Kaczynski during his entire time in Montana. Three days before Christmas 1998, Waits told me: "I've never seen anyone more sane than Ted—he's calculating beyond description. If Ted wants the world to see him as sane, I'll be the national crier for his sanity: I'm his best ally in this." Waits argues that, "Ted *does* care about the environment, but that's not where his motivations [for the bombings] came from. He sent the bombs out of hatred and revenge. The hatred might have begun with concern for the environment, but what he really hated were infringements on his own parts of nature—his privacy, his solitude. He was perfectly willing to litter in parts of the forest he didn't care about. His motivations are very complex, *he's* very complex—but not insane."

Consider the Unabomber's Christmas cards. Theodore Kaczynski's eighty-five-year-old neighbor in Montana, Irene Preston, told *U.S. News & World Report* magazine that she received Christmas cards from Kaczynski for nine years.[49] One holiday season, Kaczynski wrote to her, "I had a particularly good crop of carrots in my garden this year." Ms. Preston recalled she played cards with him (Pinochle). She remembered him as "very kind and gentle."

The Unabomber's defense lawyers also reportedly planned to rely upon stories from Theodore Kaczynski's personal and family history. Two incidents in Kaczynski's early childhood were targeted by his family and by investigators as possible causes of his future crimes. At the age of nine months, Kaczynski was hospitalized for an allergic reaction to eggs and denied virtually all contact with his parents. At age seven years, he had allegedly been left alone to sob in a hospital lobby while his father and grandmother went into the maternity ward for David to be born. Kaczynski himself has written a careful and exhaustively documented rebuttal of the picture his family paints of his childhood.

Portions of the Unabomber Manifesto seem to correspond with reported events in Kaczynski's early life, and perhaps these passages are autobiographical. The manifesto argues that because technological society "needs scientists, mathematicians and engineers ... heavy pressure is put on children to excel in these fields. It isn't natural for an adolescent human being to spend the bulk of his time ata desk absorbed in study. A normal adolescent wants to spend his time in active contact with the real world ... [b]ut in our society, children are pushed into studying technical subjects, which most do grudgingly."[50] Perhaps Kaczynski was describing his own childhood. Perhaps not.

Kaczynski's childhood and early adult life had been far better and more privileged than virtually all of my capital clients, although Kaczynski's personal history was

[49] Marianne Lavelle, *Defending the Unabomber: The Case May Revolve Around Ted Kaczynski's Angry Writings, His Shack, And The Pleas of His Brother.* U.S. NEWS & WORLD REPORT. Nov. 17,1997,

[50] Kaczynski, *supra* note 9, § 115.

not perfect (whose was?). Kaczynski asserts that when his parents became angry at him, they would verbally abuse him. In particular, his parents sometimes called him "sick" and emotionally disturbed, and they compared him to a particular man who was mentally ill and institutionalized. On the other hand, Kaczynski's parents have been described as solid, hard-working people who loved him, sacrificed for him, and tried to help him.

Theodore John Kaczynski was born in Chicago, Illinois, on May 22, 1942, the oldest son born to Jonathan and Wanda Kaczynski. His father Jonathan provided financially for his family.

Theodore's father committed suicide in 1990 by a self-inflicted gunshot wound to the head. The father had been diagnosed shortly before his death with lung and spinal cancer. His mother Wanda was well-read and articulate; she loved Shakespeare, Austen, Dickens, and Thackeray. Ted's mother kept a diary about her son and read to him daily from children's books, then from boys' literature, and later, from journals *like Scientific American.* When his parents suspected that Kaczynski might have been unhappy in high school — although he joined the band, played trombone, joined the math club, coin club, biology club and German club—because he was so much brighter than his peers, his parents and high school officials decided to accelerate Ted's curriculum to allow him to skip two years of high school and enter Harvard, on a scholarship, at age sixteen.

Harvard was no picnic for the adolescent and immature Theodore Kaczynski. He didn't fit in, and he tended to gravitate to intellectual boys who shared his developing passion for mathematics and science. This Harvard crowd tolerated Kaczynski because of his intellect and his eccentricities. Kaczynski's classmates "were chess-players with Elvis pompadours, teenage pipe smokers marveling at Isaac Asimov and Ray Bradbury and fantasizing about landing on the moon," according to the *New York Times.* His dorm room was a mess and he played his trombone loud at night. Surprisingly, his grades were average.

While at Harvard, Kaczynski underwent psychological testing. The Unabomber media implied that this suggested Kaczynski's belief, during his undergrad years at Harvard, that he needed psychological help. In fact, Kaczynski—like many of his Harvard classmates—consented to be subjects of psychological studies. Kaczynski participated in a psychological study with Harvard students as subjects. Kaczynski wrote to me that participants in the study were given code names, and Kaczynski's code name was "Lawful."

Please indulge me a brief digression. During the four years Kaczynski was an undergraduate at Harvard (1958 to 1962), some fairly weird psychological research was going on there—not all of it with the consent of the subjects. For example, Dr. Henry Murray, the chief researcher in the Harvard study in which Kaczynski participated worked as a Lieutenant Colonel during World War II with the Office of Strategic Services (OSS), the precursor of the CIA (my father worked for OSS and CIA). At OSS, this researcher worked on using drugs in interrogation.

Also, at Harvard in the 1950s and early 1960s, the CIA and the military conducted experiments on the effects of LSD on unsuspecting subjects. Writer Alston Chase reports that Dr. Murray, the chief researcher in the Harvard study in which Kaczynski participated, was fascinated with LSD and set Timothy Leary up at Harvard.[51] Chase hypothesizes that the Harvard experiments must have been CIA operations: The only conceivable purpose of such studies would have been to generate data for the CIA on how to break down the wills of subjects during interrogation.[52] In other words, mind control.

Alexander Cockburn recently wrote:

> The man experimenting on the young Kaczynski was Dr. Henry Murray, who died in 1988. Murray became preoccupied by psychoanalysis in the 1920s, drawn to it through a fascination with Herman Melville's "Moby Dick," which he gave to Sigmund Freud, who duly made the excited diagnosis that the whale was a father figure. After spending the 1930s developing personality theory, Murray was recruited to the OSS at the start of the war, applying his theories to the selection of agents and also presumably to interrogation.
>
> As chairman of the Department of Social Relations at Harvard, Murray zealously prosecuted the CIA's efforts to carry forward experiments in mind control conducted by Nazi doctors in the concentration camps. The overall program was under the control of the late Sidney Gottlieb, head of the CIA's technical services division. Just as Harvard students were fed doses of LSD, psilocybin and other potions, so too were prisoners and many unwitting guinea pigs.
>
> Sometimes the results were disastrous. A dram of LSD fed by Gottlieb himself to an unwitting U.S. army officer, Frank Olson, plunged Olson into escalating psychotic episodes, which culminated in Olson's fatal descent from an upper window in the Statler-Hilton in New York. Gottlieb was the object of a lawsuit not only by Olson's children but also by the sister of another man, Stanley Milton Glickman, whose life had disintegrated into psychosis after being unwittingly given a dose of LSD by Gottlieb.
>
> What did Murray give Kaczynski? Did the experiment's longterm effects help tilt him into the Unabomber's homicidal rampages? The CIA's mind experiment program was vast. How many other human time bombs were thus primed? How many of them have exploded?

I haven't researched the CI A-LSD-Kaczynski angle, but I did serendipitously run across an intriguing reference to how LSD was considered, at least in England, around

[51] Telephone Conversation Between Alston Chase and Michael Mello. Nov 4, 1998.

[52] *id.*

the time Kaczynski was at Harvard. I'm an avid reader of English murder mysteries—Dorothy Sayers, Martha Grimes, P.D. James—and recently I was reading P.D. James's *A Mind to Murder.* The novel was published in 1962—Kaczynski's last year at Harvard, and the year he participated in the Murray study—and it was set in a psychiatric hospital in which one of the doctors regularly used LSD to treat patients. The novelist explains that treatment with LSD was "a method of releasing deep-seated inhibitions so that the patient was able to recall and recount incidents which were being repressed by the unconscious and were responsible for his illness."[53] A nurse in the novel explains: "It's a remarkable drug, and Dr. Baguley uses it quite a lot... I think it was discovered by a German in 1942."[54] It is easy to see why the CIA might be interested in the mind-control potential of this drug discovered by a German during the Nazi era.

What does this mean? Probably nothing. There is no evidence that Kaczynski was given LSD as part of the Murray study at Harvard. Kaczynski says he was not, and it seems to me unlikely that he would not have noticed had he been given the drug surreptitiously. More importantly, there is no evidence that even if Kaczynski had been given LSD at Harvard in 1962, such experimentation bore any causal connection with Kaczynski's decision sixteen years later to begin sending bombs. I don't see how Kaczynski's participation in the Murray study could possibly explain—much less excuse or even mitigate—the seventeen-year reign of terror of the Unabomber. In short, the LSD business is both speculative and irrelevant to the only important issue upon which it might conceivably bear—why Theodore Kaczynski became the Unabomber.

Anyway, Kaczynski graduated Harvard in 1962 and headed for the University of Michigan to begin five years of graduate studies. There his intellectual gifts blossomed. To the amazement of his teachers and peers. Kaczynski began publishing papers in respected academic journals. His article, *Boundary Functions for Functions Defined on a Disk,* was published in the Journal of Mathematics and Mechanics in 1965; another paper, *On a Boundary Property of Continuous Functions,* appeared in the Michigan Journal of Mathematics a year later. His dissertation, *Boundary Functions,* was a work of pure theoretical mathematics; Kaczynski was awarded the 1967 Sumner Meyers Prize for the best mathematics dissertation at Michigan that year.

Kaczynski was publishing leading-edge work, and it landed him ajob teaching mathematics at Berkeley. Berkeley's Free Speech Movement had spawned the national campus demonstrations against the Vietnam war, and the Berkeley campus remained a hotbed of student activism. With the sixties going on literally under his nose, Kaczynski seemed oblivious to them. He seemed to be on the fast-track to tenure there, but in 1969, at age twenty-seven, Kaczynski left Berkeley determined to find a simpler life in a rural area. Perhaps Kaczynski hadn't been oblivious to the chaos around him after all. Nineteen sixty-nine was the year Neil Armstrong and Buzz Aldrin walked on the

[53] P.D. James, A Mind To Murder (1962).
[54] *id.*

moon, but the fragile planet they'd left behind, especially their United States, seemed to be coming apart at the seams.

I don't know what stories Kaczynski's family would have told in court. As mentioned above, unlike many of my death row clients, Kaczynski wasn't uneducated; he wasn't borderline retarded; he wasn't a racial minority; he didn't grow up in poverty; he probably wasn't physically and sexually brutalized by his family. Juries routinely sentence to death people who had horrible childhoods, who are retarded, who are crazy.

Personally, I must confess to a grudging admiration for Theodore Kaczynski's refusal to allow his lawyers to portray the crimes as the product of a bad childhood and adolescence. Such an "abuse excuse" defense would not have been likely to succeed in the Unabomber case in any event. It is doubtless true that genius-IQ-math-wizard white men have their sad stories to tell, but I wonder whether a jury of working-class men and women would have found those stories compelling in the Unabomber's case—except to the extent that the stories account for the crimes. Although it's impossible for me to evaluate evidence I do not know, I must wonder whether the Kaczynski family stories could outweigh the rest of the circumstantial evidence indicating that, whatever else Theodore Kaczynski was, he was not seriously and significantly mentally ill.

Other circumstantial evidence reinforces the idea that what Kaczynski's lawyers were doing was medicalizing his radical political views and the violent means he used to further his political ideology. The seventeen-year bombing campaign was methodical. The Unabomber eluded the largest and most expensive manhunt in American history. And he took very, very good notes on all of it.

Kaczynski's diary was meticulous. The portions of Kaczynski's diary I have read do not strike me as the writings of a madman. I wish they did; he'd be easier to dismiss. But they are far more chilling than that, and they are far more frightening. They are almost clinical in their content and affect. In coldly sterile detail, Kaczynski in his diary set out his "experiments," and his reasons for conducting them, as well as the specific techniques he used to construct each bomb and plan each attack. In scientific language, he described how he had taped razor blades and nails to increase the killing potential of one of his pipe bombs. After his first fatal bombing, Kaczynski wrote in his diary: "Excellent. Humane way to eliminate somebody."

Kaczynski's war on technology seems to have been an evolutionary process. According to Chris Waits, Kaczynski's private journals—-which Waits quotes in his book about the Unabomber—reveal that Kaczynski's campaign began with acts of property destruction (sabotaging bulldozers and logging equipment, the sorts of things today associated with environmental organizations like Earth First!) before he moved up to murder. Kaczynski's early monkey wrenching in Lincoln, Montana can be seen as a precursor to Earth First! tactics like tree spiking—driving nails into old-growth trees, making it dangerous to fell them with a chainsaw. Ron Arnold has argued that Kaczynski's violence exists within the context of American eco-terrorism.

And then there is the Unabomber Manifesto itself. Don't decide the manifesto is a delusion rather than a philosophy until you read it for yourself. I read it, all 35,000 words of it, several times. The manifesto's central thesis is that the Industrial Revolution has done humanity more harm than good. Kaczynski's notion of personal freedom stands at the core of the manifesto— essentially a libertarian document:

> Freedom means being in control (either as an individual or as a member of a *small* group) of the life-and-death issues of one's existence: Food, clothing, shelter, and defense against whatever threats there may be in one's environment. Freedom means having power: Not the power to control other people, but the power to control the circumstances of one's own life.[55]

Technology has brought obvious benefits (electricity, telephones), but the price has been an unacceptable loss of freedom, the Unabomber argues in his manifesto.

In setting out this thesis—and its antidote, a return to wild nature—the manifesto is tightly reasoned and clear in its assumptions and limitations. The manifesto's tone is pedantic and sober, and its affect isn't nearly as wild as Zola's *J'Accuse,* Paine's *Common Sense,* or Garrison's *Liberator.* Although turgid and wooden, it's no worse written than Marx, Engles, Kant, Habermas, or Hegel. The Unabomber's critique of technology also is not vastly dissimilar from the ideas articulated by contemporary social critics. One such critic, Kirkpatrick Sale, even criticized the Unabomber manifesto for unoriginality.[56] And in September 1997, two months before Kaczynski's trial began, the *New York Times* magazine ran a special issue entitled *What Is Technology Doing To Us?.*[57] The magazine concluded that it is making us faster, richer and smarter—as well as "alienated, materialistic, and a little crazy."[58] Two months after Kaczynski was sentenced, the *Times* op-ed pages contained a piece which asked the same question and answered: "Losing our Souls, Bit By Bit."[59] In addition, there are the issues of global warming, destruction of the ozone layer, degradation of the rain forests, and the rest of all that crazy environmental stuff.

The Unabomber's political philosophy was not a hallucination. Nor were the violent means he used to further that political ideology. The manifesto explained the Unabomber's violence in this way: *Tn order to get our message before the public with some chance of making a lasting impression, we had to kill people.*[60] Without the Unabomber's violence—and his threat of further violence if the 35,000-word manifesto was

---

[55] Kaczynski, *supra* note 9, § 94.

[56] *See* Kirkpatrick Sale, *tn there a method in hie madness? Unabomber demands that the New York Times and Washington Post prim his 35,000 word text, or he will continue sending bombs,* 261 Nation 305(1995).

[57] *Special Today: What Technology is Doing To Us.* N.Y. TIMES, Sept. 28, 1997, § 1, at I.

[58] *Id.*

[59] Richard Powers, *Losing Our Souls, Bit by Bit,* N.Y. TIMES, July 15, 1998. at A19.

[60] Kaczynski, *supra* note 9, § 96.

not published in full by the *New York Times* and *Washington Post*—no major American newspaper would have published the manifesto. The Unabomber's reasoning here was coldly, brutally manipulative. It was not crazy.

By acknowledging that Kaczynski's political ideology is not crazy—Kirkpatrick Sale points out that it's not even terribly original[61]—I do not wish to glorify Kaczynski. Far from it Kaczynski is nothing more than a tinhorn terrorist who murdered and maimed innocent people to publicize his ideological screed. He said as much in the screed itself.

Nor do I wish to suggest that Kaczynski is somehow a political prisoner. He isn't. He'll spend the rest of his life in a tiny cage—and he deserves to spend the rest of his life in a tiny cage—because he's a clear-eyed, remorseless killer, for that reason and that reason alone. Indeed, Chris Waits has argued that Kaczynski's diary shows that the Unabomber's reign of terror was motivated more by petty spite and revenge than politics.

The Unabomber's killings were the *only* reason his manifesto was published; were it not for the bombings, the *Post* and the *Times* wouldn't have given Kaczynski space for a 500-word op-ed piece setting forth his critique of technology—much less seven *full* pages of newspaper. And, now, major news shows are stumbling over themselves trying to get the first exclusive on-camera interview with Kaczynski. The killings made Kaczynski a celebrity, and the killings are the only reason the media is now interested in the ideas set out in the manifesto. Without the killings, the manifesto is nothing more than the unoriginal musings of a smart hermit.

60 Minutes has, for the past nine months, led the electronic media charge to secure the first exclusive interview with the Unabomber. During this time, I have watched Kaczynski try to manipulate *60 Minutes,* and vice versa, with a fascination akin to watching maggots at work. What *60 Minutes*—or whoever else interviews Kaczynski—will find is that he's just not very interesting, at least not over the phone. They'll find him coy and evasive about the only issues that matter (why he sent the bombs), spiteful and hateful towards his brother and mother, and pretty boring about everything else. They'll find him as dull and trivial as his memoir, *Truth Versus Lies* [sic].

The prosecution in the Kaczynski case—and, more recently, the book by Kaczynski's Montana neighbor, Chris Waits—described Kaczynski as being a man motivated more by petty revenge and anger than by his concern for the environment. Both the prosecution's sentencing memorandum, and the Waits book, are based on Kaczynski's private journals. Because I do not have access to Kaczynski's journals, I remain agnostic in the debate over the motives that appear in his journals. For my purposes, the rival interpretations of the reasons for the bombings do not really matter. *Both* accounts of the reasons (the Waits/prosecution account, and the Manifesto account) are rational and sane. Indeed, Waits has told me that, in his opinion, his book demonstrates that Kaczynski is entirely sane. That is, Waits's layman's view based on his alleged twenty-five year association with Theodore Kaczynski.

[61] Sale, *supra* note 56.

Kaczynski's eve-of-trial suicide attempt seemed to many observers the final confirmation of his mental illness. I don't think so. Consider it from Kaczynski's point of view. Under the circumstances, suicide was the only rational option open to him. He was utterly alone. His lawyers had betrayed him by keeping him in the dark until it was too late for him to replace them or to defend himself at trial without a lawyer. The law-challenged judge seemed poised to refuse to allow him to exercise his constitutional right to fire those lawyers and represent himself. For the next few months, he would have to sit in court, listen to his own lawyers inexorably build a case that he was mentally ill—and there was absolutely no way he could stop it. Except for suicide.

Kaczynski's suicide attempt also would have been an act of communication, as Lydia Eccles has pointed out—an act of communication directed at his lawyers. Kaczynski claims that his counsel told him that suicide was acceptable if he found life imprisonment unacceptable. The message, in his suicide, to his lawyers was blunt: *Your defense is unacceptable.* Indeed, Kaczynski argues that, in a way, his suicide was endorsed by his lawyers. On at least three occasions, his counsel had told him that he should commit suicide if he found life imprisonment unacceptable—the suicide option was part of the lawyer's argument to persuade Kaczynski to cooperate in fighting the death penalty.

Like his actions in general—from the methodical bombing campaign to his struggles with his paternalistic lawyers—Kaczynski's suicide attempt showed his keen mind at work. In a letter to me, Kaczynski described his suicide attempt: "In my cell at night, I tore my underpants at the rim around the leg-hole. This provided a strong cord. I tied the cord around my neck, slipped one of my shower slippers under the cord and twisted the cord by turning the slipper.

"Things started to get sort of black, and I felt I was losing consciousness but too slowly—I was afraid I might pass out but that the cord might not be tight enough to kill me, and that I might survive but be brain-damaged from oxygen deprivation. So I untwisted the cord."

Kaczynski claims he intended to try again with a better arrangement for tightening the cord. However, as he paced his cell to work up his nerve, he heard the sounds of the breakfast carts outside his cell. It was too late to try again and when his suicide attempt was reported, he didn't have a second opportunity to kill himself.

Likewise, Kaczynski's present litigation—which, if it succeeds will likely end up with his execution—seems crazy to some, but it doesn't to me. Is execution necessarily a worse fate than life imprisonment, without possibility of parole, in a maximum security prison?

Theodore Kaczynski prized privacy, solitude, autonomy, and freedom above all else; these aren't mere words to him—they *are* him. For this man to spend the rest of his life in a high-tech supermax prison is a fate far worse than death.

Last October, as part of my effort to find Kaczynski a lawyer, I wrote to him with a question: *Why* did he want to go back to court, to attack his guilty plea, when that

might well expose him to a death sentence and execution? He responded with the following letter . Kaczynski wrote:

> I must explain my personal feelings about the death penalty as opposed to life imprisonment.
>
> To me, physical freedom is absolutely essential for a worthwhile existence. The history of my life bears this out. Without freedom, only despair remains for me. Even if I were able to do so I wouldn't *want* to adjust to a life without freedom. In fact, I refuse to adjust to it as a matter of principle. Such an adjustment would entail the loss of what I most value in myself. I dread the changes that long imprisonment is likely to make in me.
>
> My solitary life in the mountains gave me ample opportunity for introspection, and I know myself welt enough to be certain that my preference for death over life imprisonment will not change.
>
> In our society it is customary to oppose life to death: Life is good — death is bad. But in reality life and death are inextricably linked; they are two sides of the same coin. All organisms die eventually and in doing so they give space and nourishment to new organisms. Thus I see no point in prolonging life indefinitely when there is no longer any particular reason to live.
>
> I am not a selfless idealist and I am not attracted to martyrdom. If I could get out of prison and go back to the mountains, I certainly would do so. But if there is no hope that I will ever be released then my life is of no value to me, so I have no hesitation about sacrificing it. By fighting to the bitter end my defenders' effort to impose their will on me and the dishonest tactics they have used for that purpose, I will make a public statement against legal technicians who adhere mechanically to the principle that the client's life is to be saved by any means whatever and without regard to truth, justice, compassion, or the rights and dignity of the individual. And this will be a statement not only against legal technicians but against the technician class in general: against people who pursue blindly the goals set for them by their profession regardless of whom they hurt in the process or what values they profane. A crude and often-cited example was Werner von Braun, who built rockets first for the Nazis and then for the Americans, and undoubtedly would have built them for the Communists if he had fallen into their hands after World War II. A somewhat less crude example is provided by computer engineers who work to create artificial intelligence without giving consideration to the consequences that such a development would have for human society.
>
> Theodore J. Kaczynski
>
> [Oct. 12, 1998]

After reading the letter yourselves, you can decide for yourselves whether Kaczynski's reasons sound like the ravings of a madman. They don't to me.

Kaczynski's alleged delusions did not render him mentally incompetent to stand trial. He obviously was mentally competent to stand trial. Kaczynski's judge had no real doubt that Kaczynski was mentally competent to stand trial, and my reading of the available transcripts leads me to agree. Even when under intense pressure, from his own lawyers as well as the judge, Kaczynski was poised, and he spoke calmly, rationally, and perceptively. His actions in court were rational responses to the circumstances in which he found himself.

Most importantly to me, Kaczynski's own lawyers never seriously seemed to doubt their client's mental competency to stand trial—and therefore his mental capacity to make important decisions about his case (such as whether to testify, plea, or raise an insanity defense). Of all the participants in Kaczynski's judicial proceedings, his lawyers knew him best; they had worked with him, closely, for a year-and-a-half prior to the scheduled trial. And, so long as Kaczynski followed his lawyers' instructions, they never questioned his competency. Only when Kaczynski rejected the mental defect his lawyers had prepared for him did the lawyers question Kaczynski's competency.

The legal test for mental competence to stand trial is low: understanding of the charges and the legal proceedings, and ability to aid in one's own defense. By this easygoing test, Theodore Kaczynski was competent— by a country mile.

The transcripts of the closed-door meetings between Kaczynski, his lawyers, and the judge show that Kaczynski understood with crystal clarity what was going on around him. Sometimes Kaczynski seemed to understand better than his lawyers and the judge.

But the best evidence of Kaczynski's mental competency to stand trial are his letters to the judge.[62] For example, on December 1, 1997, during the process of selecting a jury, Kaczynski wrote a letter to the judge:

> To Judge Garland E. Burrell from Theodore J. Kaczynski
>
> Your Honor:
>
> Last Tuesday, November 25, I unexpectedly learned for the first time in this courtroom that my attorneys had deceived me. Specifically:
>
> 1. I was told that if I allowed myself to be examined by mental-health experts, the results of the examinations, and even the fact that I had been examined, were covered by attorney-client privilege and would never be known to anyone outside the defense team without my consent'. Last Tuesday I learned that much of this information had been made known to the government without my consent.

[62] Letter from Theodore Kaczynski to Judge Garland E. Burrell (Dec. 1,1997). These letters remain under seal—ostensibly to protect Kaczynski—and they are made public for the first time in my book.

2. I was told that in the coming trial my attorneys would help me to pursue certain personal concerns of my own, even if these were inconsistent with my attorneys' professional concern to do what they considered to be in my best interest in a legal sense. In particular, I was led to believe that I would not be portrayed as mentally ill without my consent. But last Tuesday I learned that I had indeed been portrayed as mentally ill without my consent.

3. When I was being urged to consent to a "[mental illness]" defense, I was misled as to the nature of such a defense. I was led to believe that it would not necessarily involve an effort to portray me as suffering from mental illness, but was only a legal device to enable a certain mental-health professional whom I know and like to tell the jury what kind of person lam. I was not informed that a [mental condition] defense would require the release of the results of mental-health examinations. Moreover, I was not informed until last Friday, November 28, of the most important results of those examinations.

4. On November 28, when I received, for the first time, copies of the briefs concerning the issue of the government's request for an opportunity to examine me, I discovered that the declarations of the defense's mental-health experts contained statements about me that I believe to be false and misleading.

I have discussed these matters with my attorneys. They admitted that they had deceived me, they expressed regret for having done so, and they promised not to do so again. But, as Your Honor can well understand, I do not find their assurances 100% convincing. I also discussed with my attorneys their future plans for my case, but I am not certain that their plans are in my best interest as I interpret it, and I found their reasoning in support of their plans unconvincing.

I therefore feel strongly the need for legal advice from some source outside my present defense team that would help me to resolve my conflicts with my own attorneys. I need such advice at the earliest possible moment, so as to avoid the risk that certain decisions will become irrevocable.

Can Your Honor help me to obtain such advice?

Theodore J. Kaczynski

Kaczynski's second letter to the judge was written on December 18. Kaczynski wrote:

Your Honor:

In order to show you that my objection to the [mental illness] defense planned by my attorneys is not frivolous or petty, I have to explain to you my feelings on this subject, which are extremely intense.

Though I object to the [mental condition] defense planned by my attorneys, the nature of that defense in itself is not the most important problem. What I find unendurable is the circumstances surrounding my attorneys' use of that defense.

During my adolescence I was subjected to frequent psychological abuse by both my parents and to bullying by my schoolmates. Perhaps for that reason, or perhaps for some other, the most horrible punishment that I can imagine is to be subjected to anything that I perceive as an injustice and to be completely helpless to defend myself against it or escape from it. And my attorneys are subjecting me to this kind of punishment in its worst form, as I will explain.

During a year and several months preceding my trial, the members of my defense team treated me kindly, they performed many services for me, they professed affection and friendship for me. Since I'd had no close friends during my adult life apart from my brother, I was very susceptible to this treatment and I soon developed strong feelings of friendship toward the members of my defense team. Some of them I even loved.

When locked up in jail, one can do very little for oneself and must depend on people on the outside to do things for one. I had nobody to help me except my defense team, and as a result I became heavily dependent on them.

I do not have a "pathological dread" of psychiatrists, but, as a matter of choice, I am averse to examination by them (unless perhaps under circumstances in which I can set the terms of the interview myself and put limits on it). The reasons are that I do not believe that science has any business probing the workings of the human mind, and that my personal ideology and that of the mentalhealth professions are mutually antagonistic. One may be willing to bare one's soul to a person whose ideology and values are friendly, but it is humiliating to have one's mind probed by a person whose ideology and values are alien to one's own.

Consequently, when Mr. Sowards asked me to cooperate with Dr. Foster, I was extremely reluctant to comply. Mr. Sowards, who is a very forceful and persuasive talker, subjected me to heavy pressure, which I found very difficult to resist because of my dependence on my defense team and my feelings of affection and friendship for them. But I would have resisted all the same if Mr. Sowards had not told me that the results of the examination would be covered by attorney-client privilege and would never be

revealed to anyone outside the defense team without my permission. Later, in order to get me to agree to a 12.2b defense, Mr. Sowards misrepresented to me what that defense entailed. These and other lies, false promises, and misrepresentations were the work of Mr. Sowards, but Mr. Denvir and Ms. Clarke were aware of the most important ones.

On November 25, when I unexpectedly learned in your courtroom that my attorneys had broken the promises that Mr. Sowards had made to me, I was shocked and horrified. The people who I thought were my friends had betrayed me. They had calculatedly deceived me in order to get me to reveal my private thoughts, and then without warning they made accessible to the public the cold and heartless assessments of their experts. Assessments that were not even truthful—and I am not attempting to dispute here the *conclusions* of their experts, I am referring to false statements of *fact* and to ideas from my writings that were taken out of context and reworded to make them sound like paranoid fantasies.

To me this was a stunning blow. I felt then and still feel that it was the worst experience I ever underwent in my life. What made it so terrible was *not* the assessments of the experts or their public revelation, but the sense of *injustice.* I had been tricked and humiliated by people for whom I'd had warm affection and in some cases love, and with whom I'd worked hard to cooperate. It was made still worse by the fact that, in subsequent discussion with my attorneys, they admitted they had broken their promises, and they said they were sorry for it, but they said they would go ahead with their [mental condition] defense whether I liked it or not, and there was nothing I could do about it.

So there it was—a profound injustice, as I perceived it, and there was nothing I could do to defend myself against it or escape from it. This would have been extremely bad if it had been done to me by a declared enemy; but because it was done to me by people who I thought were my friends and to whom I had given my heart, it was unendurable.

That was why I wrote Your Honor my letter of December I. I delayed giving it to you in hope of a settlement that would have eliminated the need for a trial. But that settlement has not been reached, and my lawyers again say they are going to force the [mental illness] defense on me whether I like it or not. The [mental illness] defense in itself would be endurable. What is not endurable is my helpless sense of injustice over the way I was tricked into providing the information on which it is based. 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. I know that that sounds like an exaggeration, but I can assure you that it is literally true.

> My feelings on this subject are so intense that there is no conceivable way I can continue to cooperate, or even communicate, with my present attorneys if they go ahead with the [mental illness] defense. There is no way I can cooperate any longer with Mr. Sowards under *any* circumstances. Ever since I learned how he deceived me I have had a strong aversion to him. That aversion has grown stronger every time i remember how eloquently and convincingly he spoke to me of "trust," knowing all the while that the promises he was making me would not be kept. By this time it makes me feel sick just to look at him.
>
> Once again, Your Honor, my refusal to go forward under present conditions is not petty or willful. I simply *cannot* continue to cooperate with my attorneys.
>
> Dec. 18, 1997
>
> Theodore J. Kaczynski

Apart from the factual question of whether Kaczynski was mentally ill, there remains the advocacy question: Would ajury have been likely to accept his defense counsel's arguments (1) that the Unabomber was crazy, and (2) that such craziness mitigated the magnitude of the crimes? This, at bottom, was his lawyers' central justification for demanding to raise a mental illness defense: It was the best chance to save their client's life, and it had a far greater chance of success with ajury than did a political or ideological defense.

Perhaps. Juriesare notoriously skeptical of mental illness defenses, even in cases where the illness is clear. And, as discussed above, Kaczynski's alleged mental illness is far from clear. His ability to evade the largest and most expensive manhunt in U.S. history; his cooly calculating diary entries; the Unabomber's Manifesto—any mental illness defense would have needed to overcome these, and more. In the end, it is not at all clear to me that ajury, even ajury convinced that Kaczynski did indeed suffer mental illness, would find that such mental illness so mitigated the cruelty and horror of his crimes that he ought not to be executed for those crimes. One of Kaczynski's surviving victims, Dr. Charles Epstein, a geneticist and pediatrics professor who lost parts of three fingers to a bomb Kaczynski mailed to his home, said it well: "Even if Kaczynski suffers from a mental illness, it doesn't 'excuse' the crimes, and it doesn't take away for me the fact that he is evil."[63]

Although Theodore Kaczynski was "nowhere near the clinical extreme," he will be remembered as a madman, and his writings will be remembered as products of a diseased mind—Kaczynski's family and his defense team did persuade the media that he was profoundly mentally ill, even if they might not have so persuaded a jury. The *New York Times'* lead reporter at the Kaczynski trial traced Kaczynski's trajectory

[63] William Glabcrson, *Evil, or Sick, to His Core: Twa Views of Unabomber,* N.Y. Times. Jan 24, 1998. at AI.

from anti-technology "man of ideas" to "nut" or "fraud."[64] The reporter wrote: "It seems hard to believe now, but it was not very long ago that the Unabomber seemed like a serious person. To read about him in many newspapers and magazine accounts was to hear of a mysterious philosopher: dangerous yet compelling, brilliant, intriguing. Yes, he was troubled, even evil—but he was a man of ideas."[65] The Unabomber "was once compared in news accounts to Daniel Boone, Henry David Thoreau and characters out of Dostoevsky ... an intriguing hybrid of Robin Hood, the Green Hornet and Mick Jagger."[66]

These comparisons seem to me a tad overblown, but I must confess to agreeing with many of the ideas articulated in the Unabomber Manifesto; the manifesto struck me as thoughtful, carefully reasoned, and modest in its goals. But now, of course, who remembers the ideas in the manifesto? "Now he's just a nut. Or, perhaps worse, a fraud ... material for Jay Leno and water cooler comic...pathetic...shtick...a bad sitcom."[67]

The problem here is not so much with the soft science of psychiatry; psychiatry is not much better able today to account for a Theodore Kaczynski than it was in 1859 able to account for a John Brown. The problem is what happens when psychiatry falls into the hands of media-wise defense lawyers in high profile capital cases. Stephen Oates' remark about John Brown's historians is equally true of Kaczynski's lawyers: "It is one thing to learn from what psychology has taught us about human beings. It is quite another for a historian—a layman—to assume the role of the psychiatrist himself...and psychoanalyze a historical personality on the basis of controversial evidence."[68]

In their effort to represent Theodore Kaczynski as mentally ill, Kaczynski's attorneys had two powerful allies: Ted's brother David and mother Wanda, aided by David's media-savvy Washington lawyer. William Finnegan noted that in a media campaign to portray Ted as mentally ill, Kaczynski's family "stayed impressively 'on message,"' according to a "key member of the defense team ... [the family] had learned how to use the press."[69] The media campaign involved long interviews with major newspapers like the *New York Times* and television news magazines like *60 Minutes.*

Thus, it wasn't just Kaczynski's lawyers who represented their client as mentally ill. Indeed, it was a "bizarre alliance of lawyers he was trying to fire, a family he had renounced, psychiatrists he did not trust or respect (and in some cases had never met), a federal judge who had drastically restricted his right to counsel and seemed to fear (with reason) the trial to come, a press convinced he was a schizophrenic ...," William Finnegan wrote in the *New Yorker.*[70]

---

[64] William Glaberson, *Rethinking a Myth: 'Who Was That Masked Man?* ', N.Y. Times, Jan. 18, 1998, § 4, at 6.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Stephen Oates, To Purge This Land With Blood 411 n.39 (1970).

[69] William Finnegan, *Defending The Unabomber.* The NEW YORKER, Mar. 16, 1998. al 60.

[70] *Id.*

Still, in the end, I believe that the principal responsibility remains with Kaczynski's lawyers. They could have shut down the media campaign by Kaczynski's brother and mother, or they could have countered it. However, the mentally ill Unabomber represented to the media by the Kaczynski family reinforced the defense lawyers' theory that their client was a paranoid schizophrenic.

Kaczynski's lawyers essentially sought to "pathologize" the Unabomber's radical politics—a politics that is basically Libertarian, neither traditional left nor right. The lawyers deceitfully attempted to portray Kaczynski's anti-technology ideology to the media as the ravings of a paranoid schizophrenic.

They also used as proof that Kaczynski was a paranoid schizophrenic the fact that Kaczynski lived out his radical agrarian philosophy by abandoning a math professorship for the solitude of Montana. Considering the popularity of back-to-the-land, self-sufficiency movements, Kaczynski's lifestyle really wasn't that radical—and not all that different from how some Vermonters I know choose to live.

If you think Kaczynski is a paranoid schizophrenic, I have a question for you: *What are his delusions?* The hallmark of paranoid schizophrenia is a delusional architecture: What are Kaczynski's delusions? That the Industrial Revolution has been a mixed blessing? Hardly a delusion. That technology is chipping away at our freedoms and privacy? Hardly a delusion. That committing murder—and threatening to commit more—was the only way to force the *New York Times* and *Washington Post* into publishing, in full and unedited, the 35,000-word Unabomber Manifesto? Hardly a delusion. That the powers that be in our culture would define the Unabomber as a pathetic lunatic? Hardly a delusion. That a simple, self-sufficient life, in one of the most physically beautiful places in America, is preferable to the rat-race of academia? Hardly a delusion.

Part of me wishes that Kaczynski *was* insane. The crimes become less threatening if we believe that only a madman is capable of them. There is something comforting in the idea that the Unabomber was a mad bomber. What else could have made him do it? Consider an alternative explanation: Theodore Kaczynski was a perfectly sane, albeit eccentric, highly-educated white man who, nearly two decades ago, decided to devote his life to designing and crafting deadly mailbombs; he went about his lethal task with scientific precision and exceptional premeditation. He wasn't a mad bomber; he was a chillingly sane bomber. The sane bomber, it seems to me, is a far scarier image than the mad bomber.

I'm not arguing that Kaczynski is a normal, well-adjusted American citizen—he isn't. Normal, well-adjusted American citizens don't devote nearly two decades of their lives to sending increasingly deadly bombs through the mail. Dr. Sally Johnson, the psychiatrist appointed by the court to examine Kaczynski's mental competence to stand trial (and who found him competent) wrote in her report:

> In the summer after his fourth year [of graduate school], he describes experiencing a period of several weeks where he was sexually excited nearly

> all the time and was fantasizing himself as a woman and being unable to obtain any sexual relief. He decided to make an effort to have a sex change operation. When he returned to the University of Michigan he made an appointment to see a psychiatrist to be examined to determine if the sex change would be good for him. He claimed that by putting on an act he could con the psychiatrist into thinking him suitable for a feminine role even though his motive was exclusively erotic. As he was sitting in the waiting room, he turned completely against the idea of the operation and thus, when he saw the doctor, instead claimed he was depressed about the possibility of being drafted. He describes the following, "As I walked away from the building afterwards, I felt disgusted about what my uncontrolled sexual cravings had almost led me to do and I felt humiliated, and I violently hated the psychiatrist. Just then there came a major turning point in my life. Like a Phoenix, I burst from the ashes of my despair to glorious new hope. I thought to kill the psychiatrist because the future looked utterly empty to me. I felt I wouldn't care if I died. And so I said to myself why not really kill the psychiatrist and anyone else whom I hate. What is important is not the words that ran through my mind but the way I felt about them. What was entirely new was the fact that I really felt I could kill someone. My very hopelessness had liberated me because I no longer cared about death. I no longer cared about the consequences and said to myself that i really could break out of my rut in life and do things that were daring, irresponsible or criminal." He describes his first thought was to kill someone he hated and then kill himself, but decided "I will kill but I will make at least some effort to avoid detection so that I can kill again." He decided that he would do what he always wanted to do, to go to Canada to take off in the woods with a rifle and try to live off the country, "If it doesn't work and if I can get back to civilization before I starve then I will come back here and kilt someone I hate." In his writings he emphasized what he knew was the fact that he now felt he had the courage to behave irresponsibly.[71]

Anyone who reads his memoir, pretentiously-titled *Truth versus Lies,* will get the impression he's...off. He clearly is a killer. But he's not a paranoid schizophrenic, not in my opinion.

One significant question about Theodore Kaczynski's alleged paranoid schizophrenia remains. If I'm correct about the paucity of the evidence that Theodore Kaczynski was indeed seriously mentally ill, then how were his family and his defense team able to convince a generally skeptical press corps and public that the methodical, genius-IQ-math-professor Unabomber was in fact a paranoid schizophrenic?

[71] Johnson, *supra* note 43.

Part of the answer is informational. Kaczynski's defense team effectively silenced their client by isolating him from the outside world for eighteen months before jury selection began in the Unabomber case. During this crucial year-and-a-half, the public conversation about Kaczynski's mental health was dominated by his brother and mother—-two people who fervently believed their family member was profoundly mentally ill. When, as the trial began and Kaczynski struggled mightily to rebut his family's portrait of him as a madman, his lawyers and the judge silenced him again. The daily press corps did not have access to the transcripts of the closed-door meetings between Kaczynski and his lawyers.

More importantly, however, the public perception of the Unabomber as profoundly mentally ill has less to do with the objective evidence of Kaczynski's mental health than with our own expectations and our own need to explain his horrific crimes. The picture of the Unabomber painted by his lawyers—the deranged loner—was the picture the public and the media expected to see and, perhaps, it was the picture they wanted to see. The Kaczynski defense team showed the nation exactly what it expected to see.

Profiles of assassins are embedded in the American psyche. From Lee Harvey Oswald to the 1998 shooter in the nation's Capitol, we define our assassins as loners who are crazy; a *Newsweek* cover story on the Capitol gunman was headlined, *The Loner.*[72] However, the most comprehensive study ever conducted of American assassins found that the madman or the lonely loser as political killer is a myth. The Secret Service studied all eighty-three people who attacked or tried to attack an American political figure or celebrity in the past fifty years; the researchers were able to interview twenty-three of the assassins themselves.[73] In a 1998 report, *Preventing Assassination,* the Service challenged several popular stereotypes of assassins.[74] Fewer than half of the assassins showed symptoms of mental illness; "None were models of emotional health, but relatively few suffered from serious mental illness that caused their attack behaviors."[75] The assassins also weren't loners, and they weren't losers.[76]

No matter. The stereotypical lone nut is firmly fixed in the American mind. The portrait painted by the Unabomber's lawyers fit right into that stereotype.

The Unabomber, and his manifesto and his diary were cultural Rorschach blots: We saw in them, him, and his crimes what we expected to see and what we wanted or needed to see. For many Americans, what we expected to see, and perhaps what we wanted and needed to see was a madman. It is less threatening for us to believe that only a madman would do what the Unabomber did. There is something comforting in the idea that the Unabomber must have been a *mad* bomber. Why else would he have done it?

---

[72] *See* NEWSWEEK, Aug. 3. 1998.

[73] Evan Thomas and Peter Anin, *A Loner's Odyssey.* Newsweek, Aug. 3, 1998. at 22.

[74] Bill Dedman, *Secret Service Challenges Assassin Stereotypes,* N.Y. TIMES, Aug. 9. 1998, 5 l,at20.

[75] *Id*

[76] *id*

Lydia Eccles, a Boston artist and anarchist, is right that the most obvious evidence that Theodore Kaczynski was sane, lucid, and competent was the Unabomber Manifesto itself—a document which, although always available to the media and the public, became invisible once the hermit Kaczynski was identified as the Unabomber. As long as the bomber "was on the loose, the Manifesto was considered a sane political document, and [the Unabomber] was a serious terrorist threat. The suspect arrested lived according to the tenets of the Manifesto. What changed to make him 'crazy'? The manifesto was removed from view, and those who wished to discredit [Kaczynski]—his family, the lawyers—were given total control of the podium. The press apparently forgot that Kaczynski had written a long and cogent analysis of political reality..." The media "ignored this obvious evidence because it threatened their belief system."[77] Further:

> The Manifesto blasphemed everything that knits together the world view of not only the status quo, but also the reformers and radical critics. Most people, like [Kirkpatrick] Sale, are able to say that Orwell's vision threatens. But they think that to become alert to this danger is to solve the problem, that is, they believe in what [Jacques] Ellul has named "the illusion of politics," that in a democracy we actually shape our future through the political process. Many of the anti-mythical ideas are more unthinkable to us than the use of violence—we are accustomed to that, provided it is rationalized in terms of our values. Given the right rationale, we are willing to kill not only guilty people, but innocent ones. Ted is questioning faith in politics itself, and challenging concepts of what self, freedom and happiness. He is a heretic at the deepest level.
>
> The medieval martyrs did not *seek* execution. They were executed because they refused to recant. There is a sense in which this entire case revolves around the idea of propaganda/social administration. From this view, and only from this view, everyone's actions make sense. How can the errors and misses be explained? That the press, defense, prosecution, and judge were all prosecuting [Kaczynski] is a good confirmation of the fact that nontrial process was the expression of ideological defense. It was worth sparing [Kaczynski] to burn the manifesto at the stake, and there was a community of interest in so doing.[78]

Thus, Eccles argues, the Unabomber's musings were as unthinkable as his murders.

As always, I return to the manifesto. The manifesto challenges the basic assumptions of virtually every interest group involved in the case: lawyers, mental health experts, press, political left and right.

---

[77] Letter from Lydia Eccles to Michael Mello, Sept. 15, 1998 (on tile with author).

[78] *id*

And that, in the end, may have been why Kaczynski's attorneys found it so easy to convince the media and public that Kaczynski was crazy, notwithstanding the absence of credible evidence. We outsiders believed it because we *needed* to believe it.

In the end, the judiciary, media and culture acted exactly as the Unabomber's Manifesto predicted they would. They defined the Unabomber and his ideas as mentally ill. Then they forgot about the man and his ideas.

C. Higher Law or Simple Murder: If Kaczynski's Not Crazy, Why Did He Do It?

Why, in the end, did Theodore Kaczynski become the Unabomber? I don't know. I don't believe he committed the killings and maimings of innocent strangers because of any mental defect. I do not believe Kaczynski has a mental defect. I believe he has a personality defect. I believe he has a *character* defect. Where the rest of us have a conscience and a soul, Theodore Kaczynski has a black hole. I believe in evil, and I believe that people make choices. Theodore Kaczynski chose to do evil, brutal things.

Perhaps Kaczynski committed his crimes for precisely the political reasons that he set out in the Unabomber Manifesto. If Theodore Kaczynski had made the defense he wanted all along, how would it have worked? Of the three recent would-be political martyrs (Timothy McVeigh, Paul Hill, and Theodore Kaczynski), Kaczynski had the most fully and publicly developed political ideology.

The Unabomber manifesto would have formed the core of any ideological defense against the death penalty. The defense would have situated the manifesto within an intellectual, cultural, and historical tradition. Eminent political scientists would then be called to interpret the manifesto, line by line, paragraph by paragraph, in excruciating detail.

The prosecution probably would have attacked Kaczynski for being unoriginal. There were many people who felt this way at the time. Kirkpatrick Sale, after lamenting the prose style and lack of intellectual originality of the manifesto, wrote that:

> The Unabomber stands in a long line of anti-technology critics where I myself have stood, and his general arguments against industrial society and its consequences are quite similar to those I have recently put forth in a book on the people who might be said to have begun this tradition, the Luddites.[79]

The defense would have argued that the ideas in the manifesto were too heretical for much of mainstream society—including law, psychiatry, science, the press, academia, and radical activists on the left and right—and that this would make people feel the need to define Kaczynski as a delusional madman. According to this argument

[79] Sale, *supra* note 56.

the "mental defect" label would be little more than a smokescreen that obscured the political ideas articulated in the manifesto. Even the label "anti-technology," as Lydia Eccles has pointed out, is "reductive of how comprehensive his heresy is."[80]

Eccles categorized Kaczynski's as follows:

> Technology: The manifesto discredits the notion of technology as the benevolent force promoted by those on the front lines of technological research and development; especially those with a vested interest such as the media industry, pharmaceutical companies, and manufacturing. Lt also goes against the more mainstream idea that technology is a neutral tool. Beyond that, it dismisses the possibility that technology might be a "mixed blessing," or a counter-cultural tool for anarchists, leftists, et al.
>
> Progress: Advances in technology and quality of life are demonized as the cancer of our society.
>
> Standard of Living: The manifesto asserts that independence is more important than security and comfort. According to the defense team's strategy, Kaczynski's rejection of status quo mores was ipso facto evidence that he was insane, and they used the cabin as evidence for that reason.
>
> Materialism: The manifesto attacks consumerism (which is merely the tip of the iceberg) and the scientific ethos, which insists that reality be material and quantifiable. Materialism denies the qualitative, subjective, experiential—as opposed to behavioral—aspect of reality (e.g., Marxists define social welfare as equal distribution of material goods, leftist death penalty workers define saving a life as saving a body, psycho-pharmacologists define mind as brain).
>
> Freedom, Rights, Democracy: The manifesto debunks these core assumptions of national identity. The abstract concept of freedom conceals the fact that we are not actually free. Democracy is an illusion. Politics are about the details, the important decisions are made behind the scenes. Individual rights provide only superficial checks on power. The First Amendment does not protect citizens from social control by propaganda.
>
> The Counter-culture: Leftists are not rebels. They are masochistic, guilty, self-serving, and fundamentally opposed to spiritual freedom. Kaczynski gives street gangs and militia groups more credence as an actual threat to authority. Advocates non-allegiance to mass movements, doesn't invoke political theory, but talks empirically about the observable behavior of complex systems.
>
> Nature Worship: The manifesto does not consider Earth to be more important than humans, but rather discusses the environment from the context

[80] Letter from Lynda Eccles to Michael Meito. Sept 15. 1998 (on tile with author).

of human liberation by introducing the notion of wild nature (autonomous nature) as opposed to benevolently managed nature.

Productivity: The manifesto ridicules the belief that paid work is a meaningful and socially valuable activity.

Academia: Instead of seeing academics as political innocents, he targets them as the biggest political threat, since they are the progenitors of cultural ideology.

Medicine, Psychiatry, Social Work: Regarding the main claims of modern medicine, Kaczynski posits that longevity should not be highly prized, since it measures life quantitatively, and without regard for the quality of a life unnaturally preserved. Psychological therapy and social work, including projects spearheaded by leftist reformers, embody various forms of social control.

The Right/Left Divide: He is uncomfortable with the perceived association of anarchist and right-wing libertarians. He argues that these groups are lumped together, even though they represent very different ideologies (he likens them to tribes), because the government cannot tolerate any free-thinking small group.

Experts: Whether they are academics, industry scientists, politicians, or business professionals, experts define and further strengthen cultural hegemony by virtue of "certified" authority.

Political Revolution/Utopia: Kaczynski tries to weigh the consequences of various revolutionary actions and states that no action will achieve the ideal sought. He proposes a calculated risk, where the benefits outweigh the liabilities, rather than suggesting a utopian outcome.

The Cloak of Intention: The manifesto argues that society writes the history books, and tries to disprove the theory that history is a contest of conflicting human wills, of good versus evil. Benevolent human intentions yield totalitarian results, and history is the unintentional by-product. The manifesto inverts Marx's idea of the revolutionary process as liberation.[81]

In addition to situating Kaczynski's politics within an intellectual, cultural, and historical context, Kaczynski's defense against the death penalty would situate Kaczynski's politics within his own personal history. *The New York Times* has already published a blueprint of the sort of penalty phase defense that I am suggesting.'[82] A massive series of articles (almost as long as the Unabomber manifesto) titled *The Tor-*

[81] *id.*

[82] *See* McFadden, *supra* note 44.

tured Genius of Theodore Kaczynski, painstakingly traced the course of Kaczynski's life.[83] Interlarded through the pieces were relevant excerpts from the manifesto.[84]

Ironically, the most powerful witness against capital punishment for Theodore Kaczynski is a witness Kaczynski himself would not allow to testily—his brother David. Since turning his brother in to the FBI as the suspected Unabomber, David Kaczynski has been trying to save his brother from a death sentence. The spectacle of David Kaczynski's divided soul—struggling to save the life of the big brother he once idolized and in the end turned in—might provide a jury with the strongest reason to spare Kaczynski's life.

An ideological defense would almost certainly fail for the Unabomber, as it failed for McVeigh, and for the same reasons. But that is not the point. The point is that it is *his* life. It's his day in court. And the choice of the grounds upon which to stake that life ought to be his and his alone.

Or perhaps, as Chris Waits and the prosecution argued, the Unabomber's crimes had nothing to do with politics or ideology—the manifesto was nothing more than a pretext, a smokescreen for simple murder. Most of Kaczynski's diaries and notebooks are not in the public record. However, the prosecution's sentencing memorandum quoted from Kaczynski's private writings. According to this document:

> The purposefulness of Kaczynski's conduct is evident from the circumstances of the crimes themselves. Each offense entailed considerable preparation and planning, from the design and construction of the homemade bombs to their clandestine implementation. And every step tn the commission of these offenses allowed substantial opportunity for reflection on the consequences. That the crimes continued unabated over the course of nearly two decades should dispel any uncertainty as to their deliberate nature.
>
> In addition to what we may rightfully infer from the cruel details of these crimes, Kaczynski's own writings provide a stark account, in his own words, of his purposes and intentions. Thousands of pages of Kaczynski's handwritten and typed documents were found during the April 1996 search of his cabin; the documents include Kaczynski's self-styled "autobiography" chronicling his life to the age of 27, a daily journal for the days thereafter, and numerous handwritten entries and notes detailing plans for the bombings, the construction handwritten entries and notes detailing plans for the bombings, the construction and placement of bombs, and Kaczynski's own reactions to the aftermath of his crimes. The earliest entry in these writings provide a detailed picture of Kaczynski's life and his motivation for becoming a serial killer.

[83] *See id.*
[84] *See id.*

Kaczynski Killed Out of Hatred

In June of 1995, late in his bombing career, Kaczynski sent a manuscript (which came to be known as the "Unabomb Manifesto") to newspapers under the alias "FC" espousing an ideological basis for his crimes. He claimed that he "had to kill people" to get a "message before the public" that technology was destroying mankind. While Kaczynski adopted the pretense that he was killing for the greater good of society, two points are clear from the writing seized from his home. First, his desire to kill preceded by several years any serous concerns about technology. Second, he wanted to kill not out of some altruistic sense that he would thereby benefit society, but, in his own words, out of "personal revenge" and without "any kind of philosophical or moralistic justification."

Kaczynski's writings contain extensive meditations on his hatred of people, his ideology and motivations, and his intent to kill his victims. In his autobiography Kaczynski recounts that he first formed a desire to kill while still a graduate student at the University of Michigan in 1966, years before he made his way to Montana and adopted his isolated lifestyle. He immediately began to plan how he would murder; "My first thought was to kill somebody I hated and then kill myself before the cops could get me." He quickly rejected this plan, however, in favor of one that would allow him to commit multiple murders and spare his own life;

> But, since I now had new hope, I was not ready to relinquish life so easily. So I thought, "I will kill, but I will make at least some effort to avoid detection, so that I can kill again."

According to his own writings, Kaczynski's decision to live a wilderness lifestyle was made in part to further his murderous plans;

> Then I thought, "Well, as long as I am going to throw everything up anyway, instead of having to shoot it out with the cops or something,... I will go up to Canada, take off into the woods with a rifle, and try to live off the country. If that doesn't work out, and if I can get back to civilization before I starve, then I will come back her and kill someone I hate."

Over the ensuing years, Kaczynski came to despise many people, including those who interfered with the solitude he craved or came to represent for him certain aspects of modern technological and industrial society. Thus, his journals are filled with expressions of hatred often expressed in terms of some ill-defined need for "revenge" and plans to injure a varied group of individuals, from campers and snowmobilers who found their way into the national forest near his home, to a woman who had spumed his advances.

In describing this abundant hatred, Kaczynski wrote: "I often had fantasies of killing the kind of people whom I hated (e.g. government officials, police, computer scientists, behavioral scientists, the rowdy type of college students who left their piles of beer-cans in the Arboretum, etc., etc., etc.) and I had high hopes of eventually committing such crimes."

Kaczynski's culpability lies in his decision to act on his "fantasies of killing." For Kaczynski, violence was never the result of momentary rage or a response to provocation; rather it was the culmination of a plan worked out over a number of years. He described his motivation as "not hot rage, but a cold determination to get my revenge" and often wrote of his resolve to act on his hatred:

> Thus, when I had a fantasy of revenge, I had very little comfort from it, because I was all too clearly aware that I had many previous fantasies of revenge, and nothing had ever come of any of them. This was very frustrating and humiliating. Therefore I became more and more determined that some day I would actually take revenge on some of the people that I hated.

And while Kaczynski wrote intensively on a need for revenge, he was less articulate in explaining what he was seeking revenge for. Instead, his writings simply reveal that his hatred extended to virtually anyone who irritated him or represented some aspect of society he disagreed with. Kaczynski did, however, give considerable thought to how he would exact a plan of revenge, and was clear-eyed enough to admit (at least to himself) that he was not acting for anyone's gratification but his own. In April, 1971, before he embarked on his serial bombing campaign, Kaczynski recorded the following in his journal:

> My motive for doing what I am going to do is simply personal revenge. I do not expect to accomplish anything but it. Of course, if my crime (and my reasons for committing it) gets any public attention, it may help to stimulate public interest in the technology question and thereby improve the chances of stopping technology before it is too late; but on the other hand most people will probably be repelled by my crime, and the opponents of freedom may use it as a weapon to support their arguments for control over human behavior. I have no way of knowing whether my action will do more good than harm. I certainly don't claim to be an altruist or to be acting for the "good" (whatever that is" of the human race. I act merely from a desire for revenge.

Throughout his furtive journal entries Kaczynski conceded that his motivation to kill grew out of a "personal grievance" against society, bereft of

any genuine belief that his actions would lessen what he viewed to be the negative impact of technology on others. Indeed, he noted that he would not plan his crimes and "take such risks from a pure desire to benefit my fellow man."

Even the causes Kaczynski later extolled in his manuscript, such as the preservation of the wilderness, he at times ridiculed in his private entries;

> I believe in nothing... [don't even believe in the cult of nature-worshipers or wilderness-worshipers. (I am perfectly ready to litter in parts of the woods that are of no use to me—I often throw cans in logged-over areas or in places much frequented by people; I don't find wilderness particularly healthy physically; I don't hesitate to poach.)

Kaczynski seems to have prided himself in acting outside moral boundaries. He boasted that from an early age he had "never had any interest in or respect for morality, ethics, or anything of the sort." Indeed, Kaczynski bragged in his autobiography:

> The fact that I was able to admit to myself that there was no logical justification for morality illustrates a very important trait of mine... I have much less tendency to self-deception than most people... Thus, I tended to feel that I was a particularly important person and superior to most of the rest of the human race... It just came to me as naturally as breathing to feel that I was someone special.

Kaczynski's journals also reflect that he worked at overcoming inhibitions against committing crimes, striving to develop what he called "the courage to behave irresponsibly,*' Thus, in ajournal entry dated December 1972 he wrote:

> About a year and a half ago, I planned to murder a scientist—-as a means of revenge against organized society in general and the technological establishment in particular... Unfortunately, I chickened out. I couldn't work up the nerve to do it. The experience showed me that propaganda and indoctrination have a much stronger hold on me than I realized. My plan was such that there was very little change of getting caught. I had no qualms before I tried to do it, and I thought I would have no difficulty. I had everything well prepared. But when I tried to take the final, irrevocable step, I found myself overwhelmed by an irrational, superstitious fear—not a fear of anything specific, merely a vague but powerful fear of being caught. I made my preparations with

> extreme care, and I figured my chances of being caught were less than, say, my chances of being killed in an automobile accident within the next year. I am not in the least nervous when I get into my car. I can only attribute my fear to the constant flood of anticrime propaganda to which one is subjected...

As early as 1975, Kaczynski took the first tentative steps on his destructive path. In the summer of that year he engaged in various acts of vandalism, including putting sugar in the gas tanks of various vehicles and vandalizing trailers and camps in Montana. In an act of a more deadly nature, he strung wire at neck height across roads frequented by motorcyclists. These acts continued over several summers and were a prelude to Kaczynski's coming bombing attacks.

Kaczynski's terrorism began in 1978. The history of his bombing reveals a patient and methodical killer. In May of that year he left Montana and returned to Chicago where he lived and worked for approximately a year. He noted in his journal that his biggest reason for returning to Chicago in 1978 was to "more safely attempt to murder a scientist, businessman, or the like" and explained:

> In Montana, If I went to the city to mail a bomb to some big shot, [a Montana neighbor] would doubtless remember that I rode [the] bus that day. In the anonymity of the big city I figured it would be much safer to buy materials for a bomb, and mail it.

Around the same time, he wrote of his continuing determination to overcome any compunction against committing crimes and realize his "ambition":

> As a result of indoctrination since childhood, I had strong inhibitions against doing these things, and it was only at the cost of great effort that I overcame the inhibitions. I think that perhaps I could now kill someone (and I don't mean just set a booby trap having only a fractional chance of success), under circumstances where there was very little chance of getting caught... My ambition is to kill a scientist, big businessman, government official, or the like. I would also like to kill a Communist.

Kaczynski's writings track his progress in realizing his "ambition." They also reflect his appreciation for the gravity and unlawfulness of his conduct. For example, Kaczynski classified many of his writings by their incriminating nature, and left catalogues designating which writings were the most damning, designating some to be burned and other to be buried. These entries illustrate how well he grasped the legal significance of his actions,

as when he noted that certain journal passages detailed events "past [the] statute of limitations." They also reveal his concern for his public image, with Kaczynski describing other passages as "embarrassing, not dangerous," or simply "very bad public relations."

Kaczynski wrote some documents in code, others in Spanish, and concealed carbon copies of his later public "FC" missives deep within a storage container in the loft of his home. Many journal entries recount daily activities in plain English text and then revert to coded text, often in Spanish, as the subject matter moves to criminal acts. Some entries explicitly recognize the incriminating nature of the contents, as in this notebook entry where he wrote:

> My motive for keeping these notes separate from the others is the obvious one. Some of my other notes contain hints of crime, but no actual accounts of felonies. But these notes must be very carefully kept from everyone's eyes. Kept separate from the other notes they make a small compact packet, easily concealed.

It is apparent that Kaczynski understood, indeed relished, the damage and suffering he was inflicting. In his journals he carefully monitored news accounts of his attacks and graphically related their success, often be describing in detail the extent of the injuries his victims suffered. He also collected newspaper or magazine articles concerning his bombings, particularly those with photographs of bleeding victims or grieving family members, as souvenirs or trophies of his accomplishments.

Kaczynski's own words demonstrate that he had neither remorse for his conduct nor empathy for his victims. When he planted his first bomb in May of 1978 at the University of Illinois, Chicago Circle Campus, he documented how he selected the name of the victim at random from the ranks of professors engaged in technical fields, and, when the bomb would not fit in a campus mailbox, left the bomb in a parking lot near a science building in hope that a student in a scientific field would find the package and blow his hands off or get killed." In his journal he boasted: "I have not the least feeling of guilt about this-on the contrary, I am proud of what I did."

In May 1979, just prior to returning to Montana, Kaczynski placed his second bomb on a table located in the Technological Institute at Northwestern University. A researcher was badly injured when he attempted to pick up the device, but not badly enough to suit Kaczynski. In a journal entry, Kaczynski stated.

> I figured the bomb was probably not powerful enough to kill (unless one of the lead pellets I put in it happened to penetrate a

> vital organ). But I had hoped that the victim would be blinded or have his hands blown off or be otherwise maimed ... maybe he would have had burns in the eyes if his glasses hadn't momentarily retarded the flow of hot gasses. Well, at least I put him in the hospital, which is better than nothing. But not enough to satisfy me,... I wish I knew how to get hold of some dynamite.

Kaczynski's writings chronicle his emotions during his subsequent crimes. In November of 1979 Kaczynski tried to "blow up an airliner" and "kill a lot of business people," but failed. He noted in his journal that "unfortunately plane not destroyed, bomb to weak" and sought consolation tn the thought that at least it gave them a good scare." Next, in June of 1980, after he mailed the bomb that injured Percy Wood in his own home, he recorded that "after complicated preparations I succeeded in injuring the pres of United A.L." Around this time he noted in his journal:

> Guilty feelings? Yes, a little. Occasionally I have bad dreams in which the police are after me. Or in which I am threatened with punishment from some super natural source. Such as the devil. But these don't occur often you enuf (sic) to be a problem. I am definitely glad to have done what I have.

Kaczynski then returned his attention to universities, and in October of 1981 planted a firebomb at the University of Utah, but was disappointed with the result:

> Last fall I attempted a bombing and spent nearly three hundred bucks just for travel expenses, motel, clothing for disguise, etc. aside form cost of materials for bomb. And then the thing failed to explode. Damn. This was the firebomb found in U. of Utah business School outside door of room containing some computer stuff.

In May of 1982, when a bomb he sent wounded Janet Smith, a professor's secretary, he lamented;

> May about 1982, I sent a bomb to a computer expert named Patrick Fischer. His secretary opened it. One newspaper said she was in hospital? In good condition? With arm and chest cuts. Other newspaper said bomb drove fragments of wood into her flesh. But no indication that she was permanently disabled. Frustrating that I cant seem to mak[e] lethal bomb.

A few months later he traveled to U.C. Berkeley and planted another firebomb, this time injuring Professor Diogenes Angelakos. Again Kaczynski registered disappointment:

> According to newspaper, vice chairman of computer sei. dept, picked it up. He was considered to be 'out of danger of losing any fingers', but would need further surgery for bone and tendon damage in hand. Apparently pipebomb went off but did not ignite gasoline. I don't understand it. Frustrated..

Kaczynski set no bombs for three years. His journals reflect that he used this sabbatical experiment with more deadly bombs. His return was marked by renewed ferocity. In May of 1985 he set a bomb in the same building where he had injured Professor Angelakos. A graduate student, then Air Force Captain John Hauser, was seriously injured when the bomb exploded with such force that it left an exact imprint of his Air Force Academy ring embedded in the workshop wall. Kaczynski followed the news accounts closely, recording the descriptions of "blood all over the place" and Hauser's mangled arm. While he confided to himself some unease over maiming a "father of two kids " he later reflected that he "just got over it" and even "laughed at the idea of having any compunction about crippling an airplane pilot."

Around the time that he places this bomb, Kaczynski mailed a bomb to the Boeing Corporation in Auburn, Washington. Unbeknownst to Kaczynski, this bomb was successfully rendered safe by police after several employees had handled it. Kaczynski could only record his disappointment: "Outcome of Boeing bomb unknown...Seems inexplicable it was designed and built with such care that malfunction seems highly improbable." He sent the next bomb to a University of Michigan Professor James McConnell, When the bomb injured the Professor's assistant, Nicklaus Suino, Kaczynski noted only scientific detachment: "Only minor injuries to McConnlls (sic) assistant. Deflagrated, did not detonate. Must be either pipe was a little weak or loading density of explosi[v]e a shade too high at failure."

Later that year, Kaczynski rejoiced when he killed his first victim. "Excellent... humane way to eliminate somebody" and "very good results" was how he described his murder of Hugh Scrutton, who died in the parking lot of his Sacramento store when Kaczynski's bomb tore his hand from his body and drove shrapnel into his heart.

In February of 1987, Kaczynski placed the bomb that injured Gary Wright in Salt Lake City. Kaczynski noted that while the bomb detonated, the results "were not enough to satisfy" him. Kaczynski was more concerned with the sketch of a suspect circulated after the bombing. He noted in his journals, "Description (several versions)...The 'composite drawing' did not show any beard, although it did show a small moustache."

Apparently alarmed by the possibility of an eyewitness, Kaczynski was silent for nearly six years. In his April 1995, letter to the New York Times, Kaczynski explained these periods of apparent inactivity;

> Our early bombs were too ineffectual to attract much public attention or give encouragement to those who hate the system. We found by experience that gunpowder bombs, if small enough to be carried inconspicuously, were to [sic] feeble to do to much damage, so we took a couple of years off to do some experimenting. We learned how to make pipe bombs that were powerful enough, and we used these in a couple of successful bombings as well as in some unsuccessful ones. Unfortunately we discovered that these bombs would not detonate consistently....
>
> So we went back to work, and after a long period of experimentation we developed a type of bomb that does not require a pipe, but is set off by a detonating cap that consists of a chlorate explosive packed into a piece of small diameter copper tubing,...We used bombs of this type to blow up the genetic engineer Charles Epstein and the computer specialist David Gelernter.

By 1993, Kaczynski no longer accepted the risk of detection involved in placing bombs, so he concentrated on designing and sending mail bombs. In June he traveled to Sacramento and mailed bombs to Dr. Epstein in Tiburo and Dr. Gelernter in New Haven. Though he critically injured both recipients, Kaczynski was only partially satisfied:

> I sent these devices during June, 1993. They detonated as they should have. The effect of both of them was adequate, but no more than adequate.

Kaczynski thereafter ensured that his next attacks were fatal. He modified his designs to improve fragmentation and inserted additional screws, paneling nails, and even bits of razor blades into the bombs to serve as enhanced shrapnel. In December of 1994 he traveled to San Francisco and mailed a package bomb to Thomas Mosser in New Jersey. Mosser opened the packaged in the kitchen of his home. The bomb detonated, spraying shrapnel with such force that nails penetrated wails and metal kitchen pans. Mosser died on the floor of his kitchen with his wife and children nearby. Kaczynski noted his satisfaction in his journal, recording that the bomb "gave a totally satisfactory result." Kaczynski later bragged about his technical innovation in one of his letters to the newspapers.

> We did use a chlorate pipe bomb to blow up Thomas Mosser because we happened to have a piece of light-weight aluminum

> pipe that was just right for the job. The Gelernter and Epstein bombings were not fatal, but the Mosser bombing was fatal even though a smaller amount of explosive was used. We think this was because the type of fragmentation material that we used in the Mosser bombing is more effective...

In April of 1995, Kaczynski sent a bomb addressed to William Dennis on at the California Forestry Association (CFA) in Sacramento. On April 24, Gilbert Murray opened the package at the CFA and was killed by the blast and shrapnel. Several coworkers narrowly escaped harm as the force of the blast sent shrapnel and fragments through the walls of the building. In a later letter from "FC" to the *New York Times,* Kaczynski expressed no qualms about missing his mark at the CFA: "We have no regret about the fact that our bomb blew up the 'wrong' man, Gilbert Murray, instead of William N. Dennis, to whom it was addressed."

Around this time Kaczynski also took to taunting victims, law enforcement, and the public in a series of letters. These letters were designed not only to instill fear, but also to thwart investigators. For example, in April of 1995 he sent a letter to one of his previous targets, David Gelernter, mocking him for having opened the package Kaczynski had sent him two years earlier:

> People with advance degrees aren't as smart as the thing they are. If you'd had any brains you would have realized that there are a tot of people out there who resent bitterly the way techno-nerds like you are changing the world and you wouldn't have been dumb enough to open an unexpected package form an unknown source.

Kaczynski explained the subterfuge in his journal:

> In a letter say that, 'scientists consider themselves very intelligent because they have advanced diplomas (advanced degrees) but they are not as intelligent as they think because they opened those packages.' This will make it seem as though I have no advanced degree.

Kaczynski sent letters to Nobel laureates Phillip Sharp and Richard Roberts threatening them that "it would be beneficial to your health to stop your research in genetics." He sent a letter to a newspaper threatening to blow up an airliner out of the Los Angeles International Airport. The threat paralyzed air travel until Kaczynski wrote another letter saying:

> Note. Since the public has a short memory we decided to play one last prank to remind them who we are. But no, we haven't tried to plant a bomb on an airliner (recently).

Kaczynski used fear to manipulate the public into considering his views. He threatened the public with "bombs much bigger" than any made before, offering to desist from further "terrorism" only if his manuscript was published in the newspapers. At the request of law enforcement, the manuscript was published in September of 1995.

Kaczynski Poses a Future Threat to Society

Kaczynski's crimes were conceived and carried out with inventive cunning. Kaczynski crafted his bombs by hand, producing sophisticated lethal contraptions without the benefit of electricity or modern facilities. He experimented with different homemade explosive charges, often creating mixtures from household products, designed and perfected electrical initiating systems for bombs, and fashioned bomb components out of scrap materials. He tested prototypes and plotted the force and distance of fragments and shrapnel to measure their effective targets, designing books that exploded upon opening, test equipment that detonated when lifted by the handle, and bombs disguised in packages fashion to look like research papers.

Kaczynski also labored methodically on his bombs, combining patience with stealth and eluding detection for nearly twenty years.

When assembling his bombs, he wore gloves and manually sanded all parts to remove fingerprints. He carefully chose stamps for his mail bombs, checking to make sure they bore no indented writing, and even soaked his stamps in homemade solution in the hopes of removing trace evidence. He went as far as to insert false evidence into his bombs to misdirect investigators, placing human hair he collected for a public restroom in a bus station on tape used to construct the device. He carefully sealed and weighed packages to determine the appropriate postage, thereby avoiding interaction with postal clerks. He researched names to select victims and fictitious return addresses, charted bus schedules to plan his attacks, and wore disguises to purchase materials and mail bombs. Kaczynski also made plans for flight in the event the authorities identified him, charting escape routes through the Montana wilderness, designating secret hiding places, and burying food and ammunition on map locations disguised in a manner so that only he would recognize them.

And while Kaczynski had claimed in his 1995 letters to the press that he would foreswear terrorism if his manuscript were published, it is clear he had no intention of halting the violence. Instead, at the time of his arrest in April of 1996, Kaczynski was preparing for more lethal attacks. When agents searched his cabin they found all the materials necessary for the construction of several more bombs. Kaczynski had stockpiled in excess of 40 pipes, many individually wrapped and bearing coded notations, and nearly

200 feet of the copper tubing of the type he had used in approximately 4" increments as detonators in many of his previous bombs. He also had chemicals arranged on shelves, some in raw form and others in individually marked containers mixed to the specifications of his explosive charges.

The array of materials Kaczynski had in inventory speaks volumes as to his future plans. He had twenty-three identical initiating devices of the sort he had perfected over the years in other bombs, as well as a fully constructed pivot switch of the same configuration that he had used in three of his last four bombs. He also had a number of timing devices, a rigged alarm clock, an antimovement ball switch, spools of wire, reserves of solder, ammunition, and even specially designated nails and screws for use as shrapnel. His home also had his work bench that included textbooks on chemistry and electrical circuitry, and even an FBI manual on fingerprinting.

The most disconcerting discovery during the search was that Kaczynski had already completed another bomb. It was, by any standard, a powerful weapon, fully-armed and virtually identical in design to that which killed Gilbert Murray. The weapon was intended to kill people, as the outside of the bomb cylinder was covered with a mosaic of individual lead squares, a trademark of an anti-personnel device, since the lead pellets create a lethal zone of some distance when the bomb is detonated. The device was disguised in a package with a label describing the aircraft industry. The package was ready for delivery, lacking only an address.

Finally, as a chilling reminder of the purpose of all this material, Kaczynski kept handwritten lists of potential victims with their home and work addresses as well as maps of various cities with these locations circled.

From what can be discerned from the search of his home, it also appears that Kaczynski's weaponry was not limited exclusively to bombs. For example, agents discovered a completely homemade, operable handgun, as well as corresponding written description of its creation and purpose, all of which further demonstrates the resourcefulness that Kaczynski was able to summon to further his murderous intent:

> A few days ago I finished making a twenty two caliber pistol. This took me a long time, for a year and a half, thereby preventing me from working on some other projects I would have liked to carry out. Gun works well and I get as much accuracy out of it as I'd expect for an inexperienced pistol shot like me. It is equipped with improvised silencer which does not work as well as I hoped. At a guess it cuts noise down to maybe one third. It is said that it is easy for machinist to make a gun, but of course I did not have machine tools, but only a few files, hacksaw blades, small vice, a

> rickety hand drill, etc. I took the barrel from an old pneumatic pistol, made the other parts out of several metal pieces. Most of them come from the old abandoned cars near here. I needed to make the parts with enough precision but I made them well and I'm very satisfied. I want to use the gun as a homicide weapon.
>
> Furthermore, while it is clear that Kaczynski plotted and carried out his crimes alone, he also contemplated recruiting others to join in his plans. Among the many documents found in his cabin were "how to" guides he had prepared—a handwritten manual recounting step by step how to construct improvised bombs detailed instructions on how to avoid detection by the FBI or police and a handwritten document entitled "How to Hit an Exxon Exec" detailing with chilling precision the step by step process one can undertake to send a package bomb to a corporate official. There were also copies of correspondence sent to other organizations, such as letters to radical environmental groups "Earth First!" and "Live Wild or Die," offering secret codes for communicating and seeking an audience for his "strategy for revolutionaries seeking to destroy the industrial system."
>
> The history of Kaczynski's conduct demonstrates that he has both the capacity and willingness to dedicate years of his life to plan murders and elude detection. If released back into society, he would kill again.[85]

In other words, Theodore Kaczynski is a psychopath. Psychopathy is not a mental illness; it is a description of conduct and of how one feels—or doesn't feel—about their own conduct. It means the absence of a conscience. Patricia Cornwell described it well:

> Genetically, these individuals are fearless; they are people users and supreme manipulators. On the right side, they are terrific spies, war heros, five-star generals, corporate billionaires, and James Bonds. On the wrong side, they are strikingly evil: the Neros, the Hitlers, the Richard Specks, the Ted Bundys, antisocial but clinically sane people who commit atrocities for which they fee! no remorse and assume no blame... People like this don't want to be caught. He isn't *sick.* He's antisocial, he's evil, and he does it because he wants to, okay ... There will always be psychopaths, sociopaths, lust murderers—whatever one chooses to call evil people who find pleasure in causing unthinkable pain.

On this view, Theodore Kaczynski did it because he *could.* And, had his brother David—a genuine American hero—not turned him in, he'd still be doing it.

[85] Government's Sentencing Memorandum. United States v. Kaczynski. C.R. No. S-96-0259 GEB (E.D. Cal. May 4, 1998). *available at* <http://www.courttv.com/trial/unabomber/documents>. Unsurprisingly, Kaczynski summarily disputes the view of' his private writings put forward by the prosecution. However, to date Kaczynski has offered no real alternative analysis of his diary.

David Gelertner, one of Kaczynski's victims—who has written a moving memoir of surviving the Unabomber—points out that certain criminal trials are about more than guilt or innocence.[86] One function of trials is to expose, identity, and condemn evil. Because of the guilty plea, this has not yet happened in the Unabomber case.

If, as I believe, Theodore Kaczynski is the Unabomber, he deserves to spend the rest of his life in a cage. But even he—even Ted Bundy, even Hitler—is entitled to his day in court. Every American citizen, no matter how despicable, is entitled to that.

II. The Duties of a Law-Abiding Capital Defense Lawyer

> *Lawyering is one of those insular, seif annotating vocations whose members believe they can only learn from each other—like chiropractors, cops and Jesuits.*[87]

At its core, the Unabomber non-trial was about a clash of strongly-felt ideologies. Kaczynski's ideology was clear. But less clear—and no less important to understanding the meltdown of the Unabomber defense team—was the anti-capital-punishment ideology of Kaczynski's court-appointed lawyers. Thus, the Unabomber case was not simply a contest of wills; it was also a contest of world views and personal politics.

I believe Kaczynski's assertion that he pled guilty in exchange for life imprisonment without the possibility of parole, not because he feared the death penalty, but because he simply had no other choice. It was the only way he could prevent his lawyers from portraying him as crazy and his manifesto as the ravings of a madman.

Theodore Kaczynski was denied his day in court. The lawyers he ultimately tried to fire had forced him into a defense that he would have rather died than raise. In the guise of providing him with the constitutional right to the assistance of counsel, Kaczynski's judge and his court appointed lawyers stripped him of the only power he had left as an American citizen: the power to have his case raised against the indictment in a manner that was personally acceptable to him. Kaczynski was, after all, the main player in a judicial proceeding where his life was on the line. His life, his liberty—not his lawyers' life, not his judge's life.

Both the prosecution and the defense can claim Kaczynski's guilty plea as a victory. The defense lawyers won, because their client would not be executed—an outcome few would have predicted at the time jury selection began. The prosecutors won, because the confessed Unabomber would never take a breath as a free man. The Judge won, because the plea means no appeal, and no appeal means no reversal by the appellate courts—and a reversal was a very real possibility, given the multitude of serious errors

[86] *See generally* David Gelertner, Drawing Life: Surviving the Unabomber (1997).

[87] Tom Nadau, a reporter who covered the Unabomber non-trial for the *Sacramento Daily Recorder.*

Burrell had made even before the trial began. The Justice system won, because it was spared the spectacle of a trial that had degenerated into farce even before opening statements had been made.

Did the Unabomber's victims and their families win? I wonder. They were spared the uncertainty of a jury trial, but the prosecution's evidence of Kaczynski's guilt was so solid that the jury almost certainly would have convicted him of murder. Kaczynski would have been sentenced to life imprisonment without the possibility of parole at the very least, which was his sentence under the plea agreement. Kaczynski might have been sentenced to death, which was a very real possibility regardless of the defense raised by the defense lawyers. There was at least one Unabomber victim, David Gelernter, who was outspoken in his wish that Kaczynski die for his crimes. Gelernter wrote that "we execute murderers in order to make a communal proclamation; that murder is intolerable ... [a] deliberate murderer embodies evil so terrible that it defiles the community."[88] The Unabomber deliberated on his murderous campaign for seventeen years.

Did American society as a whole win in the Unabomber plea? Thirtyeight states, the federal government, and the overwhelming majority of the public supports the death penalty for the most heinous murderers. Jeff Jacoby, an eloquent supporter of capital punishment, gave powerful articulation to why so many Americans support capital punishment:

> Life is not the ultimate value. Otherwise no nation would send young men to fight for honor, or against tyranny, or in defense of freedom. Life is sacred, but some things are more sacred. And if that is true of innocent life, how much more so is it true of guilty life-—of those whose hands are slick with the blood of others?
>
> It is for the good of society that assassins ought to die—that we may declare, to ourselves and to the world, that the crime of stealing life is worse than any other crime and deserves a penalty worse than any other penalty.
>
> It is up to the law to speak for [the victims of crime]—to speak for all grief-stricken survivors confronted with the butchery of someone near and dear. Capital punishment says to them: We, the community, take your loss with the utmost seriousness. We know that you are filled with rage and pain. We know that you may cry for vengeance, may yearn to strangle the murderer with your bare hands. You are right to feel that way. But it is not for you to wreak retribution. As a decent, and just society, we will do it. Fairly. After due process, in a court of a law.[89]

---

[88] Gerlernter, *supra* note 86, at 122–23.

[89] Jeff Jacoby. *The Unjust Logic of Sparing Murderers,* Boston Globe. Aug. 10, 1998 (quoting David Gerlernter).

If American society did win in the Unabomber's plea, that victory carried a high price tag. The Kaczynski prosecution, which did not even include a trial, cost a million and a half dollars, which does not include the one million dollar reward given to David Kaczynski for turning in his brother. The Unabomber saga has been called the most expensive case in American history, because it involved numerous federal agencies for two decades. Some have estimated the cost of the case to be as high as fifty million dollars (almost as much as the Starr report), but the actual cost has never been calculated. Still, the Unabomber is in prison. That's a win.

And Theodore Kaczynski? Did he win? Once again, I wonder.

His lawyers won Kaczynski the right to spend the rest of his natural life (he was age fifty-five at the time of his non-trial) in a federal "Supermax" prison that boasts the very latest in detainment technology. This means that Kaczynski is locked in his cell for twenty-three hours a day—a cage slightly smaller than his cabin. Solitary. A tiny, little cage. All his own, for the rest of his life. Except for legal correspondence, all his mail is read. For any American, this would not be much of a life. For Theodore Kaczynski, who prized freedom and privacy above all else, it must be a living hell.

Not that he doesn't deserve it; perhaps he should get worse treatment. However, the point is that this is what his lawyers *won* for him. This was the victory for which they seized control of his defense and, along with the judge, forced him into pleading guilty.

The Unabomber's lawyers could not have succeeded in their efforts to bushwhack Kaczynski's defense without Burrell's help, ft was the judge who ruled that they "controlled" the case. It was the judge who insisted that Kaczynski was seeking to delay the trial, even though Kaczynski was ready to proceed without delay. It was the judge who blamed Kaczynski, not his lawyers, for disrupting the trial. Burrell was thè one who relentlessly demanded that the show go on regardless of the Sixth Amendment and the fundamental fairness that is its foundation.

Of all the judge's rulings regarding the hostile takeover of Kaczynski's defense, the most erroneous was the judge's rulings that Kaczynski did not have a constitutional right to fire his lawyers and represent himself. Both the defense and the prosecution agreed that Kaczynski had a right to self-representation and that he had exercised that right in a timely fashion.

Judge Burrell's ruling turned the right to the assistance of counsel on its head. He transformed a constitutional protection designed to shield the defendant's constitutional rights into a sword with which to kill Kaczynski's right to a trial before his peers. The whole purpose of the right to the assistance of counsel at criminal trials—a right recognized since the infamous *Scottsboro* case of 1932—is to *empower* the citizen-accused whom the state has decided deserves to die.

Again, the constitutional language is "assistance." Theodore Kaczynski's lawyers, however well-intentioned and paternalistic, were not "assisting" him. They were controlling him. They strong-armed a man on trial for his life—a man who they had long conceded was mentally competent to stand trial. This finding of competency to stand

trial meant that Kaczynski was competent to make the important decisions in his case—such as whether he would testify, whether he would accept a guilty plea, and whether to stake his life on a mental illness defense, a defense with little chance of success in this or any other high profile serial murder case.

Kaczynski never should have been forced into the position of having to choose between no legal counsel and a defense team determined to raise a mental defect defense. Kaczynski's lawyers forced this Hobson's choice on their client, and they did it on the eve of the trial for his life. And he was blamed for their brinkmanship.

The deepest soul searching should have been done by Kaczynski's court-appointed lawyers before they seized control of their client's case. They should have specifically thought long and hard about their decision, months before trial, to agree with the prosecution regarding Kaczynski's mental competency. They are at least partially responsible for the events that culminated in Kaczynski's coerced guilty plea. They knew from the outset that mental illness was their best defense, and they also must have known that their client opposed that defense. Their apparent hope was that by forcing Kaczynski to choose—on the eve of his trial—between going with their defense or representing himself, their client would relent and allow them to control the defense.

It was a gamble, and they lost.

The hard part of playing chicken is knowing when to flinch. Theodore Kaczynski never flinched. Given the choices with which his lawyers had left him, he chose to exercise his constitutional right to represent himself. The judge denied him even that.

As elsewhere in the Unabomber case, the real issue here is power: Should it be the man whose life hangs in the balance, or his court-appointed lawyers who decide whether to raise a mental defect defense? I believe the choice belongs to the accused.

His lawyers'job was to represent him—not to manage him, not to control him, and not to silence him.

Of course this case certainly did present Kaczynski's lawyers with an ethically awkward conundrum. Both are dedicated opponents of capital punishment, and Kaczynski was asking them to present a defense that surely would have won him a death sentence—and would have won his lawyers the anger and contempt of their peers in the capital defense bar. Perhaps Denvir and Clarke were only interested in the preservation of their professional reputations.

I do know that defense lawyers regularly confront confi icts between their own private morality and their duties to their clients. In that conflict, either the client should prevail or the lawyer should withdraw from the case due to the conflict of interest.

A few years ago, I found myself in an ethical situation similar to that facing the Unabomber's attorneys. My client was Paul Hill, who was then (and remains now) on Florida's death row for murdering a doctor and his escort in front of a Pensacola clinic that performed abortions. Hill's cause was anti-abortion, not anti-technology. I am personally adamantly prochoice. I also thought that Hill might be mentally ill, but I followed his instructions not to raise that issue in his case.

Rather, I agreed to, and actually wrote, a lengthy legal argument that Hill's killings were justifiable because his views on abortion were correct. Notwithstanding my personal pro-choice beliefs, I was ready to stand up in the Florida Supreme Court and argue that because life begins at conception (a notion endorsed by the Pope, among others), Hill's crime was justified because, in taking two lives, he was acting reasonably because his actions saved more than two unborn lives. I never had a chance to make the argument. Hill fired me because he thought, erroneously, that I intended to portray him as mentally ill. He was represented by a pro-life movement lawyer who probably made Hill's argument with warmer zeal than I would have. The Florida Supreme Court rejected those arguments and affirmed Hill's death sentence; he will probably be executed sometime in the next few years. The Hill case (and the Unabomber case) are extreme examples of the sort of conflicts that defense lawyers deal with all the time.

I believe that Kaczynski's lawyers were acting in what they honestly believed to be their client's best interests legally. But that was not the point, and that was not their job. They had one client and only one client; that client clearly was competent to stand trial, and his lawyers knew it.

Even if Kaczynski's lawyers had felt he was too crazy to stand trial— something they obviously did not believe—they should have asked the judge months before trial to explore that issue in a serious way. Once their client had been found competent to stand trial, they were ethically and morally obligated to either (1) put on the defense their client wanted them to put on, or (2) move to withdraw when other counsel could take the case over with reasonable time and resources to prepare for trial.

Abandoning Kaczynski to represent himself was not a legitimate ethical option for the defense lawyers in this case. Kaczynski did not want to represent himself—and for very good reasons. He wanted lawyers willing to abide by his wishes.

Kaczynski's lawyers managed to save his body—they succeeded in keeping it off the lethal injection gurney. But in so doing, they robbed him of his life. Even his lawyers believed that the manifesto was nothing more than the scribblings of a madman.

There are, of course, rules and regulations that purport to codify the ethics of the legal profession. These rules and codes are exquisitely vague on the questions of power and control at issue in the Kaczynski case, which is evidenced by the reliance of Kaczynski's lawyers and the prosecutors on the same rules and interpretive case law to support their respective positions. The American Bar Association Standard 4–5.2 provides:

> CONTROL AND DIRECTION OF THE CASE
>
> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:
>
> (i) what pleas to enter;

(ii) whether to accept a plea agreement;

(iii) whether to waive jury trial;

(iv) whether to testify in his or her own behalf; and

(v) whether to appear,

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusions reached. The record should be made in a manner which protects the confidentiality of the lawyer client relationship.[90]

Unless the client is disabled. Model Rule 1.2 requires that a lawyer shall "abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued."[91] Ethical Consideration 7–7 is similar:

> In certain areas of legal representation not affecting the merits of the cause of substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise, the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.[92]

Model Rule 1.14 provides that "when a client's ability to make adequately considered decisions in connection with the representation is impaired ... the lawyer may ... take ... protective action only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[93] Further, as the comment to Rule 1.14 notes, the law recognizes intermediate stages of competence: Even clients lacking general competence often possess the ability to "understand, deliberate upon, and reach conclusions about matters affecting ... [their] own well-being."[94] These codifications are vague, and what directive content they do possess seems to me illusory. One difficulty is the indeterminacy and malleability of the language used here. Another difficulty is that the black letter codes of professional ethics themselves reflect competing,

[90] A.B.A. Standard 4–5.2 (3rd ed. 1993).
[91] Model Rules of Professional Conduct Rule 1.2 (1995).
[92] Model Code of professional Responsibility Canon 7–7 (1995).
[93] Model Rules of Professional Conduct Rule 1.14 (1995).
[94] *Id.* Rule 1.14 (1995).

even conflicting, values. This jurisprudential "personality disorder," in turn, reflects the drafting histories of the codes and rules. At critical points, when one is most in need of rules with directive content, there are none: the final language is an affect of the negotiation and compromise processes from which the language came. They were, after all, drafted by lawyers. The rules offer enough wiggle room to justify the actions of Theodore Kaczynski's trial lawyers. But that's only part of the problem, and it's the easier part.

The deeper problem is law culture in general. Ironically, the Unabomber manifesto anticipates the professional forces that forced Kaczynski's lawyers to act as they did with respect to the mental defect defense. Kaczynski's was the victim of a cultural phenomenon that the manifesto calls the victim of a cultural phenomenon that the manifesto calls "oversocialization": "The oversocialized person is kept on a psychological leash and spends his life running on rails that society has laid down for him."[95]

Shortly after pleading guilty, Kaczynski demonstrated a clear understanding of why his lawyers did what they did to him. He wrote:

> Perhaps I ought to hate my attorneys for what they have done to me, but I do not. Their motives were in no way malicious. They are essentially conventional people who are blind to some of the implications of this case, and they acted as they did because they subscribe to certain professional principles that they believe left them no alternative. These principles may seem rigid and even ruthless to a non-lawyer, but there is no doubt my attorneys believe in them sincerely.

Lawyers wear masks. Kaczynski got this exactly right. His lawyers were immersed in the culture of lawyering in general and capital defense lawyering in particular. Law culture has its own specialized morality, norms, and values. We all know, even without attending law school, that lawyers operate according to their own code of ethics. These ethics are variously described as "role morality," or "role differentiated behavior." Essentially, lawyers live by an ethical code that is different from the rest of the world (including the rest of our world, when we're not acting like lawyers). To some extent, we leave our "everyday ethics" at the threshold of our respective office doors each morning when we show up to work. We do things—we're ethically required to do things—that, if they were done by others, outside the profession, would be deemed wrong or immoral (keeping certain kinds of secrets, for example, even when revealing those secrets would prevent other people from suffering harm). Law students are taught to "think like lawyers," and lawyers are taught to act like lawyers, without questioning the foundational values on which our specialized role morality is based.

The general problems of ethical role morality are magnified in capital cases where the stakes are life and death. Criminal defense lawyers fight hard for their clients; capital defense lawyers fight harder. Criminal defense lawyers sometimes act paternalistically

[95] Kaczynski, *supra* note 9, § 26.

to save a client from himself; capital defense lawyers do so more often. I have argued elsewhere that capital punishment warps the law and deforms the lawyers and judges who apply the law. Capital punishment not only warps, it deforms the professional ethics of those who work in the legal profession.

III. Deciding Who Dies

> *A man's spiri! 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.*
>
> Murray Kempton

Timothy McVeigh and the Waco massacre; Paul Hill and abortion; Theodore Kaczynski and anti-technology—we seem to live in an age when some Americans are ready and willing to kill other Americans to make an ideological point. It almost makes one nostalgic for the days when courtmarshal defendant Captain Howard Levy, M.D., presented evidence to try to prove that the United States was following "'a general policy or pattern or practice' of war crimes in Vietnam," or when the Winooski Forty-Four "tried" America's policies in Central America.[96]

McVeigh, Hill, and Kaczynski all faced trials for their lives. Kaczynski never got his trial. Hill and McVeigh did, although their respective court-appointed attorneys responded very differently to their clients' wishes regarding their defenses—against the imposition of capital punishment—by raising defenses that were based on their political ideologies. Hill wanted to invoke a little-used defense to argue that his killings were justifiable homicide—or at least motivated by a sincere desire to prevent a greater harm—because he was saving the lives of the "unborn." When Paul Hill's trial judge denied him the counsel of his choice (an anti-abortion attorney who wanted to argue that the murders were justifiable homicide), he fired his court appointed public defenders and represented himself. After the judge ruled that his "political necessity" defense evidence was inadmissible, Hill stood mute. His jury unanimously recommended that Hill be put to death. On appeal, Hill was represented by the anti-abortion lawyer he had been denied at trial. The state Supreme Court, rejecting Hill's "necessity" defense, unanimously affirmed Hill's death sentence.[97]

Like Paul Hill, Timothy McVeigh was sentenced to death. However, unlike Hill (and Kaczynski), McVeigh's trial lawyers did mount a vigorous political defense against a death sentence. In his opening statement at the penalty phase of McVeigh's bifurcated capital trial, the bomber's lawyer told the jurors that the defense would reveal to them a Timothy McVeigh who had been a model soldier deeply disturbed by the federal

[96] *See* Andrew Kopkind, *Captain Levy — Doctor s Plot, in* Trials of the Resistance, p. 25 (1970). *Seeaho* POR AMOR AL PUEBLO (1986).

[97] Hill v. State of Florida. 688 So. 2d 901.906 (Pin. 1996).

government's botched raid at Waco, Texas.[98] McVeigh's attorney told the jurors he would ask them to consider "what Mr. McVeigh believed happened at Waco."[99] After Waco, McVeigh thought that "the federal government that we rely on to protect us, serve us, had turned the tables, had become master, had declared war on the American people."[100] He tried to spark the jurors to empathize with McVeigh's misplaced passion. "You will hear," McVeigh's lawyer closed, "that the fire in Waco did keep burning in McVeigh. He is in the middle of it."[101]

McVeigh's lawyers showed the jury the magazine articles and videotapes about Waco—where about eighty people (including children) died in the catastrophe at the Branch Davidian complex near Waco, which burned to the ground on April 19, 1993. This was exactly two years before McVeigh bombed the Federal Building in Oklahoma City that killed 168 people, including many children. McVeigh's lawyers called the author of some of the *Soldier of Fortune* magazine articles that had impressed McVeigh as a witness. The defense tried to paint McVeigh's outrage and political sentiments to the jury in a vivid light. The author of a book titled *Ashes of Waco* "summarized what McVeigh might have gleaned from other articles and videos critical of the Government's role" in Waco and Ruby Ridge. In closing arguments, McVeigh's lawyers, seeking to spare him, reiterated that the bombing was political."[102]

One can only speculate how the presentation of evidence struck the jurors. I think I can imagine how revolted I would have been had I served as a member of the McVeigh jury listening to this sort of evidence and argument—I know how I would feel if Judge Vance's assassin had offered political swill as an "excuse" for the deadly bomb he mailed to Judge Vance's home. Unsurprisingly, the McVeigh lawyers' strategy backfired and left the lawyers open to harsh and very public criticism. "Legal experts" denounced the lawyers' "bizarre strategy" that may well have "persuaded the jury to impose a sentence of death rather than life in prison."[103] *Newsweek* interviewed some of McVeigh's jurors, and proclaimed that the defense strategy was a "catastrophe."[104] However, *Newsweek* also reported that all twelve McVeigh jurors "accepted," as mitigating evidence, the defense's "depiction of McVeigh's deep hostility toward the federal government after Waco and the FBI shoot-out at Ruby Ridge,"[105] They agreed that McVeigh believed

---

[98] Jo Thomas, *McVeigh 's Lawyers Cite Waco in Urging Jury lo Spare His Life,* N.Y. TIMES, June 7, 1997. § I, at 1.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] Jo Thomas, *Jury Begins Its Deliberations On Punishment for Fate McVeigh,* N.Y. Times. June 13. 1997.at Al.

[103] Nina Bernstein, *Defense's Portrait of Political Outrage May Have Backfired.* N.Y. TIMES, June 14, 1997, § I, at 9.

[104] Peter Amin and Tom Morgenthau, *The Verdict: Death.* NEWSWEEK. June 23, 1997, at 40..

[105] *Id.*

the federal government's "ninja-warrior tactics in those incidents were 'leading to a police state,"'[106]

One commentator opined "[t]he strange calculation of the defense in presenting Mr, McVeigh as politically motivated seemed [to be] forced by Mr. McVeigh himself."[107] However, the decision to base McVeigh's defense against capital punishment on his political reasons for committing the crime was apparently a choice made by his lawyers. In an interview, one of McVeigh's trial attorneys was asked "[d]id Mr. McVeigh instruct you to bring a penalty phase that portrayed this as a political act? Was this a way of painting himself as a martyr?"[108] The lawyer responded:

> Tim doesn't want to be a martyr. He was an active participant, but we [i,e., the lawyers] made all the final decisions. This was not a conventional capital case; it needed unconventional tactics. The government prosecuted Tim because of what he believed happened at Waco. We turned that on its head. We said, "Let's talk about Waco." In the end, all twelve jurors said Waco and Ruby Ridge were mitigating factors.[109]

It is not likely that Theodore Kaczynski (or Paul Hill, for that matter) would have fared any better than McVeigh with a political defense. Arguing the political bases of his crimes would have increased the likelihood of a death sentence. Still, the evidence would have been admissible during the penalty phase of the trial, for the same reasons it was admissible in McVeigh's.

The precedent here is of course the *Locked* doctrine, which is based on the 1978 case of *Lockett* v. *Ohio.*[110] The *Lockett* doctrine is a sort of Magna Carta that obliges a capital sentencing body to hear, and to be allowed to consider, any mitigating evidence that has bearing on any aspect of the defendant's character, record, orcrime.[111] "Mitigating evidence," the *Lockett* doctrine provides, is any "fact about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death." As Louis Biiionis has derrionstrated, the definition of what counts as "mitigative evidence" in *Lockett* is broad:

> *Lockett's* definition extends constitutional protection to the kind of evidence that must be taken into account at sentencing to produce a morally appropriate sentence. Any evidence about the offender or the offense that might support a conceivable moral argument against the death sentence in a particular case is protected under the *Lockett* definition. Mitigating

[106] *Id.*

[107] *Id.*

[108] *We Did the Best We Could,* Nat't LJ. A6 (1997)

[109] *Id.*

[110] *See* Locket v. Ohio. 438 U.S. 586(1978).

[111] Louis Bilonis. *Moral Appropriateness, Capital Punishment and the Lockett Doctrine,* 83 J. Crim, l. & Criminology 283, 301 (1991).

> evidence might include, for instance, evidence that a death sentence would be unjust because the defendant's personal responsibility for the offense is lessened by youth, stunted intellectual and emotional growth, mental retardation or impaired capacity, mental or emotional disturbance, provocation by others, insanity, the influence of alcohol or drugs at the time of the offense, orto shared or limited participation in the actual crime. *Lockett's* definition of mitigating evidence also would embrace evidence in support of a claim that the defendant suffered tragic or horrible circumstances in his or her formative years, such as abuse, neglect, poverty, or domestic turbulence, that might explain the defendant's failure to develop into a fully normal and law-abiding citizen. Evidence tending to show that a death sentence would be too harsh because the defendant in the past has succeeded in making a well-behaved and peaceful adjustment to prison life, is prone only to isolated incidents of violent behavior that can be controlled or minimized in prison, has been willing to confess or cooperate with authorities in some way, or otherwise has good prospects for rehabilitation would find protection in *Locket's* definition. So, too, would evidence of some of the defendant's positive traits—such as remorse, general good character, hard-working nature, success in overcoming considerable hardships, service to the community or the military, or relatively minor criminal record—that distinguish the defendant from truly incorrigible murderers and commend restraint in imposing the harshest sentence.[112]

The core questions on the table during in the penalty phase of a capital case—whether the defendant has lost his moral entitlement to live, whether he deserves to die—are essentially moral, not legal questions. To be sure, the sentencing jury must be provided with a legal framework with which to structure their moral inquiry (set out by legislators in statutory lists of "aggravating" and "mitigating" circumstances, for instance). Still, the ultimate decision—life or death—is a moral one. Capital defendants have a constitutional right to present any relevant mitigating evidence that might cause the sentencing body to choose life over death in that particular case. The motivation for a murder is directly relevant to that moral calculus, even when that reason is a political ideology, as the judge in the Timothy McVeigh case agreed. Perhaps Kaczynski's judge would have agreed as well, had he been willing to consider and hear all of the relevant evidence.

IV. Paternalism, autonomy and attorney-Assis ted Suicide

Capita! punishment is to law what Surrealism is to Realism in art.

[112] *Id.* at 301–06.

I come now to the question of suicide in general and attorney-assisted suicide in particular. If I am right that Theodore Kaczynski was mentally competent to stand trial, that such competency includes the competence to make important, personal decisions about his case, and that Kaczynski may not even be a paranoid schizophrenic, then the issue becomes should he have been able to choose to forego a mental illness defense, his only real chance of avoiding a death sentence? And should his lawyers have gone along with such a suicide mission? I think the answers to both questions are "yes."

Kaczynski's handwritten motion for a new trial, filed earlier in April 1999, argues that Kaczynski's trial lawyers—dedicated idealists, lifelong opponents of capital punishment, determined to save their client's life by any means necessary, to save Kaczynski from himself, if necessary—did not have a legitimate right to force a mental illness defense on Kaczynski. Thus is framed the most interesting and bedeviling ethical dimension of the case: What should a defense lawyer do, who is committed to opposing the death penalty, when her admittedly mentally competent client makes a knowing and informed decision that will almost certainly result in a death sentence? My topic may appear narrowly focused, but in fact it implicates a constellation of issues at the core of the attorney-client relationship: the lawyer's duty of undivided loyalty to the client, the duty to maintain client secrets and confidences and, perhaps most fundamentally, locating the appropriate balance of power between lawyers and the condemned client.

It's a paradox. The worst among us—capital murderers awaiting execution—are the only Americans with a legal *right* to commit suicide assisted by the state, which includes attorney assistance to enforce it. In Spring 1997, the United States Supreme Court held that the Constitution does not provide terminally ill people with a right to assisted suicide— regardless of whether that assistance be provided by a physician, spouse or other loved one.[113] Terminally ill cancer patients or AIDS patients in chronic and excruciating pain have no constitutional right to professional, medical assistance in aid of suicide—a legal reality underscored by the recent conviction of Dr. Jack Kevorkian for murder.[114]

But since Gary Gilmore's consensual execution in 1977, the law has been fairly settled that a condemned prisoner—and no one else in America—*does* have the right to forego challenges to the legality of suicide, so long as the prisoner is deemed by the courts to be mentally competent to make the decision.[115] When he makes that decision, the state will provide him with all the assistance he needs to die, including a death machine and the technicians necessary to make it work. In other words, a death row

[113] *See* Vacco v. Quill. 521 U.S. 793 (1997).

[114] *See* Julie Grace-Pontiac. *Curtains for Dr. Death.* Time, April 5. 1999, at 48.

[115] *See* Gilmore v. Slate of Utah, 429 U.S. 1012 (1976).

prisoner who is mentally competent and fully informed of the risks and consequences of his actions, has a legal right to die.

Loyalty is at the heart of this difficult question. The two characteristics most commonly associated with the attorney-client relationship are themselves grounded in notions of loyalty. Attorneys must keep the client's secrets in confidence, and they are forbidden to represent conflicting interests. Neither rule is absolute, and there are loopholes that provide lawyers with great discretion in applying the professional rules to individual factual patterns. Still, the unifying narrative theme of lawyering in America is loyalty.

Two overlapping constellations of issues are central to my belief that attorney-assisted suicide is one of the duties, no matter how difficult, of a capital defense lawyer with a mentally competent client. The first issue is whether following my client's wishes constitutes "state-assisted suicide." The second issue central to my conclusion has to do with power, self-determination and client empowerment.

The resolution of my first problem is inseparable from my own personal beliefs about suicide. Some commentators on consensual execution seem to think they can resolve this complicated problem by calling it something else: If consensual executions are "state-assisted suicide," then they're bad and ought to be banned. If they're called executions, then they may be legitimate in certain tightly-controlled circumstances.

For its part, the *stale* surely perceives a difference between suicide and execution. Robert Brecheen was a model prisoner during his twelve years on Oklahoma's death row. But a few hours before he was scheduled to be killed by lethal injection he attempted suicide by taking an overdose of sedatives. Doctors had to pump his stomach at a local hospital to save his life. Mental health experts examined him to determine whether he was mentally fit. Brecheen then was brought back to the prison. Forty minutes later, the execution squad strapped him to a gurney, and he was executed. Every prisoner on Phase II of Deathwatch in Florida is placed under twenty-four hour suicide watch.

The state obviously has its reasons for refusing to allow condemned people to "cheat the executioner." But, the state's reasons need not be my reasons. The mere fact that the state insists on doing the killing itself ought not necessarily resolve for me, as a lawyer, whether I ought to acquiesce in the state's—and my client's—desire for execution.

To pretermit the tyranny of labeling, and to call the thing by its real name, I concede that Kaczynski is seeking "state-assisted suicide." The question then becomes whether 1, as an attorney, should assist the state in its will to execute him. I answer this question in the affirmative.

I believe that every mentally healthy adult has a sovereign right to end his life at the time of his choosing—without interference by the government for that person's "own good." His reasons for suicide are his and his alone; regardless of whether the government deemsjiis reasons good, bad, or nonexistent. The suicide decision may be

based on good reasons or bad reasons or no reasons, but our government lacks the legitimate power to second-guess or sit in judgment of those reasons.

For my own part, I think that the prospect of spending the rest of my life in a maximum-security prison would be far worse than the prospect of execution by lethal injection, electric chair, hanging, gassing, or firing squad. I have never been incarcerated as a prisoner, but I have, during my years as a Florida capital public defender, spent many hours visiting with my clients in Florida's maximum-security prison. I have been close enough to smell the fear and despair of the place, and to imagine the utter lack of privacy or solitude that would be, for me, perhaps the worst part of living in that world. The sound of electronically-operated gates clanging shut upon entering the prison proper is a sound that produces a feeling I cannot convey with words—and it's always been so for me, even though I knew I was free to leave at will.

We all have our private terrors.[116] For many the worst aspect of living on death row is the cacophonous *noise* of the place. William Styron has written that exhaustion combined with sleeplessness is a rare torture,[117] and I could scarcely imagine sleeping in that place.

In 399 B.C., Socrates himself was a volunteer for execution in ancient Athens. After refusing to use the one argument that might have saved his neck, he rejected the increasingly insistent demands of his disciples that he escape execution by fleeing the city.[118] In the *Criio,* Socrates argued that " the really important thing is not to live, but to live well."[119]

Death is an unknown, Socrates argued to his judges in the *Apology,* and one ought not fear the unknown: " [W]e are quite mistaken in supposing death to be an evil," he said.[120] " I have good grounds for thinking this."[121] This is so because death is " one of two things. Either it is annihilation, and the dead have no consciousness of anything, or, as we are told, it is really a change—a migration of the soul from one place to another."'[122] Either way, "[i]f death is like this, then, I call it a gain, because the whole of time, if you look at it this way, can be regarded as no more than one single night," or it is a journey that would enable Socrates to continue in "examining and searching people's minds, to find out who is really wise among them, and who only thinks that he is."[123] Socrates' last words to his accusers and his judges: " Now it is time that

[116] At the siege of Sebastopol, Tolstoy jumped out of the trenches and ran towards the bastion under heavy tire from the enemy. He was horribly afraid of rats, and had just seen one; Orwell's harrowing scene at the end *of 1984,* when Winston Smith confronted his rats; the scene when Indiana Jones looked into the pit, and said "Snakes! Why did it have to be snakes!" Raiders of the Lost Ark (Paramount 1981).

[117] *See* William Styron, Darkness visible (1990).

[118] See Plato, Soerup tVe^t'l/'o^SEljn The Collected Dialogues of Plato 3 (Edith Hamilton and Huntington Cairns, eds., 14th ed. 1989).

[119] PLATO, *Crito, in id.* 27, 33.

[120] Plato, *supra* note 121, at 34.

[121] *Id.* at 24–25.

[122] *Id.* at 25.

[123] *Id.*

we were going, I to die and you to live, but which of us has the happier prospect is unknown to anyone but God."[124]

This brings us to the second issue: as a lawyer, counselor, and friend of death row prisoners, I always considered the defining goal of my representation to be client empowerment. My overriding aim was to serve as my client's ambassador in a legal system that was bent on killing him regardless of what he did or said, and regardless of what I did or said on his behalf. A client's lawyers are his only allies in a howling sea of hostility— political and judicial, to the extent that those are two separate categories. Often in today's political and judicial climate, the most we can offer the condemned person is a leaky life raft taking water on fast, a flimsy structure that may delay the inevitable, but not for long.

The law has stripped the condemned person of the power to determine the quality and quantity of his remaining time on earth in all respects save one: Right or wrong, regardless of whether I might personally agree with it, the simple fact is that at the present historical and jurisprudential moment, constitutional law does empower him to choose death over what passes for life in a maximum security prison. As a mere lawyer-—with a limited capacity to imagine what life is like in a federal supermax prison or on death row—I won't take that final choice away from a condemned person, too. I would help my client help our government kill him.

I have often been asked which, in my opinion, is the greater evil: the death penalty or denying a person their day in court? I don't much like either. But the constitutional law is clear that the former is OK and the latter isn't—so the latter is more *constitutionally* evil.

But that's too much a lawyer's answer. Perhaps I should explain briefly why I oppose capital punishment. It's not because the state lacks the moral authority to kill. Sometimes—in war, for example—the state is morally *required to* kill, to act in self-defense.

Rather, I oppose capital punishment because I don't trust the government to decide who dies. Our government can't even get the mail delivered on time. My experience with capital punishment as a legal system leaves me convinced that the state simply isn't competent to decide which of its citizens has lost his moral entitlement to live.

Governments make mistakes because people make mistakes. Too often totally innocent people end up on death row and executed. The social benefits of the death penalty aren't outweighed by the inevitability of erroneous death sentences and executions. Executing innocents is as inevitable as the law of averages and the fallibility of governmental systems designed and administered by fallible human beings.

Preventing executions is very important to me. But if s not the only thing that's important to me. There are choices and decisions that the person whose life is on the line ought to be allowed to make, as a basic part of human dignity and autonomy. Whether to stake your life on a mental defect defense is one of those choices.

[124] *Id.* at 26.

The threat of a death sentence opens the way for abuses of the accused individual's rights by lawyers and judges. Look, had this been a simple assault case, there's no way Kaczynski's lawyers would have forced a mental defect defense on him. But the threat of a death sentence skews the attorney-client relationship.

It's too tempting for well-meaning attorneys to seize control of the case "for the client's own good." Usually, lawyers and their clients have the same goal in a death case: to avoid a death verdict by any legal means necessary. But Kaczynski's case is different: Here was an intellectually smart, ideologically-motivated killer, who didn't really care much about a possible death sentence.

In my book about the Unabomber non-trial, I give Kaczynski's trial lawyers the benefit of the doubt; I am willing to assume that they honestly believed Kaczynski was a paranoid schizophrenic, and that their takeover of the defense was motivated by a sincere desire to save their client's life. But, in Kaczynski's motion to vacate his guilty pleas, there is an intriguing suggestion to the contrary, Kaczynski asserts that Quin Denvir, his lead attorney, counseled him that suicide was an option if Kaczynski found life imprisonment unendurable, Kaczynski quotes Denvir as saying: *"I have no problem with my clients committing suicide"*

Now, I ask you; What sane lawyer would counsel suicide to a client the lawyer really believes is a paranoid schizophrenic? This suggests that not even the lawyers really believed Kaczynski was a paranoid schizophrenic. That casts the legitimacy of what they did in an entirely different light,

I went into my correspondence with Theodore Kaczynski 80% sure he wasn't a paranoid schizophrenic and 100% sure that I hated him for what he did—I have a special venom in my heart for people who commit murder by sending bombs through the mails. Now, after our at times intense correspondence, I'm 100% certain Kaczynski isn't a paranoid schizophrenic—unless radical environmentalism, a willingness to kill for them, and a reclusive lifestyle are proof of mental illness.

He is a killer. For me, nothing changes that. I hate what he did, and, because of the way my judge was murdered, that hate is personal. As smart and funny as he is in his letter writing, in my eyes he remains a murderer. He's the coldest, most calculating killer with whom I've ever communicated, Theodore Kaczynski *is* the Unabomber,

Kaczynski is a bomber, but he is not a *mad* bomber. He's not crazy; he's something more frightening—he's a chillingly *sane* bomber, I mean, Kaczynski handmade the tools to hand-make the bombs—-and he did that for seventeen years. In his diaries and notes, he explained his "experiments," as he called them, in excruciating detail.

Indeed, while it was important to me that Kaczynski have a choice—a meaningful choice—to decide whether or not to go back to court to seek to invalidate his guilty plea, I have been trying to persuade him not to exercise it. I tried to persuade Kaczynski to decide not to go back to court to vacate his guilty plea. To date, Kaczynski remains determined to invalidate his plea and have his day in court—fully aware that the outcome will be a death sentence.

Because that decision is Kaczynski's, and his alone—not mine, not his lawyer's, not his family's—I will continue to support his right to make it, even though it could well result in an outcome I abhor.

I am painfully aware of the ironies here. By helping Theodore Kaczynski challenge his guilty plea, I'm helping him dig his own grave; as Matthew Haggman aptly put it in the Vermont Law School *Forum:* "Kaczynski isn't crazy, but he is guilty, and he wants his day in court, after which he will almost certainly be found guilty and executed. For [me] this episode began with bitter irony—[my] ultimately befriending a man who put to a fine art a practice that killed [my] mentor, Judge Vance. Aiid it may end, through [my] efforts, with Kaczynski facing what [I] have spent most of my professional life as a lawyer fighting—the death penalty."

As I've said before: Nothing about capital punishment is easy.

V. The Unabomber Case on Appeal

> *There is a time when the operation of the machine becomes so odious, makes you so sick at heart that you can 'I take part; you can 'I even tacitly take part, and you 've got to put your bodies on the gears and upon the wheels, upon the levers, upon all the apparatus and you 've got to make it slop. And you 've got to indicate to the people who run it, to the people who own it, that unless you 're free, the machines will be prevented from working at all.*
>
> Mario Savio,
>
> Berkeley, California, Dec. 1, 1964

The last document I drafted for Theodore Kaczynski was an application for Certificate of Appealability; however, it was, in essence, a first draft of his initial brief in the Ninth Circuit Court of Appeals challenging District Judge Burrell's summary denial of his section 2255 motion to vacate his guilty pleas.[125] I suggested Kaczynski raise five issues on appeal:

1. Judge Burrell erred in failing to recognize that if a defendant has a constitutional right to choose any of several alternatives, and if he is denied to choose all of these alternatives except by pleading guilty, then his "choice" to plead guilty is involuntary. As the Ninth Circuit reiterated just last year, "a criminal defendant may be asked to choose between waiver and another course of action *so long as the choice presented to him is not constitutionally offensive."*[126] In that case, the court ruled that a defendant on trial for his life "cannot be forced to choose between incompetent counsel and no counsel at all."[127]

---

[125] Judge Burrell had also presided over Kaczynski's non-trial.

[126] Crandall v. Bunnell, l44F.3d 1213,1215 (9th Cir 1998) (emphasis added).

[127] *Id* at 1216. In *Crandall,* a capital defendant was assigned a Cal ifomia pubi ic defender. Based on "minimal" factual investigation of his client's case, the public defender "concluded that Crandall did

Theodore Kaczynski's guilty plea was the result of constraints on his ability to exercise his decision-making power in a reasonable and rational manner. On the one hand, Kaczynski was deprived of the right to make personal and basic decisions about his defense. On the other hand, he was denied the right to fire his court-appo inted lawyers and represent himself. Separately, these errors violated the Constitution. Together, they deprived this guilty plea of any semblance of the reliability required by the Constitution.

Theodore Kaczynski was unquestionably mentally competent to stand trial. From this it follows that he was constitutionally entitled to make the important personal decisions about his case: whether to plead guilty or innocent, whether to testify, whether to stake his life on a mental defect defense. When Judge Burrell ruled that Kaczynski's court-appointed lawyers had the power to raise—against Kaczynski's will and against his vehement objections—a mental defect defense, he had no choice other than to plead guilty. It was unconstitutional to force Kaczynski into choosing between going to trial "assisted" by lawyers who would represent him in a way that was an anathema to him, or to plead guilty. (The other option, selfrepresentation, was precluded by the District Court's flagrant denial of Kaczynski's fundamental rights under *Faretta.*[128]*)* Because the *choice* was unlawful, the guilty plea caused by the choice is unlawful.

---

not have a triable case. (The lawyer] decided to wait out his client and the prosecutor until they both realized that a plea bargain was the best course of action. [The lawyer] was willing to wait 'as long as it took' for both Crandall and the prosecutor to 'simmer down.' *Id.* at 1217

Crandall did not "simmer down." He exercised his right to self-representation in his capital trial He was found guilty and sentenced to death.

To be sure. *Crandall* is factually distinguishable from Kaczynski's case Crandall's lawyer did virtually no investigation; Kaczynski's lawyers did massive investigation. Crandall's lawyer made little effort to establish meaningful communication with his client: Kaczynski's lawyers stayed in close communication with Kaczynski, although they apparently kept him in the dark, for as long as possible, about their plans to raise a mental illness defense.

Analytically, however, *Crandall* is germane to Kaczynski's case. In both cases, capital defendants were forced into unconstitutional choices.

[128] "[T]he right to appear pro se exists to attimi the dignity and autonomy of the accused." McKaskle v. Wiggins, 464 U.S. 168, 176 (1984). This is clear from the logic of the Supreme Court's landmark case on self-representation, in Faretta v. California. 422 U.S. 806 (1975), Anthony Faretta was charged with grand the It. Mr. Faretta was dissatisfied with the California state public defender the court assigned to represent him. He requested to represent himself. The judge, after initially allowing selfrepresentation, held a hearing to determine Faretta's "ability to conduct his own defense." *Id.* at 808 The court then ruled that Faretta must he represented by the public detènder. He was. and he was convicted *Id.*

In Anthony Faretta's case, the Supreme Court framed the issue before it in this way: whether a defendant'has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so. Slated another way. the question is whether a state may constitutionally hale a person into its criminal courts and there tbrce a lawyer upon him, even when he insists that he wants to conduct his own defense." *hl.* at 807. The court ruled that "astate may not constitutionally do so." *Id.*

The court reasoned that the "right to self-representation-to make one's own defense personally—is., necessarily implied by the structure." of the constitutional source of the right to counsel, the Sixth Amendment. *Id.* at 819. "The right to defend is given directly to the accused; for it is he who suffers the consequences of the defense fails." *Id.* at 819–20.

As the prosecution argued in a pretrial motion:

> In *Jones* v. *Barnes,*[129] the Supreme Court held that 'the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.' Courts have added to that list the decision whether to rely on an insanity defense.[130] Although a defendant in the federal system does not have to plead insanity,[131] the decision to rely on an insanity defense usually requires the defendant to admit to committing the actions constituting the charged offense and to waive his Fifth Amendment privilege against self-incrimination,[132] Because those decisions are closely akin to the decisions whether to plead guilty or to testify, the decision

---

The Sixth Amendment itself speaks of the "assistance" of counsel. The Supreme Court explained that "an assistant, however expert is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing ddendant-not an organ of the slate interposed between an unwilling defendant and his right to defend himself personally." *Id.*

"To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment" the Supreme Court continued, *id.* "In such a case counsel is not an assistant, but a master: and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative." *Id.* An "unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution for. in a very real sense, it is not *his* defense." *Id.* at 820–2).

The Supreme Court in Anthony Faretta's case recognized that virtually all defendants would be better off with counsel; the old saw, "the person who represents himself has a fool for a lawyer." is firmly rooted in the experience of most criminal attorneys Still, the court in Faretta's case also recognized that individual free will must trump the paternalistic values of compulsory representation, and, "[wjhatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." *Id.* at 833–34 A defendant's choice to represent himself, so long as he is "made aware of the dangers and disadvantages of self-representation," must be honored. *Id.* at 835. His choice "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (citing Illinois v. Allen. 397 U.S. 337.350–51 (1970) (Brennan, J., concurring)). What Kaczynski's judge (and his lawyers) did to him was 'To imprison a man in his privileges and call it the Constitution." *id.*

[129] Jones v. Barnes. 463 U.S. 745, 751 (1983).

[130] *See* United States v. Marble. 940 F.2d 1543, 1547 (D.C. Cir. 1991); Alvord v. Wainwright. 725 F.2d 1282, 1288–89 (11th Cir. 1984), terr *denied, W* U.S. 956 (1984); Foster v Strickland. 707 F.2d 1339, l343 (HthCir. 1983). *cert, denied,* 466 U.S. 993 (1984).

[131] *See* Fed. R. Crim. P. 11(a). 12.2(a).

[132] *See* Powell v. Texas, 492 U.S. 680.685 (1989) (a 'defendant waive[sj his Fifth Amendment privilege by raising a mental status defense"); Hendricks v. Vasquez. 974 F.2d 1099. 1108 (9th Cir. 1992) (defendant waives Fitth Amendment right by introducing psychiatric testimony in support of a mental defense); Dean v. Superintendent, 93 F.3d 58,61 (2d Cir. 1996) (discussing need to admit offense in order to pul on an insanity defense), *ceri, denied,* 117 S. Cl. 987 (1997).

whether to put on an insanity defense is a fundamental one that belongs to the defendant.

Note that it was the *prosecution* making this argument. There was an Alice-in-Wonderland quality to the Unabomber non-trial. The prosecution was advocating for Kaczynski's right to control his own defense and for his right of se If-representati on. The court-appointed defense lawyers were arguing that their will, not their client's, should prevail. The world was upside down, the law turned inside out.

2. Judge Burrell erred in summarily rejecting Kaczynski's claim that his guilty plea was involuntary. "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized."[133] A guilty plea must be the voluntary expression *of the defendant's own choice.*[134] "The agents of the state may not produce a plea by actual or threatened physical harm or by *mental coercion overbearing the will of the defendant."*[135] Kaczynski's case is somewhat unique in that it was not an agent of the state (i.e. the prosecutors) who coerced Kaczynski into pleading guilty, it was his own lawyers (Clarke and Denvir) as well as the trial judge.

Several courts, including the Ninth Circuit, have indicated that coercion by *the accused's counsel* can render a plea involuntary.[136] The voluntariness of Kaczynski's guilty plea can be determined only by considering the totality of the circumstances.[137]

At the core of Kaczynski's coerced guilty plea was the representation he received from attorneys Clarke and Denvir. Both attorneys were well aware, from the beginning, that Kaczynski vehemently opposed a mental illness defense and would do anything to avoid portrayal as a "madman." Kaczynski diligently pursued the possibility of acquiring attorney Tony Serra (who would present a "political" defense consistent with Kaczynski's desires), attempted to commit suicide the night before trial, and petitioned the court to represent himself pro se. All of these actions were done for one simple reason—to avoid a mental illness defense. Despite Kaczynski's *clear* objection to a mental illness defense, Denvir and Clarke continued to believe that such a defense was the only way to spare Kaczynski's life. Although they may have ultimately been correct, the defense was inconsistent with the way Kaczynski choose to make his defense; a choice which is protected by the Sixth Amendment to the Constitution.[138] A second factor which led to Kaczynski's involuntary guilty plea, centered on the judge's

---

[133] Brady v. United States, 397 U.S. 742, 748(1970).

[134] Iaea v. Sunn, 800 F.2d 861, 866 (9th Cir, 1986) (citing *Brady,* 397 U.S. at 748).

[135] *Id.* at 866 (quoting *Brady.* 397 U.S. at 750) (emphasrs added).

[136] *Id.* at 866–67; *See* United Stales v. Moore. 599 F.2d 310 (9th Cir. 1979) (a guilty plea that is entered because defense counsel is unprepared for trial is involuntary); *see also* Peete v. Rose. 381 F. Supp. I 167 (WD. Tenn. 1974) (finding that defense counsel's statement that defendant could get a "Kin Klux jury' that might give him the chair" rendered defendant's guilty plea involuntary)

[137] *See Brady.* 397 U.S. at 749.

[138] *See Iaea.* 800 F.2d at 866 (citing United States v. Martinez. 486 F.2d 15,21 (5th Cir, 1973)) (when examining the coerciveness of a guilty plea, the concern is not solely with the defendant's subjective state of mind, but with the constitutional acceptability inducing the guilty plea).

repeated misstatement of the law that it was Denvir and Clarke's decision whether to pursue a mental illness defense. The Constitution grants the accused the right to make *his* own defense. As long as Kaczynski was mentally competent, a determination made by the court and Dr. Sally Johnson, it was *his* decision whether to pursue such a defense. The prosecution argued this, and the Sixth Amendment seems to reflect this proposition. Once again Kaczynski was denied constitutional protection, but this time it came from the one body specifically designed to assure constitutional protection.[139]

Finally, the Ninth Circuit has held that in determining the voluntariness of a guilty plea, "[t]he district court should consider such factors as the amount of time remaining *before* trial when [the defendant] plead guilty."[140] After Kaczynski exhausted all possible avenues to avoid a mental illness defense, he was left with no choice but to plead guilty. It was not until January 22, 1998, the morning which trial was to begin, that Kaczynski plead guilty. In fact, immediately after the judge denied Kaczynski's motion to proceed pro se, Denvir approached the bench and communicated Kaczynski's intentions to plead guilty. As Kaczynski himself explained.

> [T]his put me in such a position that I had only one way left to prevent my attorneys from using false information to represent me to the world as insane: I agreed to plead guilty to the charges in exchange for withdrawl of the prosecution's request for the death penalty... I am not afraid of the death penalty, and I agreed to this bargain only to end the trial and thus prevent my attorneys from representing me as insane....[141]

In sum, both the United States Supreme Court and the Ninth Circuit have held that a guilty plea must be the voluntary expression of *the defendant's* own choice. Kaczynski's guilty plea was the expression of Denvir and Clarke (and, consistent with their ethical beliefs of capital punishment) as well the court which faced intense pressures by the public to bring the case to an end. It was never the voluntary expression of Theodore Kaczynski. While it is true that under oath and in court, Kaczynski informed the judge hat he was pleading guilty voluntarily, the totality of the circumstances indicate otherwise. In fact the totality of the circumstances indicate one basic point: Kaczynski plead guilty in order to avoid being portrayed as mentally ill.

3. The District Court erred in failing to recognize that, without a § 2255 remedy, there will be no remedy for flagrant violations of *Faretta v. California,*[142] in cases that end in guilty pleas. In this case, the District Court's flagrant and egregious violation of Kaczynski's *Faretta* rights[143] forced him into an unconditional plea bargain. Since

[139] *See id.* at 867 (third parties are not responsible for the integrity of the criminal justice system in the same way as *judges* or prosecutors nor are they in the same position of power).

[140] *Id.* al 868 (emphasis added).

[141] Statement of Theodore Kaczynski, Jan. 26, 1998.

[142] 422 U.S. 806 (1975).

[143] The District Court's ruling that Kaczynski's *Faretta* request was untimely and made tor the purpose of delay was clearly erroneous. The Ninth Circuit has consistently equaled the issue of timeliness

the bargain bars the defendant from appealing in the normal way, his only recourse

---

with the initiation of trial proceedings. A demand for self representation is timely "if made before meaningful trial proceedings have begun." United States v. SchalK 948 F.2d 501,503 (9th Cir 1991). Trial proceedings begin once the jury is empaneled and begins to listen to the evidence in the case. *See* fritz v Spalding, 682 F.2d 782. 784 (9th Cir. 1982); *see also* Crawford v. Rateile. No. 92–55702 (9th Cir. Aug. 20. 1993).

In *Fritz,* the defendant was accused of armed robbery. Thirty days before trial. Fritz moved to represent himself, claiming he and his attorney could not agree on a defense strategy. Fritz withdrew his motion to proceed pro se following a meeting with his attorney. On the morning of the afternoon trial, however, Fritz once again moved the court to allow him to represent himself at trial, claiming he and his attorney had honest, fundamental differences. Fritz's motion was denied by the trial court, and he was subsequently convicted. On appeal. The Washington Court of Appeals held that Fritz's request was a tactic to secure delay. The State Supreme Court denied review. Fritz tiled a writ of habeas corpus with a federal magistrate judge, who also held that Fritz's motion on the morning of trial was untimely because it would have resuited in delay. The United States Court of Appeals for the Ninth Circuit reversed. The court held that "Fritz asserted his Faretta right on the morning of an afternoon trial, before any trial proceedings had begun. It was therefore timely as a matter of law, unless it was made for the purpose of delay." *Frit-.* 682 F.2d at 784. In holding that Fritz did not intend to secure delay, the court reasoned thin "any motion to proceed pro se that is made on the morning of trial is likely to cause delay: a defendant may nonetheless have bona ride reasons for not asserting his right until that time, and he may not be deprived of that right absent an affirmative showing of purpose to secure delay." *id.* The court further held th nt a showing that a continuance would be required can be evidence of a defendant's intent to secure delay.

Eleven years later, the Ninth Circuit again addressed the issue of timeliness and delay. In *Crawford.* the defendant requested self representation following his counsel's unsuccessful argument on a pre trial motion made on the morning his trial was to begin. The trial court denied the motion as untimely in light of it being made on the morning of trial. The California Appellate Court affirmed, and made no finding as to whether the motion was made to secure delay. The defendant tiled a habeas petition with the federal district court. The district court held an evidentiary hearing on the issue of delay and found that the record contained no evidence of intentional delay. The district court granted the defendant's habeas petition and the state appealed. The United States Court of Appeals for the Ninth Circuit held that because the defendant made his request following his dissatisfaction with counsel's pre trial motions argued on the morning of trial, he could not have been expected to make the request al an earlier lime. Furthermore, the court found significant that the defendant's *Faretta* motion did not seek an additional continuance. Finally, the court held that "the mere fact that the *Faretra* motion was made on the morning of trial does not require that it be denied as untimely." *Crawford,* No. 92–55702 (9th Cir. Aug. 20, 1993)

Like *Fritz* and *Crawford,* Kaczynski made his request to proceed pro se on the morning his trial was to begin. The request was made prior to the jury hearing any evidence and before any meaningful trial proceedings had begun. See *Fritz,* 682 F.2d at 784 (quoting United States v. Chapman, 553 F.2d 886, 895 (5th Cir. 1977)) ("a defendant must have a last clear chance to assert his constitutional right before meaningful trial proceedings have commenced.") Defendant asserted his *Faretta* right on the morning of his afternoon trial and before the commencement of any trial proceedings. It was therefore timely as a matter of law.); *but see* Carroll v. Gomez. No. 91–55811 (9th Cir Nov. 19, 1992) (defendant's request to proceed pro se following the *cornpietian* of the prosecutions case, held as untimely).

Further. Kaczynski communicated to the court that he was ready to proceed immediately, without a continuance. As the Ninth Circuit noted in both *Fritz* and *Crawford,* the request tor a continuance is sign iti cant in determining whether a *Faretta* motion is merely a tactic to secure delay. Kaczynski's statements to the court (through Ms. Clarke) clearly established that this was not his intention.

is a section 2255 action. However, the ruling by the District Court in this case means that a guilty plea forced by an egregious *Farcita* violation—a *Faretta* violation that is the but-for cause and proximate cause of the resulting guilty plea—would have no remedy whatsoever. Had Kaczynski's case gone to trial (instead of being resolved by a coerced guilty plea), the judge's denial of Kaczynski's rights under *Farcita v. California* would have constituted reversible error. That the judge's rulings caused a guilty plea—rather than an unconstitutional trial—renders the resulting guilty plea equally unconstitutional.

The Supreme Court has recognized a hierarchy of constitutional errors—certain constitutional rights (and therefore violations of those rights) are more fundamental than others. According to the Court's taxonomy of constitutional errors, the most fundamental—such as denial of the right to counsel[144]—are "structural errors" and must "be corrected regardless of their effect" on the trial, because they violate "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."[145] As to such "structural errors," prejudice is not presumed but rather is irrelevant.

Denial of the basic *Gideon* v. *Wainwright* right to counsel is such a "structural error," the denial of which can never be harmless. So is the *Farelta* right to self-representation a "structural" constitutional right that is "so basic to a fair trial that [it's] infraction can never" be treated as harmless error.[146] Had Kaczynski's guilty plea been the result of a denial of the right to counsel, it could not stand,[147] because the right to counsel is "structural." Likewise, because Kaczynski's guilty plea was the product of the denial of his right to se If-representation—also "structural"—it cannot stand. Similarly, the

---

Finally. Kaczynski could not have reasonably been expected to make his request to proceed "pro se" at an ear)ter lime. Prior to trial it was Kaczynski's understanding that he and his attorneys had reached an agreement not to set forth a "mental defense" during the go il I-in nocent phase of his trial. In exchange, Kaczynski had agreed to the possibility of expert psychiatric testimony during the sentencing phase, if in fact he was convicted. When Kaczynski learned that his attorneys would indirectly set forth evidence during trial (absent expert testimony) indicating "mental incapacity," he made a request to the court to proceed pro se. His request was made on the morning of trial because up until that time he believed his attorneys would honor their agreement. The request was made in good faith and as a final effort to avoid being portrayed as a madman.

[144] *See* Rose v. Clark, 478 U.S. 570. 577 (1986) (cataloging such rights).

[145] United States v. Olano, 507 U.S. 725, 735 (1993).

[146] *See* Peters v. Gunn, 33 F. 3d 1190, 1193 (9lh Cir. 1994) ("Improper denials of the right of self-representation are not subject to harmless error analysis"): see. e.g., McKaskle v. Wiggins, 465 U.S. 168, 177–78 n.8 (1984). "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. *The right is either respected or denied; its deprivation cannot he harmless." Id.* (emphasis added); Johnson v. United States, 117 S. Ct, 1544, 1550 (1997); Sullivan v. Louisiana, 508 U.S. 275, 279 (1993); Arizona v. Fulminante, 499 U.S. 279.310 (1991); McKaskle v. Wiggins, 465 U.S. al 177–78 n.8 (1984); Meyers v. Johnson, 76 F.3d 1330, 1336–39 (5th cir. 1996) (per se prejudice rule applies to denials of self-representation on appeal as well as at trial).

[147] Hill v. Lockhart, 474 U.S. 52 (1985).

unreasonable denial of Kaczynski's right to counsel of his choice—Attorney J. Tony Serra—was a denial of Kaczynski's fundamental rights.[148]

4. The District Court erred in summarily rejecting Kaczynski's specifically-pled claim that his court-appointed lawyers rendered ineffective assistance of counsel when they forced a mental defect defense upon an admittedly-mentally-competent-tó-stand-trial client whom had expressly and vehemently rejected such a defense. This case presents the most basic questions about the essential nature of the attorney-client relationship in death penalty cases: What ought a capital defense lawyer do, who is in this line of work because of personal opposition to the death penalty, when their admittedly-competent-to-stand-trial client makes a decision that is likely to result in a death sentence?

As detailed in the section 2255 motion, Theodore Kaczynski's attorneys knew from the outset that Kaczynski would never accept any defense that portrayed him as suffering from major mental illness. They therefore knew that a serious conflict with him was to be expected, but they used various tactics to delay until January 5, 1998, the moment at which the conflict reached a crisis. Kaczynski's attorneys systematically deceived him about their intentions with respect to mental-status evidence. Kaczynski did not know until November 25, 1997, that his attorneys intended to portray him as suffering form serious mental illness. Kaczynski's attorneys caused a three-week delay, from November 25 to December 18, 1997, in Kaczynski's bringing his conflict with them to the attention of Judge Burrell, Kaczynski's attorneys used pressure, deception, intimidation, and violent language to prevent Kaczynski from securing the services of J. Tony Serra, an attorney who would not have used a mental-status defense in Kaczynski's case. In forcing a mental-status defense on him over his objections, Kaczynski's attorneys rendered ineffective assistance of counsel.

Contrary to the District Court's analysis in its order denying the section 2255 motion, this is not simply a traditional *Strickland v. Washington*[149]*/Hill v. Lockhart* claim of ineffective assistance. Rather, this is a conflict of interest case—a conflict between Kaczynski's interest in having his case defended his way, and his defense lawyers' paternalistic determination, based on their own personal opposition to capital punishment, to "save" Kaczynski from a death sentence by any means necessary to save the mentally competent Kaczynski from himself. Contrary to the District Court's reasoning denying Kaczynski's ineffective assistance claim, the Ninth Circuit has decided that a defendant asserting this sort of claim need *not* make a specific showing of prejudice.[150] Although a defendant is not entitled to a particular lawyer with whom he can have a "mean-

[148] *See* Bland v. California, 20 F.3d 1469, 1478 (9lh Cir. 1994) (deprivation of counsel of choice is structural error that de lies analysis for prejudice; harmless error doctrine accordingly is inapplicable); *see generally* Peter W. Tague, *An Indigent's Right to the Attorney of His Choice.* 27 Sian. L. Rev. 73 (1974) (discussing why an indigent defendant should be allowed to choose his or her attorney).

[149] *See* Strickland v. Washington, 466 U.S. 668 (1984).

[150] *See, e.g.,* United States v. Moore, 159 F.3d 1154. 1158 (9th Cir. 1998) ("A defendant need not show prejudice when the breakdown of a relationship between attorney and client from irreconcilable

ingful attorney-client relationship,"[151] "[i]f the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant's] Sixth Amendment right to [the] effective assistance of counsel"—*without* a showing of prejudice.[152] For example, a single attorney's joint representation of two criminal defendants with conflicting interests is reversible error only upon a showing of prejudice, but "[such error] should be presumed prejudicial if the defendant cannot make a specific showing of prejudice."[153] This is so, not so much because of the fundamentality of the right that was violated, but instead because prejudice is simultaneously so likely to occur and so difficult to prove.[154]

Further, Kaczynski claims that his lawyers failed under the standards of *Strickland v. Washington* and *Hill* v. *Lockhart.* For example, Kaczynski alleged in his section 2255 motion that his lawyers repeatedly lied to him about their planned defense. And in one of many factual allegations made by Kaczynski in the section 2255 motion—and not mentioned by the District Court—Kaczynski claimed:

> During the discussion of June, 1997 and earlier, when Kaczynski argued that he preferred the death penalty to life in prison, [Lead Counsel Quin] Denvir told him that if he found life in prison unacceptable he could always commit suicide... On the first of these occasions Denvir said, "I have no problem with my clients committing suicide..." Denvir told Kaczynski this on at least three occasions, and on at least one of these occasions Clarke was present and expressed no disagreement with what Denvir was saying.

By forcing a mental defect defense upon an admittedly competent-to-stand-trial defendant, Kaczynski's lawyers failed the "performance prong" of *Strickland and Hill.* In addition, counsels' actions "prejudiced" Kaczynski as that term is defined in *Hill v. Lockhart.* As the Court explained in *Hill,* the prejudice prong poses a different inquiry in guilty pleas than it does under *Strickland:*

> The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the *plea process.* In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a *reasonable probability that, but for counsels ' errors, he would not have pleaded guilty and would have insisted on going to trial.*[155]

---

differences results in the complete denial of counsel"); *accord* Familia-Consoro v. United States, 160 F 3d 761. 763 (1st Cir. 1998).

[151] Morris v. Slappy, 461 U.S. 1, 3–4 (1983).

[152] *Moore.* 159 F.3d at 1158.

[153] United Stales v. Olano. 507 U.S. 725, 735 (1993); *see, e.g.,* Cuyler v. Sullivan. 446 U.S. 335. 349 (1980) ("[a] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief'): Holloway v. Arkansas, 435 U.S. 475,489–9) (1975).

[154] *See Olano.* 507 U.S. al 743 (Stevens, J,, dissenting).

[155] *Hill.* 474 U.S. at 59 (emphasis added).

Kaczynski's section 2255 motion and the record in this case demonstrate that but for counsels's hostile takeover of the defense, Kaczynski would indeed have "insisted on going to trial."[156] The lawyers' actions also prejudiced Kaczynski by depriving him of the most basic constitutional birthright of American citizens charged with capital crimes in American court: a day in court, *assisted*—not controlled—by counsel. Further, counsels' actions, by coercing Kaczynski into pleading guilty, compelled him to waive several meritorious legal issues—issues that would have rendered any death sentence extremely vulnerable to reversal on appeal. In addition, Kaczynski was represented by public defenders. Had he possessed the money to hire his own lawyer, perhaps such retained counsel might have been less willing to override their paying client's insistence about what defense to raise—and, if not, Kaczynski could simply fire them and hire a lawyer willing to respect his wishes. But because he was represented by public defenders, he couldn't control them because he couldn't fire them: All he could do was to ask the judge for help. When the judge sided with the public defenders, Kaczynski tried to exercise his right to self-representation, and the court refused that too. Kaczynski couldn't do what a client able to hire his own lawyers could have done—replace his disloyal attorneys months before the trial.

Finally, Kaczynski's court-appointed lawyers, Quin Denvir and Judy Clarke, rendered ineffective assistance of counsel by advising him not to attempt to withdraw his guilty plea prior to sentencing. A motion to withdraw a guilty plea in the federal system may be made *only* before sentencing, when withdrawal is permitted for "any fair and just reason."[157] Federal Rule of Criminal Procedure 32(e) provides:

> Plea Withdrawal. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.[158]

However, as Kaczynski set out in his section 2255 motion:

> One or a few days before his sentencing hearing on May 4, 1998, Kaczynski told Denvir and Clarke that he wanted to try to withdraw his guilty plea at the hearing. Denvir and Clarke answered that they were not sure that that was a good idea, and that they would think about it and speak to him on the subject before court opened on May 4. Shortly before the opening of court on May 4, Kaczynski asked Clarke what she had to say about this wish to request to withdraw his plea. She answered that it would not be a good idea for him to ask to withdraw the plea, because the judge would

[156] *Id.*

[157] *See* Fed. R. Crim. P. 32(e).

[158] FED. R. CRIM. P. 32(e); *accord* United States v. Am mindown. 497 F.2d 615 (D.C. Cir 1973)

not grant the request; moreover, the judge might use the request to bolster his argument that Kaczynski was trying to manipulate the judicial process for the purpose of delay, and he might issue a finding to that effect, which would be to Kaczynski's disadvantage. Kaczynski answered that he knew that the judge was very unlikely to allow him to withdraw his plea, but that by asking to withdraw it he hoped to make a "good record" that might help him to withdraw it later. However, Clarke told Kaczynski that in her opinion he would have a better chance of successfully vacating his plea later if he refrained from asking to withdraw it at the sentencing hearing. In deference to Clarke's advice, Kaczynski did not ask the court to let him withdraw his plea... Clarke knew, or should have known, that by failing to challenge his guilty plea at the sentencing hearing, Kaczynski was not increasing but decreasing the likelihood that he would be able to vacate the plea at a later time. In this respect, Clarke rendered ineffective assistance of counsel. Consequently, the courts should treat [the § 2255 motion] as if Kaczynski had in fact challenged his guilty plea at the sentencing hearing.

5. Judge Burrell erred in declining Kaczynski's request that the judge recuse himself from hearing the section 2255 motion.[159] Judge Burrell was personally and intimately involved in the chain of coercion that culminated in Kaczynski's coerced guilty

[159] In his supplemental motion to recuse Judge Burrell. Kaczynski attached the following declaration:

Declaration of Michael Mello

1. My name is Michael Mello. I am a professor of law at Vermont Law School, where I have taught the required course in legal ethics. I am a member of the Bar of Florida. I have been involved in capital postconviction litigation, in state and federal court, on a full-time or part-time basis, since 1983. To the best of my recollection. I have never before filed a document in court advocating the recusal of a judge. I wrote this declaration at the request of Theodore Kaczynski.

2. I recently published a book about the Theodore Kaczynski case. In the course of researching the book, I acquired "knowledge of all the facts," *Yagmanv. tiepublic Ins. Co.*. 98? F.2d 622,626 (9th Cir. 1993). in the proceedings that culminated in Theodore Kaczynski's guilty plea including the un red acted transcripts of the *in camera, ex parte* meetings between Kaczynski, Judge Burrell, and Kaczynski's defense lawyers.

3. lit addition to the court records, I have read news accounts of the in-court proceedings, and I have spoken widi journalists and observers who were present during the open-court proceedings. These observers commented on the judge's apparent "anger" (their word) at Kaczynski

4. My reading of the court records, as well as the reactions of observers present in court, have led me to conclude that Judge Burrell's impartiality is tn reasonable question by Kaczynski. I believe that "a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned." *Yagman, supra* at 626.

5. It is, of course, hornbook Jaw that 'a judge's prior adverse ruling is not sufficient cause for recusal." United States v. Studley, 783 F.2d 934,939 (9th Cir. 1986).

a. Kaczynski's request for recusal is not based on "prior adverse rulings." Rather; it is based on Judge Burrell's personal involvement in the totality of circumstances that culminated in Kaczynski's coerced guilty plea. Judge Burrell did not simply "rule" adversely. He was an active participant in the *in camera, ex parte* meetings. Following those meetings, the judge's anger at Kaczynski was so palpable that journalists covering the proceedings in open court commented on it.

plea judicial impartiality in the constitutional sense may be lacking because the judge is involved in a very personal way in the matter at issue—as reflected in the con-

---

b. Certain of the judge's ruI ings in this case were so clearly contrary to the record that they support an inference of bias against Kaczynski For example, the judge denied Kaczynski's constitutional right to self-representation ostensibly because Kaczynski had made his request "too late" and lor purposes of "delay." However, the record—particularly the portions of the record the judge ordered sealed, ostensibly to protect Kaczynski—prove that Kaczynski was seeking no delay and that his request was timely.

c. Similarly, the judge ordered a delay in the proceedings to access Kaczynski's mental competency to stand trial and to represent himself. No party had seriously questioned Kaczynski's competency to stand trial. The judge threatened Kaczynski with a 30 days in a menial institution unless he cooperated with the competency evaluation ordered by the judge. Kaczynski did cooperate. Yet, after he was found competent, the court still denied his right to self-representation.

d. Further, when the judge was informed, on January 22, by Kaczynski's counsel, that a negotiated solution to the case was possible, the court initially refused to allow a brief delay to pursue this possibility of pretermitting the Unabomber trial. Grudgingly, the court gave the parties one hour to confer. Within that hour, a negotiated plea was worked out.

6. Judge Burrell's summary rejection of Kaczynski's motion for recusal also evinces a lack of impartiality.

a. Judge Burrell's assertion that Kaczynski's recusal motion should be denied because it docs not allege "extrajudicial" proof of impartiality is typical of the judge's practice of relying on arid procedural technicalities to defeat the ends of justice the procedural rules are designed to promote. Under

the judge's logic, a judge who said, during a guilty plea colloquy, that "I'm letting you plead guilty because you're a damned kike." would not be subject to recusal because the anti-Semitic slur was not "extrajudicial."

b. Judge Burrell also denied Kaczynski's recusal motion because it did not articulate specific facts demonstrating bins. But Kaczynski's I 2255 motion described the impossible circumstances under which it was written. An unbiased judge, who actually was interested in knowing why Kaczynski believes him to be biased, would have asked—he would not have summarily denied the recusal motion.

7. Judges are human. Humans don't like to admit they made mistakes. It is human to resist admitting error—particularly the sorts of egregious error alleged in Kaczynski's § 2255 motion, A reasonable person, in possession of al! the facts, would think it unlikely that Judge Burrell will admit that he botched the most high-profile case of his career to date.

8. Canon 2 of the ABA's Model Code of Judicial Conduct (1990) commands that a judge shall avoid.. the appearance of impropriety in all of the judge's activities." The commentary to this Canon stresses that "a judge must avoid.. appearance of impropriety...The test for appearance of impropriety is whether conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with...impartiality..."

a. How did Judge Burrell "appear"? To at least some observers, he appeared to be "angry" at Kaczynski Canon 3(B)(5) provides that "a judge shall not, in the performance of judicial duties, by words *or conduct* manifest bias or prejudice ..." The comment explains that "facia! expressions and body language, in addition to oral communications, can give to parties and lawyers in the proceedings, jurors, the media and an *ap* others *pearance* of judicial bias." (emphasis added).

b. Further, at least one journalist, who was present in the courtroom, wrote that Judge Burrell appeared to be influenced by fear of public criticism. *See* Finnegan, *Defending the Unabomber,* NEW YORKER, March 1998. Canon 3(B)(2) of the Model Rules provides that "a judge shall not be swayed by... fear of criticism."

c. The point was not that Judge Burrell wits in fact "angry" or influenced by fear of public criticism. The point is that he so *appeared* by presumably reasonable observers.

tempt cases, for example.[160] Further, on several occasions, the judge appeared "angry" at Kaczynski, according to journalists (and Kaczynski) who were present when the judge's anger flared at Kaczynski. As Kaczynski argued in his section 2255 motion, his court-appointed lawyers placed their own professional reputations—and perhaps their sincere personal opposition to capital punishment—ahead of the clearly-expressed wishes of their mentally-competent-to-stand-trial client. Judge Burrell knew well of the rift between Kaczynski and his lawyers, but he did little to quell the growing division—indeed, he made it worse. Judge Burrell aided Kaczynski's lawyers in their ultimately successful effort to corner Kaczynski to either mount a defense he abhorred or to plead guilty. Exhausted, isolated and alone, Kaczynski pled guilty.

If Kaczynski gets his day in court, he'll probably be found guilty of murder and sentenced to death or life imprisonment. But there is one possible scenario under which Kaczynski could be set free.

This is how it could happen. First, Kaczynski wins his motion to invalidate his guilty plea. That means the Kaczynski case returns to the pretrial motions stage. Kaczynski files a renewed motion to exclude from evidence his private diaries. There is a very strong constitutional argument that our government ought not be al lowed to send a person to death row based on his private diary. Assume that Kaczynski's diary motion is granted.

Winning a new trial, and then winning exclusion of his diaries from that trial, could set the stage for Kaczynski's ultimate acquittal. This is so because the prosecutors themselves have described the diaries as the "backbone" of their case against Kaczynski. If the prosecution is deprived of its "backbone," there is at least the possibility that the jury won't find Kaczynski guilty beyond a reasonable doubt. This scenario would then need to be repeated as to the *siale* charges against Kaczynski; that's as it should be.

This scenario is unlikely, to be sure. It's most likely that the outcome of any Kaczynski trial would be a conviction of murder and a sentence of death or life imprisonment.

---

9. Like the Model Code, the purpose of the recusal rules is to maintain the perception and the appearance, as well as the reality, of impartiality and fairness by judges. The bottom tine is that, given Judge Burrell's extensive personal role in the events that culminated in his coerced guilty plea—a guilty plea that was coerced by Judge Burrell as well as by the court-appointed lawyers for Kaczynski—"a reasonable person with knowledge of a) I the facts would conclude that the judge's impartiality *might* reasonably be questioned." *Yagman, supra.* In my own mind, after studying the record in this case, I believe that Judge Burrell's impartiality might reasonably be questioned.

10. A reasonable person, in possession of all the facts, might well conclude that Theodore Kaczynski's § 2255 motion would not receive a fair and impartial hearing in Judge Burrell's court. Judge Burrell's expected final determination — that he did nothing wrong in his personal involvement in the events that led to Kaczynski's illegal plea-cannot have credibility, to Kaczynski or to many others, including this writer.

Michael Mello

May 11, 1999

[160] *See. e.g,* Mayberry v. Pennsylvania. 400 U.S. 455 (1971).

Still, jury trials are unpredictable things. Nearly anything is possible. Remember OJ. Simpson.

VI. Conclusion: The Temptations of Capital Punishment, America's Self-Inflicted Wound

> *"He's mad," said Dr. Carr.*
>
> *"He's clever," said the red-haired nurse*
>
> Dorothy L. Sayers, *Unnatural Death* (1927)[161]

I tend to see the law through the frame of reference of capital punishment. As a lawyer, I oppose the death penalty because it warps and deforms both the law and the people who practice the law. Capital punishment as a legal system turns good people—judges, lawyers, juries, governors, legislators—into killers. It tempts prosecutors to want to win too much. It tempts judges to cut constitutional corners. It tempts legislators to practice the politics of death.

The Unabomber case suggests that capital defense lawyers are not immune to the temptations of capital punishment. The Unabomber's lawyers are good and decent people who were determined to save their client's life in spite of himself. But, I believe, in saving their client's body they destroyed his life: The Unabomber will forevermore be labeled (inaccurately, in my opinion) a paranoid schizophrenic. I believe the Unabomber's lawyers were wrong—ethically and morally—in doing so.

Capital defense lawyers work in an ethical hall of mirrors. They (until recently I would have said "we") must attempt to reconcile, harmonize and live with a host of conflicting ethical values. Because the stakes are life and death those ethical conundrums are placed in especially bold relief. For the capital defense lawyer, issues of ethics are neither theoretical nor abstract. How he or she addresses these issues will drive virtually every aspect of how the client's case will be investigated and litigated.

I have worn the same professional masks as those donned by Kaczynski's attorneys, and I have spent a significant portion of my life as a lawyer representing people who the government wanted to execute. Like Kaczynski's lawyers, my experience has taught me that capital punishment as a legal system has not lived up to its promises of fair and equitable treatment for those on trial for their lives. Like Kaczynski's lawyers, I know how complicated the attorney-client relationship can be in the best of times and that, when the stakes are life itself, the times are rarely the best.

But on the most fundamental aspect of the attorney-client relationship, I part company with the Unabomber's lawyers. Kaczynski's attorneys apparently viewed their essential role as saving their client's life by any legal means necessary—to save him

[161] Dorothy L. Sayers. Unnatural Death (1927).

in spite of himself. Although they conceded again and again that Kaczynski was mentally competent to stand trial, his lawyers saw it as their decision-—not their client's decision—to stake their client's life on a defense based on mental defect—a defense that he found reprehensible on many counts, not the least, one would think, being that it was in direct conflict with the Unabomber's manifesto.

I believe his lawyers' primary duty was to empower their client, not to manage him. The choice of whether to stake Kaczynski's life on a mental defect defense—or on a political defense based on the Unabomber's ideas about technology—-belonged to Kaczynski and not his lawyers. I agree with Kaczynski's lawyers that, as a strategic matter, a mental defect defense was more likely than a political defense to spare Kaczynski from a death sentence (although, given the crimes and Kaczynski's coldly rational explanations for committing them, I doubt that any defense could have kept him from a death sentence). I also agree that a political defense probably would have backfired, as it reportedly did with Timothy McVeigh, angering the jury and thus making a death sentence more likely.

But this is not the point. Given the overwhelming evidence that Kaczynski was mentally competent to stand trial, the decision to forgo a mental defect defense was his to make, tactically wise or not. The columnist Ellen Goodman, writing about the case in early January 1998, asked rhetorically if the "Mad Hatter" should be 'Tunning the show." My answer is emphatic: Hell yes, when the Hatter is on trial for his life and especially when the evidence of his madness is flimsy.

The paternalism of Kaczynski's lawyers was beneficent and sincere—they did what they genuinely felt was best for him. Still, I am left with nagging doubts about the validity of the role that personal politics and ideology played in the choices the Unabomber's lawyers made. Ironically, their ideology seems more problematic than Kaczynski's "delusional" theories.

It seems pretty clear that Kaczynski's lawyers strongly oppose capital punishment. Like myself, that opposition has led them to make career decisions that many in the legal profession might view as a bit crazy.

In John Brown's day, he was called a "monomaniac" on the subject of slavery. Kaczynski could be labeled a monomaniac on the subject of technology. I have been called a monomaniac on the subject of capital punishment. Like Kaczynski's lawyers, I passed on jobs at prestigious law firms in order to help people who most of my neighbors and friends (most Americans, I'd guess) feel have little right to a lawyer at all, much less a good one—and all in aid of a political ideology that proposes to abolish capital punishment.

It would be deliciously interesting to see the outcome were Kaczynski's defense team—or any other zealous opponents of capital punishment—to subject themselves to the battery of tests to which Kaczynski was subjected by his lawyers. I wonder whether the whole lot of us "abolitionists" might then have been labeled, as Kaczynski was, "high-functioning paranoid schizophrenics," which would of course place us at the least-ill end of schizophrenia, where obvious symptoms are often absent. Many of us

are just as monomaniacal as the Unabomber and John Brown when mounted on our hobby horses.

As Wendell Phillips said about John Brown: "Hard to say who's mad."

Reasonable minds can, and probably always will, disagree about whether the Unabomber's lawyers were right in what they did. This conversation about the appropriate balance of power between capital clients and their lawyers will continue for a long time, and that is appropriate. At least this much good may come out of Theodore Kaczynski's reign of terror.

VII. Postscript: The Ninth Circuit Speaks

On October 22, 1999, after this essay had been completed and submitted for publication, the Ninth Circuit Court of Appeals granted Theodore Kaczynski permission to appeal Judge Burrell's summary dismissal of his section 2255 motion. In the language of the applicable statute, the court granted Kaczynski's request for Certificate of Appealability.

Such permission to appeal requires the prisoner to make a "substantial showing of the denial of a federal constitutional right."[162] The Ninth Circuit held that Kaczynski had made such a showing as to three issues. The court framed the three issues as follows. First, "whether appellant's guilty plea was voluntary."[163] Second, "whether appellant was properly denied the right to self-representation."[164] Third, "whether a criminal defendant in a capital case has a constitutional right to prevent his appointed counsel from presenting evidence in support of an impaired mental-state defense at trial."[165] The Court's order also set out a briefing schedule.[166]

The Ninth Circuit's order is just the first step in the appeals process. However, it is a significant event: A federal appellate court has found that the Unabomber has made a "substantial showing" of the denial of a federal constitutional right. The issues as framed—particularly the se lf-representation claim—would allow the appellate court to order vacation of the guilty pleas without first remanding for an evidentiary hearing. And the "who decides" issue could well result in a landmark ruling, a ruling which would be a prime candidate for Supreme Court review.[167]

The Unabomber's legal odyssey, it would seem, is far from over.

---

[162] 28 USC § 2253(c)(2).

[163] Order, United States v Kaczynski, No 99–1653 (9th Cir. Oct. 22, 1999), at p.1.

[164] *Id*

[165] *Id.*

[166] *Id.* at 2.

[167] The Supreme Court has granted cert in a case to decide whether the *Farren a* right of selfrepresentation extends to appeal. In that case, an embezzler wanted to represent himself on direct appeal to the California Slate Court of Appeals. The state courts said no.

The embezzler filed a pro se cert petition (typed on a bad mumial typewriter) in the Supreme Court. The Court granted the petition.

Appendix A.

Theodore Kaczynski is being denied his day in court: Lawyers he does not want are forcing him to «take his life on a defense he would rather die than raise.

In the guise of providing him with the constitutional right to the assistance of counsel—"assistance" is the word used in the Sixth Amendment, the contemporary constitutional source of criminal defendants' right to counsel—the federal government has stripped him of the only power he had left as an American citizen: the power to have his case against the indictment, to put on his defense in a judicial proceeding where his life was on the line—his life, his liberty—not his lawyer's life, not his judge's life.

The trial judge ruled last week that Kaczynski cannot fire his lawyers and that those lawyers have the legitimate power to raise a defense based on Kaczynski's alleged mental illness—notwithstanding Kaczynski's refusal to allow such a defense to be raised. Kaczynski wants to raise a "necessity defense"—a claim that his crimes were justified as part of his political war against technology.

Federal law would likely preclude such a defense to the murder charges, but federal law does, in my view, allow Kaczynski to raise his anti-technology views as a defense against imposition of the death penalty in his case. Kaczynski and his lawyers appear to recognize that he will almost certainly be found guilty of murder at the first phase of his bifurcated capital trial.

The battleground in *United States vs. Kaczynski* is over penalty. And at the penalty phase of the trial, Kaczynski's necessity defense evidence is admissible under the Supreme Court's 1978 *Lockett* decision.

The judge's rulings turn the right to the assistance of counsel on its head —they transformed a constitutional protection designed to shield the defendant's constitutional rights into a sword with which to disembowel that defendant's ability to have his day in court. The whole purpose to the right to the assistance of counsel at criminal trials—a right recognized since the infamous Scottsboro case in 1932—is to empower the citizen-accused the state has decided deserves to die. Again, the constitutional language is "assistance." Ted Kaczynski's lawyers, however well intentioned and paternalistic, are not "assisting" him. They are controlling him. They are strong-arming a man on trial for his life—a man the judge has already found mentally competent to stand trial.

That finding of competency means that 3'ed Kaczynski is competent to make the important decisions in his case—-such as whether he will testify, whether he would accept a guilty plea, and whether to stake his life on a mental illness defense, a defense with little chance of success in this case.

Now that the trial has been postponed for almost two weeks—until Jan. 22, when the judge will decide on Kaczynski's competency to stand trial—there is a bit of time for all sides to take a step back, take a deep breath and reassess their respective positions. The prosecution should take this breather to reconsider their unfortunate

decision to reject a negotiated plea to life imprisonment without possibility of parole for Ted Kaczynski: The public would thus be safe from Mr. Kaczynski, and the judicial system would be spared the spectacle of a trial guaranteed to be a sideshow.

The judge should use the time to sort out Kaczynski's counsel situation, once and for all, in a manner fair to Kaczynski and least likely to be reversed on appeal.

But the hardest and deepest soul searching must be done by Kaczynski's court-appointed lawyers because—specifically their decision months before trial to agree with the prosecution that Kaczynski was mentally competent to stand trial—are at least partially responsible for the events last week.

They must have known from the outset that mental illness was their best defense, and they also must have known that their client opposed their raising that defense. Their apparent hope was that by forcing Kaczynski to choose—on the eve of his trial—-between going with their defense or representing himself, their client would relent and allow them to control the defense. It was a gamble, and they lost.

The hard part of playing chicken is knowing when to flinch. Ted Kaczynski didn't flinch. Given the choice into which his lawyers have forced him, he chose to represent himself.

My strong hope is that, during this break in the proceedings, Kaczynski's lawyers will decide they cannot ethically allow Kaczynski to represent himself at his capital trial. The lawyers themselves then have a choice: They should either represent Kaczynski the way he wants to be represented, or they should step aside and allow Tony Serra (who is willing to represent Kaczynski, without fee) serve as Kaczynski's lawyer. Should Kaczynski's lawyers decide to step aside, they should do so now—to allow Serra as much preparation as possible between now and Jan. 22.

The real issue here, as elsewhere in the Unabomber case, is power: Who decides whether to raise a mental illness defense? Is it the man whose life hangs in the balance-—the man the court has already found mentally competent to stand trial? Or is it his court-appointed lawyers?

The choice is his. His lawyers' job—their ethical duty as lawyers and their moral duty as human,beings—is to "assist" him in making his defense. Their job is to represent him—not to manage him or control him.

I appreciate that the judge's rulings have put Kaczynski's lawyers, Judy Clarke and Quin Denvir, in an ethically awkward position. I also appreciate that Ms. Clarke and Mr. Denvir are acting in what they honestly believe to be their client's best interests legally. But that is not the point, and that is not their job. They have one client and only one client, and that client has been found competent to stand trial.

If Kaczynski's lawyers feel so strongly he is too crazy to stand trial, they should have asked the judge months ago to explore that issue in a serious way (not with a pro forma quickie psychiatric exam). Having not done so, if their client is found competent to stand trial, they should either (I) put on the defense their client wants to put on, or (2) move to withdraw.

Regardless, a continuance of the trial has become necessary. If Ms. Clarke and Mr. Denvir are to continue to represent him, they will need time to prepare the defense he wants raised. If new counsel is to represent him, then they will need time to come up to speed on this extraordinarily complex case.

Abandoning Kaczynski to represent himself pro se is not an option for the defense lawyers. Ted does not want to represent himself—for very good reasons. He wants a lawyer willing to abide by his wishes. He's entitled to that under the Sixth Amendment to the Constitution.

The Supreme Court has said repeatedly that the legality of death penalty trials must be judged by the "evolving standards of decency that mark the progress of a maturing society." Consider how our standards of decency have "evolved" from 1859 to today.

John Brown, the slavery abolitionist whose 1859 raid on the federal arsenal at Harper's Ferry, Virginia, was, in the minds of several historians, critical in galvanizing public opinion in ways necessary to make war possible and likely, if not inevitable: John Brown's hanging by the Commonwealth of Virginia made him a celebrated martyr in the North, thus convinced the South that compromise on the slavery issue was impossible and therefore secession (and war) inevitable—exactly as Brown himself had hoped and planned.

Perhaps the most striking aspect about John Brown—besides the subsequent vindication of his "crazy" abolitionist views—was his carriage during his trial and the way his lawyers respected him.

At trial, Brown had refused to allow his lawyer to raise an insanity defense (Brown's family had a history of insanity); Brown knew exactly what he was doing when he raided Harper's Ferry: attempting to incite a slave rebellion, a plan far fetched but not crazy (at least not to Virginia and the South, in the years following the Nat Turner, Denmark Vesey, and Gabriel Prosser rebellions and other slave uprisings); if Brown was crazy, then so were a number of northern abolitionists.

And, like Socrates, after Brown's trial and death sentence, he categorically scotched the plans of his followers to organize Brown's escape from Virginia. No, Brown insisted: His execution would do far more for his cause than anything he could ever do alive. On this score Brown was right, at least in the eyes of historians. Some things are worth dying for. Our standards of decency have come a long way in 139 years.

In a column in last week's Boston Globe, Ellen Goodman asked rhetorically whether the "Mad Hatter" should be "running the show?" My answer is: Hell yes, when the Hatter is on trial for his life, it's his show to run.

Michael Mello, *Unabomb Defense Should Assist and Not Resist,* National L.J., Jan. 26, 1998, at A.2I. A version of this piece also appeared on the *Sacramento Bee* web page in January 1998.

Professor of Law, Vermont Law School. This is, with edits, additions, and updates, the text the author prepared for the 1999 Thurlow M. Gordon Lecture, presented on May 20, 1999, at Dartmouth College. Hanover, New Hampshire, in June 1999—after this lecture was presented and before it was published—the author resigned as Theodore Kaczynski's informal, pro *bono* advisor. The published form of this essay reflects his current views of the Unabomber. views that were influenced by events that occurred after this lecture was presented at Dartmouth.

The author is grateful to Judy Hilts and Laura Gillen, who word-processed this essay. Portions of this essay come from his recent book published late last year. *See* MICHAEL MELLO, THE UNITED STATES Versus Theodore John Kaczynski: Ethics, Power and the invention of the unabomber (1999), Like the book, this essay owes an enormous debt of gratitude to five Vermont Law School students who provided indispensable assistance: Rich Hentz, Ellen Swain, Jason Ferriera, Ingrid Busson, and Paul Perkins. The phrase "non-trial of the century" used in the title was coined by Shay Totten.

The author would like to thank *Law Review* Editor-in-Chief Rose Costello, Articles Editor Ross Jones, Ken Dobson, Jim Tucker, and the staff of the *Law Review* for preparing this essay for publication. As always, it has been delightfill to work with the *Law Review.*

Because this essay was delivered as a lecture, it is without many citation footnotes. However, the book from which portions of the essay was drawn is heavily footnoted, and any reader wishing to learn the precise sources upon which the author relied on will find them there. The exception is section VI of this essay, which is footnoted because it covers ground not covered in his book. In addition, the author refers the reader to Joel Newman's thoughtful essay. *Doctors, Lawyers and the Unabomber,* 60 MONT. L. REV. 67 (1999). The *Law Review* graciously started to add citation footnotes to this essay, but it seemed to me that those good folks already have too much work

This essay is dedicated to Laura Gillen and Judy Hilts.

Michael Mello
The Non-Trial of the Century
Representations of the Unabomber
Fall 1997

Vermont Law Review (Vol. 22:000, 1997).
<www.lawreview.vermontlaw.edu/wp-content/uploads/2025/12/24VtLRev417.pdf>