United States v. Kaczynski: Representing the Unabomber

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The Unabomber's Pen Pal

The first letter from the Unabomber arrived out of the blue. One morning in July, 1998, the letter just showed up in my Vermont Law School mailbox. It was in a white, legal-sized envelope, addressed to me, with Kaczynski's name, prisoner number, 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 as a Florida capital public defender. Still, the envelope, and the letter it contained, seemed authentic. I recognized his cramped, painfully precise handwriting, and the envelope contained all the appropriate prison stamps, such as the prison mail room's date stamp.

Theodore Kaczynski wrote to me because, several months previously, I had written a couple of newspaper op-ed pieces questioning whether his lawyers and judge were about to deny him his day in court. How Kaczynski learned about these op-ed pieces, and how he got my address, I have no idea. But there it was, in blue ink, very legibly printed: Kaczynski's request for copies of the two op-ed pieces.

I replied that I was willing to correspond with him, but that he needed to understand two things up front. The first was that I was writing a book about his case; this meant I couldn't be his lawyer. The second was that nine winters previously, a man I loved like a father— federal appellate judge Robert S. Vance—was murdered by a mail bomb. 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. He became my friend and my father in the law. A few days before Christmas 1989, a racist coward with a grudge against the federal judiciary mailed a shoebox sized bomb to judge Vance. The bomb detonated in the kitchen of his home on the outskirts of Birmingham, Alabama. Judge Vance had been a genuine hero of the race wars in Alabama during the 60s and 70s. I mourn him every day. I miss him every day. 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.

I mentioned Judge Vance's murder in my letter to the Unabomber because I wanted 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 designed, 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 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. Ted Kaczynski needed to know that.

After writing Kaczynski about my book and my judge, I fully expected never to hear from him again. But I did hear back again, and promptly. Kaczynski and I remained in touch, by letter and by phone, for more than a year after he first contacted me. The stack of materials he sent me is two feet tall and runs more than 2,000 pages. Although

we've never met, we have exchanged about 150 pieces of mail and spoken by phone several times.

At first, the correspondence was almost exclusively about my book, but it soon turned to Kaczynski's legal hopes. In the early fall of 1998, 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. As fall wore on, and I was unable to find the right lawyer for the Unabomber, it began to look as though I might come up empty. So Kaczynski asked me to work on a Plan B—to draft a motion attacking the guilty plea that he would file on his own, pro se. I agreed to write a draft, and three Vermont Law School students—Jason Ferriera, Ingrid Busson, and Rich Hentz—stepped forward to help. These three students volunteered their time—a lot of their time—to this project. These students worked their tails off on this project, yet they earned no money, no class credit, and no recognition from the law school. Although not lawyers yet themselves, these three exemplified the best in the calling that 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 recruited. In December 1998, both efforts reached a culmination of sorts. We found Kaczynski a lawyer, 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 Ted was in good legal hands.

But it wasn't meant to be. As Kaczynski describes in his motion to vacate his guilty pleas, on April 3, three weeks before the filing deadline, the lawyer I had recruited backed out of the case. It was too late for new counsel to come in, and given the delays in the U.S. mails, it was too late for Kaczynski to run a draft past me or another lawyer. So he wrote the motion himself. He dusted off the draft my students so conscientiously prepared; he wrote the 123-page motion by hand, and he filed it. Our draft, which was designed to be a safety net of sorts, in case Kaczynski found no lawyer, served its purpose.

When District Judge Garland Burrell denied Kaczynski's motion to set aside his guilty plea, I called the prison to give him the bad news. Kaczynski's prison counselor agreed with me that it would be better for Kaczynski to hear of the denial from me rather than hearing it on the 6:00 news. As always, he took the result in stride, and we spent most of the conversation discussing where to go from there. At Kaczynski's request, I drafted an application for permission to appeal to the Ninth Circuit. That concluded my involvement in the litigation.

The Ninth Circuit granted Kaczynski permission to appeal. On the merits, the court split 2–1 in favor of affirming the guilty plea and sentence.

Most of what the public knows about the Unabomber case is wrong. But not for lack of media coverage. 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 apiece, according to reporter Tom Nadau.

The mainstream media, despite its thorough and generally excellent daily coverage of Kaczynski's interaction with the criminal justice system, largely bought into Kaczynski's lawyers' spin on his travails. In particular, the daily press—which did not have access at the time to the court records upon which I rely—seemed to accept unquestionably these principles: (1) Kaczynski was a paranoid schizophrenic; (2) his lawyers acted properly in raising a mental illness defense regardless of their client's vehement objections; and (3) Kaczynski himself, not his lawyers, was responsible for the disruption of his trial. The chaos into which Kaczynski's trial plunged was blamed on Kaczynski'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 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. My point is not to criticize the daily press; the reporters did the best job possible with the limited facts available to them. However, transcripts of the closed door meetings between Kaczynski, his lawyers, and the judge, present a different, more accurate picture of the Unabomber and his lawyers. That picture suggests that Theodore Kaczynski was unquestionably competent to stand trial and therefore was competent to make important decisions about his case. 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. As long as he followed their instructions, the Unabomber's attorneys never doubted that he was mentally competent to stand trial. The fact that Kaczynski was mentally competent to stand trial meant that he 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 Unabomber trial. 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 serious suicide attempt. Then, failing suicide, Kaczynski was left with only one way to prevent being publicly cast as mentally ill. He pled guilty.

Based principally on court documents and published accounts by first-hand observers of the events described, this is what I believe happened in the Theodore Kaczynski case.

The Crazy Hermit and His Lawyers

Soon after Kaczynski's arrest, the court determined that he lacked the money to hire a defense lawyer and therefore appointed Montana federal public defender Michael Donohue to represent him. Kaczynski described forming a quick and close relationship with Donohue. Five days after Kaczynski's arrest, the well known attorney J. Tony Serra wrote Kaczynski a letter in which he offered to represent him. Serra wrote: "My personal belief systems prompt me to volunteer my services to you... I have done many cases with similar symbolic content. I would serve you loyally and well." Serra told Kaczynski that he viewed the case "as one where [Kaczynski's] ideology would be the crux of the defense (not insanity; not a 'whodunit')." After reviewing the letter, Kaczynski decided to continue to work with Donohue. However, Kaczynski remained in touch with Serra.

When it became clear that Kaczynski would be tried in California, federal public defender Quin Denvir was appointed lead counsel. Denvir asked the judge to appoint Judy Clarke, a passionate opponent of capital punishment, as co-counsel, which he did. A third lawyer, Gary Sowards, later joined the defense team. Sowards, a prominent specialist in mental illness defenses, seemed to be in charge of that aspect of the Kaczynski defense. Sowards had a leading role in selecting the defense mental health experts, and, like any good criminal defense lawyer, Sowards knew how to select experts who would give him the diagnosis he wanted.

Within the small community of experienced capital defense lawyers, Denvir, Clarke and Sowards are widely regarded by their peers as among the most competent. Longtime opponents of capital punishment, Denvir, Clarke and Sowards have for a professional lifetime put their principles first. Denvir and Clarke could have made far more money in private law practice. Both are federal public defenders—*capital* public defenders—by choice, and they are two of the best in the business.

According to the *Washington Post,* long in advance of trial—perhaps as early as May 1996—prosecutors and defense lawyers had agreed that Kaczynski was mentally competent to stand trial. The defense lawyers were right: Kaczynski clearly was competent to stand trial. Four decades ago the Supreme Court articulated the legal test for competency: To be tried, a criminal defendant must possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a

"rational as well as factual understanding of the proceedings against him." Theodore Kaczynski obviously met this test.

Beginning before his arrest, and continuing until after he pled guilty in January 1998, Kaczynski's family portrayed him as seriously mentally ill. After Kaczynski's arrest on April 3, 1996, the Kaczynski family's lawyer cited Kaczynski's alleged mental illness as a reason the government ought not seek the death penalty in the case. "In his correspondence," the family's lawyer wrote to the prosecutor, "Ted projects his own feelings of anger, depression and powerlessness onto society at large—a society of which he has never really been a member. He blames these ill effects on a wide variety of external factors, including childhood classmates, teachers and his family as well as the media, chemical and electronic mind control, education, science and technology."

On November 12, the first day of jury selection in the Kaczynski case, the *Wall Street Journal* published an article headlined *Alleged Unabomber's Attorneys Press For "Mental Defect" Defense.* The article cited Kaczynski's lead defense attorney as saying that his client's refusal to be examined by prosecution psychiatrists might be due to paranoia.

On November 30, the Newark, New Jersey *Star-Ledger* published a story headlined *Contrary Kaczynski Hampers Defense.* The newspaper reported that "Kaczynski, based on claims put forward by his attorneys, suffers from a classic case of paranoid schizophrenia, an irreversible disease characterized by a preoccupation with one or more delusions, or with frequent hallucinations related to a single theme." The definition of the disease listed in the leading professional textbook of psychiatrist disorders states: "The combination of prosecutory and grandiose delusions with anger may predispose the individual to violence."

As a result of this extensive publicity, everyone seemed to know about the defense Kaczynski's lawyers were preparing for him—everyone, that is, except their client. He would first learn it during jury selection.

The process of selecting a jury was prolonged, beginning on November 12 and running through December 22. Because of the extensive pretrial publicity the case had received, and the need to "death qualify" the jury (i.e., to weed out prospective jurors whose personal feelings about capital punishment might prevent them from fairly considering the sentencing evidence), 600 jurors were summoned; of these, 450 jurors filled out extensive questionnaires. One hundred-eighty-two jurors were brought into court for individual questioning by the prosecution, defense and judge. Only at that point did Kaczynski learn that his lawyers intended that mental illness would be a significant feature of his trial.

It appears that prior to November 21, 1997, Kaczynski was not present in court during a single hearing on any of the motions surrounding the defense counsel's filing of the notice of intent to rely on expert psychiatric evidence. On November 21, 1997, the court directed lawyers for the defense and prosecution, as well as Kaczynski himself, to meet and confer concerning the extent to which the defendant would allow himself to be examined. At that hearing, defense counsel advised the court that they "were willing

to speak with Mr. Kaczynski and encourage him to engage in any testing which the government experts find necessary." The court questioned Kaczynski at the conclusion of the proceedings.

On November 25, the judge addressed the government's motion to preclude expert mental defect evidence during jury selection; at that point, according to news reports, Kaczynski became noticeably agitated. He became agitated because he had just discovered that his lawyers had released a psychiatric report to the prosecution and public. He slammed his pen down on the defense table, where it skittered.

Kaczynski's surprise and anger during jury selection seemed genuine to perceptive observers. And if, as Kaczynski asserts, he was kept in the dark about trial strategy, this is consistent with one model of capital defense lawyering, where the idea is to "manage"—i.e., control—the client who resists following the attorneys' best judgment. Recalcitrant clients who insist on fruitless strategies may bend to arguments, threats, promises or other forms of pressure. Almost always, such techniques succeed in persuading clients whose lives are at risk to try and minimize the risk.

By keeping their client in the dark about the defense they planned to present, Kaczynski's lawyers precluded his ability to exercise certain options available to any criminal defendant. Kaczynski could have replaced his court-appointed lawyers with a lawyer willing to present the defense he wanted. Such an attorney, J. Tony Serra, was in fact ready and willing to do exactly that. Or, Kaczynski could have exercised his constitutional right to act as his own lawyer at trial, if he had adequate time to do so.

As it turned out, Kaczynski later tried to exercise both of these options—but Judge Burrell ruled that he did so too late. The judge ignored the fact that the *reason* Kaczynski made his lawful requests "too late" was because his own court-appointed attorneys manipulated him into that position, forcing his hand at a critical moment in the proceedings.

On December 5, 1997, the Montana cabin Kaczynski had built and lived in for more than two decades arrived, on a flatbed truck, in Sacramento for his trial. The truck, towing the cabin shrouded in a tarp, had departed Montana three days earlier. The driver, fearful of leaving his rolling cargo unguarded, slept in the truck for two nights and even ate his meals there; the driver made the 1,110-miles journey driving only at night. The truck arrived trailed by a media caravan. According to the Associated Press, Kaczynski's lawyers paid to have the cabin transported to Sacramento to provide the trial jury with a window into his mind. The lawyers "say it is the most tangible proof that Kaczynski is mentally ill." Until needed as a defense exhibit at the trial, Kaczynski's Montana home would be kept at Mather Field, an old Air Force base near Sacramento.

The media drumbeat continued that Kaczynski's attorneys knew their client was mentally ill. The *Washington Post* reported that "the lawyers for Theodore Kaczynski have a problem, and the problem is their client. His attorneys believe Kaczynski is mad. So do at least two psychiatrists they hired." The message that Kaczynski was crazy influenced the way the outside world perceived and understood the coming battles

between Kaczynski and his attorneys. Who would favor a madman's attempt to control his defense? Who would not support the poor lunatic's lawyers' attempts to call the shots and save his life? Kaczynski's attorneys took on a heroic role in the media. Soon, when the centrifugal forces of Kaczynski's resistance to his lawyers' pressure would tear the defense apart, who would side with the madman and against his lawyers? By now, the *New York Times* was speculating about the existence of "a serious conflict between Mr. Kaczynski and his lawyers over trial strategy." The day before, the judge had held an unusual closed door meeting with Kaczynski and his counsel, without any prosecutors present. The judge said afterward that the meeting "involved matters of attorney-client confidentiality."

Behind Closed Doors: A Fragile Truce

In early December, Theodore Kaczynski wrote a series of letters to the judge, prompting him to hold a series of extraordinary closed door meetings with Kaczynski and his lawyers, from which the prosecutors were excluded. Although the meetings focused on the deteriorating relationship between Kaczynski and his attorneys, they also dealt with Kaczynski's mental competency to stand trial. The competency issue and the representation issue were closely linked, at least in the minds of Kaczynski's lawyers. During the meetings, it became evident that the defense lawyers equated Kaczynski's "mental incompetence" with his resistance to their determination to portray him as mentally ill.

On December 18, there occurred an "unexpected" (as described by the court reporter who recorded it) closed door session between the judge and Kaczynski's lawyers. The judge, defense counsel and Kaczynski were present; the prosecutors were not. At that hearing, lead defense attorney Quin Denvir spoke of "a major problem" that had come up between Kaczynski and his lawyers. Denvir told the judge: "You just need an opportunity to explore with Mr. Kaczynski and counsel where things are and try to figure out where to go from here. We are all unhappy and sad to be in this position, but we are in the position." Denvir also addressed the issue of his client's mental competency to stand trial. Denvir said: "We are not requesting a hearing or inquiry into the issue of competency," and, second, that "as to the question of competency, we were fairly confident that Mr. Kaczynski understood the nature of the proceedings and the role of counsel and the Court and that we had been able to, up to that time, to accommodate his mental illness in preparing and presenting the defense."

Defense counsel also addressed, apparently for the first time, their views on the appropriate allocation of decision-making power and responsibility between attorneys and their clients. A footnote to their brief noted that prevailing American Bar Association standards on the control and direction of a case provide that "certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel." The ABA standards provide that the decisions are to

be made by the accused (after full consultation with counsel) include what pleas to enter, whether to accept a plea agreement, whether to waive jury trial, whether to testify in his or her own behalf, and whether to appeal. However, the text of defense counsel's brief argued that "the decisions whether to ... present a defense based on ... defendant's mental condition [as it] bears on guilt fall squarely within the category of strategic decisions that ultimately must be decided by trial counsel." Thus, defense counsel argued that they, not a client concededly competent to stand trial and to make the important decisions in his case, had the authority to stake Kaczynski's life on a mental illness defense.

Kaczynski himself disagreed, and he said so in a series of letters to the judge. In the first, Kaczynski set out three possible options that could satisfactorily resolve the conflict he was having with his lawyers: (1) proceed with current counsel under certain conditions; (2) obtain substitute counsel; or (3) represent himself, "preferably with an attorney appointed to provide [him] with advice." After receiving these letters, the judge ordered the secret, in-chambers meeting with Kaczynski and his lawyers; the prosecutors were excluded from these meetings. The meetings ended up taking two days.

The court observed that the closed-door meetings were necessary "to make an inquiry adequate for the court to reach an informed decision about Kaczynski's concerns with appointed counsel's representation. These concerns involved attorney-client communications." The court also sought to make clear that defense counsel were not questioning Kaczynski's competency. In addition, the court determined that there was "no need to give Kaczynski the warnings required [in order for him to discharge his defense counsel and represent himself at trial]."

On December 22, the court held another closed door hearing. There, Kaczynski accused his lawyers, particularly Gary Sowards, of deceiving him about their intent to use a mental illness defense. The defense lawyers did not exactly admit to their client's allegations, but they did not exactly deny them, either. The lawyers were evasive; Kaczynski was not. At the December 22 hearing, Kaczynski and his attorneys, with the court's assistance, reached an agreement over the mental illness defense. Kaczynski's lawyers would abandon their efforts to present expert evidence in support of a "mental disease or defect" at the guilt/innocence phase, but they reserved the right to present such evidence at the penalty phase. Kaczynski's lawyers may have been displeased about this compromise, but it did create the possibility of delaying the conflict for a while.

The question of Kaczynski's mental competency to stand trial also arose at the December 22 hearing, at least hypothetically. The judge ruled that there was no evidence that Kaczynski was incompetent; rather, the court stated, *"I personally have no doubt about your competency,"* and, *"I feel that Mr. Kaczynski is competent."*

The following exchange occurred (with my italics added):

THE COURT: I feel that Mr. Kaczynski factually and legally understands everything that has occurred during the proceedings against him; that he understands he has to make choices. One of the choices that he apparently has made is the abandonment of the [mental illness] defense. That abandonment may very well end up with a guilty verdict in this case.

You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: But based upon the intelligent approach he has used in dealing with the issue, the eloquent manner in which he has voiced his opinions, it just *seems clear to me that he would rather risk death than to assert that as a defense.* Not to say that that's a necessary result—

THE DEFENDANT: (Nods head up and down.)

THE COURT:—because you would have to go to the sentencing phase. But it just seems that the only way he would have a chance of avoiding a guilty verdict ... would be to assert the [mental illness] defense. But he's willing to give that up.

THE DEFENDANT: Yes. Yes, sir.

THE COURT: *But I don't see his abandonment of that defense as something that evidences incompetence. </quote>*

As to Kaczynski's ability to "understand the nature and consequences" of the trial proceedings—the core of mental competency to stand trial—Kaczynski's lead defense counsel said, *"I don't think there's any doubt about that."* Denvir explained what he *meant* when they suggested, always hypothetically, that Kaczynski might possibly be incompetent: "our feeling ... is that any discussion of competency was merely raised in the context of if Mr. Kaczynski were to proceed with what he wanted to do in representing himself. I think that's what raised the question ... *So any questions of competency were raised only on the hypothetical that he was going to seek to have us discharged and represent himself."*

As the prosecutor put it later, "the defense argument goes something like this: that in part the defendant is not competent, or they question his competence, because he refuses to go along with the defense that they have chosen. They have kind of equated his refusal with [in] competence. ' '

This circular reasoning cannot be right, and it isn't. Professor Richard Bonnie is correct that "disagreement with counsel is not, in itself, evidence of incompetence. Counsel's advice may ... fail to take adequate account of the defendant's values and preferences ... unless the defendant is decisionally incompetent, his preferences bind the attorney." In fact, "the purpose

of the competence requirement is to establish the minimum conditions for autonomous participation. From this standpoint, the necessary conditions are ordinarily satisfied if the client is aware that she has the prerogative to decline the attorney's advice, and is able to understand the nature and consequences of the decision."

The transcript of the December 22 hearing demonstrates that the negotiated truce between Kaczynski and his lawyers was tentative and provisional. The judge said: *"Why don't we try it this way first, to see if it works. And if you have difficulty with it, I think you know how to reach me."*

Thus, two days of closed door meetings addressing Kaczynski's competency and his relationship with his attorneys had produced a fragile truce. At the guilt/innocence phase of trial, defense lawyers would not present expert evidence that Kaczynski was mentally ill, and on that understanding he would continue with those lawyers. Also, because Kaczynski had agreed not to fire his attorneys, they would not challenge Kaczynski's competency to stand trial.

The truce didn't last, and probably couldn't, given the fundamentally antithetical positions taken by Kaczynski and his lawyers. Four days after the lawyers' abandonment of plans to raise a mental illness defense at the first phase of Kaczynski's bifurcated trial, his lawyers notified the prosecution that if Kaczynski were convicted, they "plan to try to spare him a death sentence by arguing in the penalty phase that he is mentally ill." Further, defense counsel told the prosecution informally that they intended to introduce lay testimony at the guilt phase of trial to demonstrate Kaczynski's alleged mental illness. For example, the defense might show the jury photographs of Kaczynski "before and after" he became a hermit in the wilds of Montana. Kaczynski did not learn of these developments until the evening of Sunday, January 4, the night before the trial was scheduled to begin.

Thus, notwithstanding the withdrawal by Kaczynski's lawyers of their notice of intent to introduce *expert* evidence about Kaczynski's mental illness at the first phase of Kaczynski's trial, the lawyers still planned to present *non-expert* evidence of Kaczynski's mental condition. The stage was set for another confrontation between Kaczynski and his counsel over who controlled the case.

The Truce Collapses, and the Unabomber Tries to Fire His Lawyers

On what had been scheduled as the opening day of Theodore Kaczynski's capital murder trial, the drama began the instant Kaczynski entered the courtroom. There, in the front row, with his arm draped around their 80-year-old mother Wanda, was Ted's brother David. The *Washington Post* reported that "it is believed to be the first time the two brothers have been face-to-face since David alerted the FBI two years ago that his brother might be the elusive Unabomber." Kaczynski, refusing to acknowledge the presence in court of his brother and mother, sat with his back to them. Wanda and David held hands and wept, as Ted sat only a few feet away from them.

Also in the courtroom, on the front row behind the prosecution table, sat two survivors of the Unabomber's bombs: Charles Epstein and David Gelernter. David Gelernter, a Yale computer sciences professor, had been outspoken in his views that Kaczynski was an evil coward who deserved to die.

Just after the judge took the bench to begin the trial, Kaczynski addressed the judge. Kaczynski, dressed in a bulky knit sweater and blue pants (an observer would later write that he looked "more like an aging grad student ... than the wild-haired hermit who was arrested nearly two years ago,") clutched an envelope as he spoke. Kaczynski said: "Your honor, before these proceedings begin, I would like to revisit the issue of my relations with my attorneys. It's very important."

The judge ushered Kaczynski and his lawyers into his chambers for meetings that dragged on so long that the jurors were sent home. For the next four-and-a-half hours, Kaczynski and his counsel met with the judge in closed session. The *New York Times* observed that "it was clear from the defense lawyers' remarks, in a brief courtroom session after the closed door proceeding, that Mr. Kaczynski was continuing to rebel against his lawyers' efforts to portray him as insane." According to the redacted transcript of the January 5, 1998 meeting, it was here that the question of Attorney J. Tony Serra's taking over Kaczynski's defense was raised. Serra, who had inspired a 1989 movie, *The True Believer,* starring James Woods, is a long-time radical lawyer known for his unpopular clients, his ponytail, and his marijuana habit. Serra's clients have included Hell's Angels and Black Panthers. He also successfully represented two inmates on death row. According to news reports, Serra's office had a resume painting him as as a legal "warrior" who has served his profession well, intent on "defending society's outcasts" and who believes the 1960s were the "golden age of law."

The judge asked Kaczynski: "What is your goal, Mr. Kaczynski, your ultimate goal as far as Mr. Serra is concerned?" Kaczynski's reply was redacted, according to the transcript, "for attorney-client privilege and representation matters." The judge noted that one issue on the table "is a presentation issue focused on a change of counsel, possible change of counsel, at this stage of the proceeding... What I think I should do is maybe appoint another lawyer to assist Mr. Kaczynski with what he has char-

acterized as a conflict-type issue. I'm saying that in front of you. And then that way he would have a lawyer to communicate with the court on these types of issues. He could communicate either personally or through a lawyer ... I don't foresee that the communications that Mr. Kaczynski has just related should be communication that should cause a breakdown in the attorney-client relationship."

Denvir as lead defense counsel replied: "It may be, though, your honor, to Mr. Kaczynski it has caused that or could cause that if it's confirmed. I think that's what he may be conveying to you. I'm not sure ... your honor, one thing I think Mr. Kaczynski has said is that he would like to know whether Mr. Serra would in fact be available to represent him, and the court might consider having—calling Mr. Serra or having us call him to see if he could make himself available on short notice to resolve that question for Mr. Kaczynski."

The judge then asked Kaczynski: "Do you want me to communicate with Mr. Serra's office, Mr. Kaczynski, as your attorney has indicated?" Kaczynski responded: "I think that would be a very good idea." Lead defense attorney Denvir then asked Kaczynski: "Would you like that? Would that be helpful?". Kaczynski responded: "Yes, it would." The court then held a telephone conversation off the record. The judge then observed, "His office doesn't open until around 9:00. The message center that receives messages for the office didn't have a pager number or any other means of communicating with the people in the office."

While waiting for Tony Serra's office to open, Denvir opined that the problem between Kaczynski and his lawyers wasn't simply a failure to communicate. It was more basic than that. Denvir: "I think without going into a lot of detail about it, I think that what you have termed a communication problem may be a much deeper one that goes into the representation problem. I think that Mr. Kaczynski's feelings may be that there is a much more fundamental breakdown in the attorney-client relationship. I'm not sure of that and—." Kaczynski: "Yes."

A moment later, the court told Kaczynski: "You have fine lawyers. I've seen a lot of lawyers appear in front of me in criminal cases ..." Kaczynski: "Your honor, I do not question my attorneys' abilities." The court: "Okay." The court asked whether Kaczynski or his lawyers had "any problems if I call a [new] lawyer right now? ... I am thinking about appointing another lawyer." Attorney Denvir replied, "I think it would be very helpful. I think Ted would like that." Kaczynski interjected: "I think that would be good."

The judge raised the question of delay, saying to Kaczynski: "I'm assuming that when I communicate with Mr. Serra's office, it's possible that this matter could be resolved and we could proceed on with the trial..." But Kaczynski responded: *"I don't think it's likely that the matter can be resolved that easily. My lawyers have suggested that I should make it clear to you what I want. And what I'm looking for is a change of counsel."*

Not long afterward, the court said: "I just spoke to a secretary in Tony Serra's office... She could not verify whether or not he's even going to come in the office. She thinks it's

possible that he's on vacation right now and couldn't give me details about that." Later, the court received a message from Serra's office, that he was abroad, and no one was sure exactly when he would be back. The attorney sending the message further stated that Serra was interested in the case but had a conflict with the federal defender's office and unequivocally withdrew his offer to represent Mr. Kaczynski because of the conflict.

However, the judge came up with the name of another attorney to represent Kaczynski in his dealings with his current counsel and with the court: Kevin Clymo. Attorney Clymo arrived, met with the group, met with Kaczynski, and reported back: "In my conversations with Mr. Kaczynski, I do not get the impression that he has a desire to represent himself..." For his part, Kaczynski stated, " ... [T]he possibility of change of representation or representing myself is still very, very nebulous. There's still no definite intention there. It's just a possibility that may arise after present discussions continue. So I don't think change of counsel is yet the issue, though it may become an issue."

While Kaczynski was out of the room, the judge told defense attorneys Denvir and Clarke: "I wanted to chat with you about that [mental competency] issue, because it's my discernment that you had previously indicated that if Mr. Kaczynski took a position that frustrated the defense you were going to assert on his behalf, that maybe that would indicate the need for a competency hearing. And I'm assuming, based on everything I heard, that Mr. Kaczynski may not agree with the defense you are asserting—at least you contemplate asserting..." Attorney Denvir: " ... There's the possibility, in my mind at least, of the need for a competency hearing, but I'm not in a position, I don't think we are, to tell the court that it is necessary at this time. We may know better after we explore the communication questions and these other questions with Mr. Clymo and Mr. Kaczynski to advise you in that regard." When attorney Clymo reported that he was making progress, but needed more time, Clymo suggested that, "with regard to these proceedings in open court, I think it would be appropriate to continue to have Ms. Clarke and Mr. Quin [Denvir] represent Mr. Kaczynski's interest with the government in public on the record. Is that all right with you?" Kaczynski: "That's agreeable to me."

Kaczynski's sense of the matter was that Clymo was in effect acting as an advocate *for* his lawyers (Denvir and Clarke) and *against* Kaczynski. To Kaczynski, Clymo's role seemed to be to persuade Kaczynski to accept what his attorneys wanted rather than vice versa. Among other things, Kaczynski claims, Clymo tried to frighten him away from requesting representation by Tony Serra; Clymo went so far as to say he would have doubts about Kaczynski's mental stability if he asked to be represented by Serra.

The judge then denied a motion from the prosecution seeking to preclude Kaczynski from introducing non-expert testimony to show that he had a mental defect. The judge's order implied that Kaczynski's attorneys would be allowed, over their client's

vehement objection, to rely on non-expert testimony in evidence to establish that Kaczynski suffered from a mental defect.

The redacted transcripts of the closed-door meetings are confusing and disjointed. One plausible interpretation is that Kaczynski had agreed to continue with his current counsel in control of the defense. Another, equally plausible interpretation is that Kaczynski had put the court and his lawyers on notice that their control of his defense was unacceptable. My own best guess is more complicated. I think Kaczynski, his lawyers and his judge were all honestly seeking a compromise that would allow the trial to proceed. They all came away from the meetings with very different perspectives about what they thought had been agreed upon in those meetings. When subsequent events exposed the fault-lines of those rival interpretations, the Unabomber defense team fell apart.

The pressure on Kaczynski to acquiesce in what his lawyers and judge wanted him to do must have been intense. He was alone. He was isolated. He was a prisoner. He was vulnerable. He must have found it all but impossible to resist the pressure from his lawyers and the judge who had appointed them to represent him. The strain was beginning to show. During the closed-door meetings with the judge on January 7, Kaczynski indicated that he was simply too tired to argue his own case and had no choice but to continue with his lawyers. He said, "Your honor, if this had happened a year and a half ago, I would probably have elected to represent myself. Now, after a year and a half with this, I'm too tired and I really don't want to take on such a difficult task."

At the conclusion of this, the second day of closed-door meetings, Kaczynski stated in open court, for the first time, that he did not want his lawyers to pursue a mental health defense. But the judge told Kaczynski several times that his attorneys are "in control" of his case and that they would be allowed to introduce non-expert testimony about Kaczynski's alleged mental state.

Although Judge Burrell announced in open court that Kaczynski had agreed to proceed with his present lawyers, the court also explained that he had received a communication from J. Tony Serra, offering to represent Kaczynski for free. Serra wrote: "If he is successful in recusing his present attorneys, I'm willing to serve on his behalf," according to a note the judge read in court, and "I wish him well whatever way it goes." Then, still in open court, Kaczynski told the judge, "I think I would like to be represented by [Serra] ... since he had agreed he was not going to pursue a mental health defense." Kaczynski added that Serra would be able to meet with him next week, but conceded "he would need considerable time to prepare."

Treating Kaczynski's request as a motion to substitute his present counsel with Serra, the judge told Kaczynski, "the motion is denied." The judge reiterated his prior rulings that it was too late for Kaczynski to change lawyers, reminding Kaczynski that a jury had been selected, witnesses were ready to go, and the trial was about to begin. The *Washington Post* described Kaczynski's reaction: "The alleged Unabomber looked at the judge for an instant, and then began rapidly writing on his legal pads." During

the afternoon proceedings in open court, Kaczynski was "alternatively scribbling on his legal pads, shoving notes at his attorneys, or whispering animatedly at them. His brother, David, and mother, Wanda, attended the session. But Kaczynski did not look at them."

Also on January 7, the prosecution filed a brief arguing that the decision to pursue or forego a particular line of defense belonged to the defendant as long as he was mentally competent to stand trial. The prosecution argued that because the Sixth Amendment to the Constitution grants to the accused personally the right to raise his defense, "the government believes that the decision to forego a legally available defense rests with the defendant," rather than with the attorney for the defendant. The prosecution explained: "Any absence of a finding that the defendant is [mentally] incompetent, which defense counsel and the court have expressly and repeatedly rejected, the government sees no reason why the defendant cannot decide whether to pursue a mental defect defense during both the guilt and penalty phases of trial, as long as he is fully advised as to the wisdom of doing so and the potential consequences of ignoring his attorneys' advice. Once the defendant makes a knowing and intelligent decision concerning the defense he wishes to pursue, however, the government sees no reason why current counsel cannot continue to represent him. Aside from differences over the mental defect defense, there can be no doubt that counsel has been able to represent the defendant vigorously. Indeed, whatever the disagreement between the defendant and his counsel, it is unlikely that substitute counsel could put on a more effective defense or more vigorously represent the defendant."

The judge was unmoved. He informed Kaczynski that counsel controlled "major strategic decisions" in the case, including the decision whether to put on non-expert mental health testimony; Kaczynski said: "I've become aware that legally I have to accept those decisions whether I like them or not. So I guess I just have to accept them."

My view is that the prosecution's brief was correct and the judge's rulings were wrong, although not entirely implausible under the law. What was missing from the judge's reasoning was his failure to ask the question: In the months leading up to jury selection, did Kaczynski's lawyers keep him in the dark about the defense they were determined to raise? If not, then it was plausible for the court to refuse to allow Kaczynski to change the rules now, on the eve of trial. But, if the lawyers had misled their client as he asserted, then the fairest course would be to do one of two things: (1) require the lawyers to follow their mentally competent client's decisions about what defense to raise, or (2) dismiss the jury, put the trial on hold, and replace Kaczynski's attorneys with lawyers more compatible with Kaczynski's values and beliefs. Since delay appeared out of the question for this relentless judge, the most reasonable option was to ask Kaczynski and his lawyers the questions: what did Theodore Kaczynski know about his lawyers' plans, and when did he know it? If the judge ever asked these questions, it does not appear on the transcripts of the public court records.

By the end of the day of January 7, 1998, Theodore Kaczynski must have felt especially alone. On the eve of trial for his life, his only institutional allies in the courtroom—his lawyers—had kept him in the dark. Now, the judge had authorized his lawyers to raise the issue of mental illness anyway, regardless of their client's wishes. Firing his lawyers and representing himself was still an option, but for the legally unschooled Kaczynski it must have been a terrifying one. He never wanted to represent himself; he wanted his lawyers to provide the assistance of counsel guaranteed him by the Constitution. Also, the judge didn't seem to want him to represent himself; although the law gave Theodore Kaczynski the right to represent himself, the judge might just deny him that right—and, if so, there would be nothing he could do to prevent his attorneys from portraying him as mentally ill.

Meltdown

Sometime during the night of January 7, Theodore Kaczynski tried to kill himself in his jail cell. He tried to hang himself with his underpants. Kaczynski's attempted suicide 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 even 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, listening 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 attempted suicide also was a communication directed at his lawyers. Kaczynski claims that his counsel told him that suicide was acceptable if he found life imprisonment unacceptable. The response conveyed by his hanging was equally to the point: Your defense is unacceptable. Yet Kaczynski's lawyers never got the message in their client's communicative act. Their determination to represent Kaczynski as mentally ill remained undeterred.

I followed the meltdown of the Kaczynski defense from my home in Vermont, a continent away from the Unabomber trial in Sacramento. I don't like to second-guess the tactical decisions made by trial lawyers in capital cases (especially high profile capital cases), particularly when I respect the lawyers as much as I do Kaczynski's lawyers; those lawyers always know facts about their case that can't be known by outside observers or commentators at the time. Still, the Unabomber's lawyers seemed to me to be denying their client his day in court.

Thus, I did something I have never done before: I wrote about a high-profile capital case that was still in trial. In the Rutland, (Vermont) *Herald,* and later in the *National Law Journal,* I published op-ed pieces arguing that Theodore Kaczynski was being

denied his day in court by his own lawyers. I think I understood why Kaczynski's attorneys had seized control of his defense: they were trying to save his life—from himself, if necessary. But, it seemed to me, by saving his body by any means necessary, his well-intentioned lawyers were destroying his life and his life's work, his manifesto.

From my far-off observation perch in Vermont, I wondered who would crack first: Kaczynski or his lawyers. I didn't think Kaczynski would; he had already sacrificed so much for his political ideology, and I didn't see him giving it all up now to stake his life on a mental illness defense he abhorred. And, given that Kaczynski was obviously competent to stand trial, I couldn't see Kaczynski's lawyers abandoning him to represent himself rather than allow him to control the direction of his own defense. Yet, as the Unabomber non-trial entered its next level of weirdness, that's exactly what his lawyers seemed to do.

Over the past weeks, Kaczynski's choices had been narrowing progressively. Now, he had only one realistic option to avoid the mental illness defense: fire his lawyers and represent himself. Kaczynski clearly did not want to serve as his own attorney; he wanted—and understood that the Constitution guaranteed him—the *assistance* of counsel in presenting to his jury, as a defense against capital punishment, an ideological defense rather than a mental illness defense. But, if representing himself was the only way to avoid a mental illness defense, that was what he would do. Kaczynski hoped that the law gave him the right to fire his lawyers and represent himself. Kaczynski understood the law better than his judge understood it.

When court convened at 8:00 a.m. on January 8, neither the trial judge nor the lawyers were aware of the suicide attempt the night before. The judge had said that opening statements would begin that morning, and the prosecutors were preparing to lead off. During the morning's proceedings, no mention was made of Kaczynski's suicide attempt. Around half an hour after court opened on January 8, defense attorney Judy Clarke noticed a red mark on Kaczynski's neck. That was the first inkling Kaczynski's lawyers had of the suicide attempt, but they did not learn of the facts until after the hearing concluded. The proceedings began, however, not with opening statements, but with Clarke's announcement that Kaczynski now wanted to represent himself. It was, the lawyer said, Kaczynski's "very heartfelt reaction to the mental defense, a situation which he simply cannot endure." He "has lived with this fear all his life," she said, "that he would be described as mentally ill." He would prefer to conduct his own defense and he was ready to proceed immediately.

As for the defense lawyers, Clarke explained that they could not, consistent with their ethical responsibilities, continue as Kaczynski's attorneys if they were forced to forfeit a mental illness defense. The lawyers did not explain how their ethical duties allowed them to abandon a capital client on the day of trial—a client they had represented for a year and a half, a client who asserts they had kept him firmly in the dark about their intentions until it was too late for him to do anything other than represent himself. According to Kaczynski, what had happened was simple: in their game of chicken with their client, Kaczynski's lawyers had counted on him blinking.

He didn't. As Clarke told the judge that Kaczynski insisted on representing himself, Kaczynski's mother Wanda wept, and his brother David appeared shaken.

On the other hand, perhaps Kaczynski's lawyers were gambling that the judge would not allow them to withdraw at this late date—that the judge would, in other words, deny their client his constitutional right to self-representation. The judge had already ruled that counsel, not the client, controlled the defense. Good defense lawyers know their judges, and these were two very good defense lawyers. They might well have been counting on the possibility that the judge might ignore the law and refuse to allow Kaczynski to represent himself at the trial.

Such a ruling would have been attractive to the defense lawyers— indeed, it would have given their client an insurance policy of sorts. The lawyers would remain on the case and in control of the defense; if their mental illness defense worked, and Kaczynski's jury voted to spare his life, then he would be sentenced to life imprisonment. If their mental illness defense failed, and the jury sentenced Kaczynski to death, then the judge's erroneous ruling (that Kaczynski did not have a right to selfrepresentation) would require the appellate courts to throw out Kaczynski's conviction and order a whole new trial: a second bite at the apple. Either way, the lawyers stood to win by the judge ruling wrongly that Kaczynski could not represent himself at trial. Either way the client "wins," but at the price of day after day listening to his own lawyers portray him as a paranoid schizophrenic.

This entire scenario depends, of course, on the judge's willingness to disregard the law and deny Kaczynski his constitutional right to selfrepresentation. As it turned out, that's exactly what the judge would do in the end.

Kaczynski's lawyer stressed, again and again to the judge, that Kaczynski was ready to proceed with the trial *"without any delay."* The defense lawyer emphasized: "Mr. Kaczynski has advised us he is ready to proceed [as his own lawyer] *today.* His request to proceed on his own behalf *would not delay the [trial]."* And: It is *"not Mr. Kaczynski's request that anything be delayed ...* He is prepared in the sense that he feels he has no choice [but] to go forward today. *He is not asking for any delay."* And: "I know the timing is a question when a delay is involved. But that is not his position. His position is he will go forward on his own behalf [today] ... *He is prepared. He is not asking, as the [prosecution] is, for any delay."*

I belabor this point—that Kaczynski was not seeking any delay of his trial—-because, as subsequent events showed, the judge didn't get it. But the judge, on his own initiative, ruled that Kaczynski's mental competency to stand trial and to represent himself would have to be examined and decided. The trial would have to be delayed, again.

The judge's impatience was palpable. The court said Kaczynski had told him "categorically" that he did not want to represent himself—a bit of an overstatement, and one that understandably left Kaczynski "shaking his head in disagreement." Then the judge seemed to soften, acknowledging that he may have forced Kaczynski into it by ruling that he could not prevent his lawyers from presenting a mental illness defense.

The judge threatened to send Kaczynski to a mental institution for thirty days of observation unless Kaczynski cooperated with the psychiatric exam. Kaczynski agreed to cooperate. The message of the judge's anger and his actions could not have been lost on Kaczynski. One need not be paranoid to understand what was going on: The judge was angry at Kaczynski for exercising his constitutional right of self-representation. None of the lawyers in the case seriously believed that Kaczynski was even arguably incompetent to stand trial.

Why, then, did the judge order another delay in the trial for a psychiatric examination that had a foregone outcome? I don't know, because I can't read the judge's mind. However, I suspect that he was trying to buy himself some time to figure out what to do about Kaczynski's invocation of his right to self-representation. It should have been an easy call: Kaczynski had invoked his right, and he was ready to proceed with the trial "without any delay"—immediately. The judge should simply have granted Kaczynski's request and let the trial begin. Or, he could, and I believe *should,* have dismissed the jury and given Kaczynski—or J. Tony Serra—time to prepare to present the defense to which Kaczynski was entitled. That, however, was unacceptable to this judge, who seemed almost obsessed with his felt need to proceed. Indeed, he seemed oblivious to the risk that his rulings had made a guilty verdict extremely vulnerable to reversal by an appellate court, which would mean more delay—a retrial with a new jury.

The judge appeared determined to search until he found a plausible ground for preventing Kaczynski from serving as his own lawyer. Journalist William Finnegan suggested a possible explanation. As he saw it, the court seemed haunted by the experience of Judge Lance Ito in the O.J. Simpson trial, and was determined not to allow the Unabomber trial to become a prolonged circus. Honoring Kaczynski's right to self-representation—and his right to put on an ideological defense—would have risked bringing upon Judge Burrell the wrath that had befallen Judge Ito. In short, even if his rulings laced the trial record with error that would require reversal by an appellate court, at least the proceedings in Burrell's court *would* be dignified—with the defense lawyers firmly in control of their potentially disruptive client.

Thus, perhaps the judge needed time to think. He needed the timeout from the trial to come up with a credible reason for denying Kaczynski his constitutional right of self-representation—preferably some reason that could be blamed on Kaczynski himself, and not upon his attorneys.

At the time the judge ordered the psychiatric evaluation, he was unaware that Kaczynski might have attempted suicide. After court had been recessed, the Sacramento sheriffs department announced that U.S. Marshals had reported at midmorning that Kaczynski had a red welt on his neck; he also had arrived at the federal courthouse the preceding day wearing his jail uniform without his underwear. Every day before court began, Kaczynski changed from his jail uniform into civilian clothes. He was also strip-searched. According to the *Washington Post,* Kaczynski told the U.S. Marshals he had lost his underwear in the shower after they noticed it missing. Even-

tually, the underwear was found inside a smaller plastic bag inside Kaczynski's trash can. According to a sheriffs department spokesman, "The underwear appeared to be stretched." Until the suicide attempt, he said, Kaczynski had been a "model prisoner."

Outside the courtroom, reporters asked Kaczynski's lawyers why he now appeared willing to cooperate with psychiatric testing. Lead defense attorney Quin Denvir gave a blunt answer: "He has no choice."

On the afternoon of January 9, the judge gathered the parties together to see if they could agree on "a psychiatrist to conduct a study and examination of Mr. Kaczynski to determine his competency to stand trial." The court said that the examination would occur in the Sacramento jail only if Kaczynski cooperated: "If he's not going to cooperate, he will be on a plane, and I will fly him to a psychiatric institution immediately." Kaczynski would be examined by North Carolina prison psychiatrist Dr. Sally Johnson, who had tested the competency of John Hinckley, the man who had attempted to assassinate President Ronald Reagan. Dr. Johnson planned to spend five days meeting with Kaczynski, evaluating the records in his case, and writing a report, which was to be sealed. Given the low threshold for finding competency to stand trial, no knowledgeable observer expected Kaczynski to be found incompetent. Certainly his lawyers didn't—they had conceded months ago that their client was indeed competent to stand trial. Although the court reasoned that Kaczynski's suicide attempt would be "significant to a determination of the competency issue," he had ordered the exam before learning of the attempt. His initial reason was Kaczynski's invocation of his right of self-representation. Like Kaczynski's lawyers, the judge equated Kaczynski's resistance to the mental health defense as possible evidence of mental incompetency. So long as Kaczynski had followed his lawyers' instructions, neither his lawyers nor his judge questioned his competency to stand trial.

Accordingly, the court issued an order stating that "the gist of the conflict between Kaczynski and his counsel relates to whether a mental status defense should be asserted and communications attendant to that defense." The court found that "while this conflict [has] presented problems, it has not resulted in a total lack of communication." The court explained that substitution of J. Tony Serra would "be inappropriate in the circumstances" because Kaczynski's request for Mr. Serra was untimely and because Kaczynski's conflict with current counsel was not "so great that it will result in a total lack of communication, thereby preventing an adequate defense."

Both the trial judge and the media made clear whom they felt was to blame for the disruption of the trial. According to a *New York Times* reporter, Kaczynski had "reduced his trial to chaos."

Dr. Sally Johnson ran a marathon psychiatric examination of Kaczynski, questioning him for twenty-two hours, on eight separate occasions, over five days. Johnson also reviewed transcripts of Kaczynski's conversations with his lawyers and the judge, and studied the reports of the defense and prosecution experts, along with other material provided by both the prosecution and the defense. A sheriff for the Sacramento Sheriff s Office reportedly said that interactions between Kaczynski and Dr. Johnson

had been calm, that Kaczynski was cooperating with the testing, and that "things are going smoothly." Dr. Johnson submitted her 47 page written assessment to the judge at 9:00 pm on Saturday, January 17. The judge scheduled a telephone conference for the following Tuesday.

During this latest delay in the proceedings of the Kaczynski trial, his lawyers and prosecutors reopened conversations about a guilty plea. The *New York Times* reported that the "sticking point" in the negotiations was Kaczynski's insistence that he be allowed to appeal the court's rulings on certain pretrial motions. At least one such ruling, allowing the government to use at trial Kaczynski's private diaries, was a very strong appellate issue for Kaczynski.

The prosecution filed a brief asking for a hearing on issues concerning Kaczynski's representation. Given that Kaczynski was mentally competent to stand trial, the brief noted that the court would face difficult questions about who would decide whether to present a mental defect defense. The purpose of the prosecution's brief was to set forth the government's understanding of the court's options, and to recommend that the court instruct defense counsel to follow their client's wishes. The brief explained: "Based on the events of January 8, 1998, it appears that the defendant will assert his constitutional right to represent himself if the court rules that defense counsel may put on a mental defect defense of any kind during the guilt phase of trial. If the defendant, after proper warning from the court, knowingly and intelligently asserts his [right to represent himself at the trial] and is willing to proceed to trial immediately," the prosecution believed that the court must grant the defendant's request to represent himself.

The brief urged the court to direct defense counsel to follow their client's wishes concerning the mental defect defense. If they sought to withdraw, "the court would have the discretion to deny their request ... In addition, the court would have recourse through its civil contempt power to enforce its decision if defense counsel continued to refuse to represent the defendant under these circumstances. Should the court hold counsel in contempt, they would have the right to appeal, to challenge the court's conclusion that they must follow the defendant's instructions."

The Psychiatric Evaluation

Dr. Johnson stated in the cover letter to her report, "It is my opinion that, despite the psychiatric diagnoses [of paranoid schizophrenia] described in the attached report, Mr. Kaczynski is not suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature or consequences of the proceedings filed against him or to assist his attorneys in his own defense."

The press reported that Dr. Johnson had diagnosed Theodore Kaczynski as suffering from paranoid schizophrenia. The *New York Times,* citing "a lawyer who had consulted on the case and had read the report," informed its readers that Dr. Johnson's

report had "concluded" that Kaczynski "suffers from serious mental illness, including 'schizophrenia, paranoid type.' " The *Washington Post* lumped Dr. Johnson in with the defense psychiatrists who had collectively "concluded Kaczynski suffers from the grandiose fantasies and delusional rage of an unmedicated paranoid schizophrenic in deep denial." The Associated Press wrote that Dr. Johnson had "diagnosed [Kaczynski] as a paranoid schizophrenic."

This was not quite right. In fact, Dr. Johnson made a *provisional* diagnosis that Kaczynski suffered from paranoid schizophrenia and paranoid personality disorder. Like the mental health experts hired by the defense lawyers, the linchpin where Dr. Johnson hung her diagnosis of Kaczynski as schizophrenic was her conclusion that his politics were a delusional architecture, not a philosophy.

Dr. Johnson's report, despite the mass of detail, rested on two dubious propositions. The first was that Kaczynski's politics were a delusion rather than a philosophy, and that his decision in the early 1970s to return to nature indicated mental illness. The second was that Kaczynski blamed his parents for his discontent and unhappiness as an adult—an idea expressed every day in countless psychiatrists' offices across America. Like the mental health experts hired by Kaczynski's defense lawyers, Dr. Johnson's report reveals as much about her own values as it reveals about the mental health of Theodore Kaczynski.

Dr. Johnson was undoubtedly under tremendous pressure to find Theodore Kaczynski mentally ill in some way. The defense lawyers wanted this outcome for obvious reasons. The judge also must have wanted it, because a crazy Kaczynski would provide the judge with more ammunition for denying Kaczynski's right of self-representation. The prosecution also wouldn't have been displeased with a finding of some sort of mental illness, because then the judge might keep Kaczynski's lawyers in control of the defense. The media and public had already decided that Kaczynski was crazy.

In the Tuesday conference with the judge, Kaczynski's lawyers reiterated the obvious point that they had conceded since 1996: that their client was mentally competent to stand trial. Because prosecutors had always maintained that Kaczynski was competent, this latest concession by Kaczynski's lawyers resolved the issue without any ruling from the judge.

Given that Kaczynski's lawyers *never* doubted his competence to stand trial, Kaczynski had the right to decide the objectives of his own defense. As Professor Richard Bonnie notes, "unless the defendant is decisionally incompetent, his preferences bind the attorney ... disagreement with counsel is not, in itself, evidence of incompetence. Counsel's advice may ... fail to take adequate account of the defendant's values and preferences." The "client's prerogatives to define the basic objectives of representation and to select the main theory of defense lie at the core of the idea that the client acts as the principal and the attorney as the agent in legal representation. This means that the attorney must accede to the client's wishes in regard to these fundamental choices."

The Unabomber's Lawyers Play Chicken With the Court and With Their Client

Under the law, the judge's decision on Theodore Kaczynski's assertion of his right of self-representation should have been a no-brainer. Dr. Johnson, the defense lawyers, and the prosecution all agreed that Kaczynski was mentally competent to stand trial. That meant that Kaczynski was also mentally competent to make the important decisions about his defense—including whether to forgo the aid of a lawyer—so long as he was warned and understood the risks and disadvantages of selfrepresentation. It does not matter that the judge might think the defendant is making a self-destructive choice. The law is that it is the *defendant's* decision to make, not the judge's.

In order for the court to deny the defendant's clear constitutional right of self-representation, the judge would have to find a procedural technicality. The procedural flaw that the court invoked was delay: Kaczynski had waited too long to invoke his right of self-representation, and his invocation of that right was designed to delay the trial.

The judge's reasoning flatly contradicted the public record in the case. Kaczynski had invoked his right to self-representation more than a week earlier, at the latest—on January 8. At that time, as Kaczynski's lawyers had hammered home again and again, Kaczynski was seeking *no* delay: He was ready to go ahead with the trial *immediately.* The government's January 21 brief summarized the relevant history as follows:

> Thus, as the government understands the record, the defendant first raised the issue that later caused him to invoke his [right of self-representation] on December 22, before the jury was impaneled. He had no reason to assert his [self-representation] rights at that time because he believed the issue was resolved to his satisfaction. Presumably, the defendant learned that the issue was not resolved to his satisfaction on or after January 2, 1998, when the government filed a motion to preclude the defense from using non-expert testimony to show a mental defect defense. The defendant then immediately raised the issue again with the court when he next appeared in court on January 5, 1998. In camera proceedings followed. During these proceedings the defendant learned that the issue would not be resolved to his satisfaction. The redacted transcripts of these proceedings indicate that at one point on January 7, the defendant was informed by the court that he had the right to represent himself, but the defendant declined to do so. The next day, the defendant, through counsel, invoked his right to represent himself in open court. As the government understands the sequence of events in this case, we cannot say that the defendant's assertion of his right to represent himself was untimely or for purposes of delay.

The defense agreed with the prosecution—a fairly uncommon event in a hard-fought capital trial. The defense's brief agreed that Kaczynski was not trying to delay the trial: he said he was ready to proceed immediately when, on January 8, he first asked publicly to represent himself. In their January 21 brief, Kaczynski's defense attorneys argued that his request to represent himself "was timely because the request was made before the jury was empaneled and sworn... Moreover, *the request was clearly not made to delay the trial since Mr. Kaczynski announced he was ready to proceed with the trial as scheduled and did not seek any delay... Mr. Kaczynski first moved to represent himself on January 8, 1998, and he has not wavered in this request."* [emphasis added]

Denvir and Clarke threatened to withdraw from the case if the court ordered them to follow their client's instruction and thus "forgo what counsel believes is the only viable defense in favor of one that would lead to Mr. Kaczynski's conviction and execution." Indeed, according to some observers, including one *New York Times* reporter, the brief implied that defense counsel might engage in civil disobedience if ordered to allow their client to control his defense.

Kaczynski's lawyers also argued that the "prosecution takes the unprecedented step of asking the court to order defense counsel on a capital case to forgo counsel's own judgment of the best defense to present at trial, and requests instead that counsel be ordered to follow the wishes of a defendant, whom experts have diagnosed as suffering from paranoid schizophrenia, on the choice of a defense that will assist the prosecution in convicting and executing the defendant." The defense lawyers continued: "The decisions whether and how to present a mental status defense in the guilt phase (other than an insanity defense) and what witnesses to call in the penalty phase of a capital trial fall squarely within the category of strategic decisions that ultimately must be decided by trial counsel." Further, "the government's argument that defense counsel would not render ineffective assistance in this case by following the defendant's wish that no mental health evidence be presented at trial is a red herring. It means little that defense counsel might pass muster under the minimal standards of performance required under the Sixth Amendment if counsel should decide to accede to a defendant's request not to present certain evidence at trial... It is unconscionable for the government to ask the court—in a capital case—to order defense counsel to forgo the only defense that is likely to prevent the defendant's conviction and execution. In fact, the government's improper interferenee with defense counsel's choice of a defense and relationship with Mr. Kaczynski infringes his Sixth Amendment right to counsel."

Judgment Day

What turned out to be the final day of the Unabomber's non-trial began with the by-now predictable ruling by the judge that Kaczynski had made his request to act as his own attorney too late. The court held that allowing Kaczynski to represent himself would amount to providing him with a "suicide forum." In the judge's view, Kaczynski

must have known that his public defenders planned to portray him as mentally ill; therefore the court found that Kaczynski's request was too late.

The judge began his opinion by criticizing Kaczynski for sending him a letter. The letter, dated January 21, covered two areas: Kaczynski's desire to represent himself; and his views on his counsels' filing of the notice of intent to rely upon mental health experts at sentencing. Although the court had in the past received letters from Kaczynski regarding these matters, this time he found it "an inappropriate ex parte communication with a jurist" because "it contained advocacy which should have been made through counsel." The judge added that "Mr. Kaczynski does not represent himself, at least not yet." The opinion then acknowledged that: "A criminal defendant has a Sixth Amendment constitutional right to self-representation if it is timely asserted and the assertion is not a tactic to secure delay." In the court's view, Kaczynski's request to proceed pro se failed to satisfy this standard.

On the matter of timeliness, the court found that "Kaczynski's first unequivocal request for self-representation occurred on January 8, 1998, seventeen days after the jury had been empaneled. Although the subject of self-representation was discussed several times over the course of the ex parte, in camera proceedings [between December 18 and January 7] Kaczynski never made a statement that could even remotely be construed as an *unequivocal* request to represent himself." Of course not: Kaczynski never *wanted* to represent himself; he wanted—and was entitled, as a matter of federal constitutional law—to be represented with the assistance of counsel. His decision to represent himself was a last resort. Before January 8, Kaczynski hoped to be able to work out some sort of compromise with his lawyers. Only when that proved impossible—on January 7—did he ask to represent himself, and to proceed with the trial "without any delay."

In addition to ruling that Kaczynski's request for self-representation was untimely, the judge held that it was a "tactic to secure delay." Tn effect, the judge reasoned that Kaczynski's willingness to proceed "without any delay" did not really mean "without any delay." "Although Kaczynski did not accompany his request [to represent himself] with a motion [for delay to allow him time to prepare], granting Kaczynski's request at this stage will undoubtedly result in a substantial impediment to the orderly process of this capital case." In the court's view, Kaczynski would need time to prepare—something Kaczynski emphatically was not asking for—and granting him that time would require selection of a new jury. The judge then explained that Kaczynski must have known that his lawyers intended to raise a defense against capital punishment based on his mental illness. At the end of his ruling, the judge did acknowledge "the paramount principle at the heart of [the right of selfrepresentation], ... the freedom of the accused to personally manage and control his own defense in a criminal case." But in this case, "if Kaczynski abandons the mental health defense, he will forgo the only defense that is likely to prevent his conviction and execution." That would convert his courtroom into a "suicide forum." Quoting from the *dissenting* opinion—*i.e.,* the losing side—of the leading Supreme Court case on self-representation, *Faretta*

v. California, the judge reasoned that the "system of criminal justice" cannot be used as "an instrument of self destruction."

However, what the *majority* of the Court had to say in that landmark case is more to the point. Many legal doctrines are unclear and difficult to apply. The right of self-representation is not one of them. The right has been well established since 1975, when *Faretta* reached the Supreme Court. In that case, the defendant, Anthony Faretta faced charges of grand theft. He was dissatisfied with the California state public defender the court assigned to represent him, and also requested to represent himself instead. The judge, after initially allowing selfrepresentation, held a hearing to determine Faretta's ability to conduct his own defense. The court then ruled that Faretta must be represented by the public defender. He was, and the trial resulted in a conviction. The Supreme Court granted certiorari to determine whether a defendant "has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so. Stated another way, the question is whether a state may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." The Court ruled that "a state may not constitutionally do so."

In so holding, the majority reasoned that the "right of self-representation—to make one's defense personally—is ... necessarily implied by the structure" of the constitutional source of the right to counsel, the Sixth Amendment. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." 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 defendant—not an organ of the state interposed between an unwilling defendant and his right to represent himself personally-

To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment, the Supreme Court continued. 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 counsel the power to make binding decisions on 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. [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.

In Faretta's case, the Supreme Court 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* justly concluded that free will should trump paternalistic choice which "must be honored out of that respect for the individual which is the lifeblood of the law."

Kaczynski's choice was not honored and no trial took place. Immediately after the judge's rulings, Denvir approached the bench and stated: "Your Honor, Mr. Kaczynski would like to offer the government that he would plead guilty ... if the government would withdraw the death penalty notice. We have not been authorized to make that offer before." All the lawyers needed was an hour, defense counsel said, "just an hour." The judge initially refused, but then relented with a warning: "You'd better do it before an hour."

With that deadline in view, the defense team then met privately, to work out terms of the plea agreement. For the first time, Kaczynski agreed to plead guilty with no strings attached, except a reprieve from a death sentence. The plea negotiations apparently took less than an hour.

Cornered by the judge's erroneous rulings, and by his own lawyers' apparent willingness to disobey even a court order to allow him to take control of his own case, Kaczynski finally caved in to the pressure. Kaczynski pleaded guilty. The plea agreement provided that, "in return for the defendant's guilty plea, the government agrees that it withdraw the Notice of Intent to Seek the Death Penalty ..." During the process of pleading guilty, Kaczynski acknowledged publicly that he was the Unabomber, responsible for the series of bombings between 1978 and 1995, throughout the United States.

Kaczynski plead guilty in this way:

> THE COURT: Mr. Kaczynski, please state your full and true name for the record.
>
> THE DEFENDANT: Theodore John Kaczynski.
>
> THE COURT: How old are you?
>
> THE DEFENDANT: Fifty-five years old.
>
> THE COURT: How far did you go in school?
>
> THE DEFENDANT: I have a Ph.D in mathematics.
>
> THE COURT: What is your occupation?
>
> THE DEFENDANT: That's an open question right now. My occupation, I suppose, now is jail inmate.

THE COURT: Okay. What past occupations have you held?

THE DEFENDANT: I was once an assistant professor of mathematics. Since then I have spent much time living in the woods in Montana and have held a variety of unskilled jobs.

THE COURT: Have you ever been treated for any mental illness or addiction to drugs of any kind?

THE DEFENDANT: No, your Honor.

THE COURT: Mr. Kaczynski, are you fully satisfied with the counsel, representation and advice given you in this case by Mr. Denvir and Ms. Clarke as your attorneys?

(Discussion off the record between Ms. Clarke and Mr. Kaczynski).

THE DEFENDANT: I am satisfied except as reflected otherwise in this record.

THE COURT: You need to explain that, sir.

THE DEFENDANT: All right, your Honor.

You know that I have had certain dissatisfactions in my relationship with my counsel. And those dissatisfactions are reflected in the record. Apart from those dissatisfactions that are reflected in the court record, I have no other dissatisfactions with my representation by counsel.

(Discussion off the record between Mr. Denvir and the defendant.)

THE DEFENDANT: I am willing to proceed for sentencing with present counsel.

THE COURT: My understanding of your dissatisfaction with present counsel is that there was a disagreement as to the assertion of the mental status defense and you had some problems with present counsel concerning communications surrounding the presentation of mental status-type evidence.

THE DEFENDANT: Yes, your Honor.

THE COURT: Is that what you are referencing?

THE DEFENDANT: Yes, your Honor. That is what I am referring to.

THE COURT: Are you referring to anything other than that?

THE DEFENDANT: No, your Honor.

THE COURT: Is it your understanding that your attorneys had discussions with the attorneys for the Government in this case concerning your change of plea?

THE DEFENDANT: Yes, your Honor.

THE COURT: Does your willingness to plead guilty result from those discussions?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you entering this plea of guilty voluntarily because it is what you want to do?

(Discussion off the record between Ms. Clarke and the defendant.)

THE DEFENDANT: Yes, your Honor.

William Finnegan described the close of the hearing:

> Next, the prosecutors laid out some of the facts that they would be prepared to prove at trial. The recitation lasted nearly an hour. It was gory—shrapnel piercing a heart, hands blown off— and what was particularly horrifying were decoded "lab notes" from Kaczynski's journals, in which he recorded the results of his "experiments." "Excellent" was his judgment on the swift, bloody death of Hugh Scrutton, a young computer-rental-business owner. "A totally satisfactory result," he wrote of the murder of Thomas Mosser, a New Jersey father of two.
>
> After each horror story—and all sixteen bombings were described—the Judge asked Kaczynski, "Do you agree with the factual representation just made by the Government's attorney?"
>
> And Kaczynski answered, in a clear, unreadable tone, "Yes, your Honor."

Relatives of Kaczynski's victims who were in court wept. As her son confessed publicly for the first time, Wanda Kaczynski wept as well. She and her son David leaned into one another for comfort. Ted Kaczynski studiously ignored them, as he had done from the outset of the proceeding.

Why did the parties agree to the plea bargain? The prosecutors, no doubt, agreed for the reason they gave: Kaczynski, for the first time, was willing to plead guilty and spare the government the enormous expense of trial. They may also have been worried that legal errors by the trial judge, especially his denial of Kaczynski's right of self-representation, would have rendered any verdict of guilt highly vulnerable to reversal on appeal. The reasons the defense lawyers jumped at the plea bargain were also obvious. From the start, counsel had identified their goal as a life sentence. The plea gave them that. Less clear was why Kaczynski accepted the agreement. Perhaps he wanted to avoid the death penalty. Perhaps he wanted to prevent his lawyers from portraying him as mentally ill; that's what he said. Perhaps both reasons, combined with exhaustion and isolation, came into play.

In reporting on the plea, the press repeated, with plodding predictability, their misstatement that Dr. Johnson had diagnosed—as opposed to *provisionally* diagnosed—Kaczynski as a paranoid schizophrenic. The *Washington Post* wrote that Dr. Johnson

had "concluded" that Kaczynski "suffers from the grandiose fantasies and delusional rage of an unmedicated paranoid schizophrenic in deep denial." *Time* magazine, in an article headlined *Crazy Is As Crazy Does,* reported that Dr. Johnson had "found that he was a delusional paranoid schizophrenic." The *New York Times* reported that after Dr. Johnson had "diagnosed [Kaczynski] as a paranoid schizophrenic," Kaczynski's "struggle seemed more and more to highlight the legal system's difficulties in dealing with the mentally ill." A *Times* editorial maintained that Johnson's "sealed report, according to people who have seen it, says that he suffers from schizophrenia and has delusions of persecution that can lead to violence. Dr. Johnson's diagnosis is in accord with the defendant's own [sic] psychiatric experts, who have said he is severely mentally ill."

Formal sentencing was deferred until May 1998. Between the time Kaczynski pleaded guilty in January, and his formal sentencing in May, he continued to be represented by public defenders Quin Denvir and Judy Clarke; during this time, he did not challenge the legality of his guilty plea or the manner in which his lawyers represented him. Kaczynski's lawyers objected to the prosecution's filing of a brief on sentencing, which the judge overruled. The prosecution's sentencing brief is a singularly powerful document on the harm wrought by Kaczynski's bombing campaign, and the methodical records Kaczynski himself kept about that campaign.

On May 4, 1998, Theodore Kaczynski was formally sentenced to four life terms plus thirty years—life imprisonment without possibility of parole, ever. On that day, Kaczynski spoke. He also listened—to the statements by people he had maimed and families of those he had killed. "May your own eventual death occur as you have lived, in a solitary manner, without compassion or love," said Lois Epstein, whose husband was disfigured by one of Kaczynski's bombs. "Lock him up so far down that, when he dies, he will be closer to hell," said Susan Mosser, whose husband's body was torn apart by one of the Unabomber's bombs.

When it was Kaczynski's turn to speak, the following dialogue occurred:

> THE COURT: Does the defendant wish to make a statement before I pronounce sentence?
>
> THE DEFENDANT: Yes, your Honor.
>
> Your Honor, may I come to the podium?
>
> The COURT: You may.
>
> THE DEFENDANT: My statement will be very brief.
>
> A few day ago the government filed a sentencing memorandum, the purpose of which was clearly political. By discrediting me personally, they hope to discredit the ideas expressed by the Unabomber. In reality, the government has discredited itself. The sentencing memorandum contains false statements, distorted statements and statements that mislead by omitting important facts.

> At a later time I expect to respond at length to the sentencing memorandum and also the many other falsehoods that have been propagated against me.
>
> Meanwhile, I only ask that people reserve their judgment about me and about the Unabomb case until all the facts have been made public.
>
> THE COURT: Let the record reflect Mr. Kaczynski has finished making his statement and returned to counsel table.

The victim impact evidence was not the aspect of the prosecution's brief that seemed to trouble Kaczynski the most. What bothered the Unabomber was the briefs use of his private diary: The diary passages quoted in the brief portrayed Kaczynski not as a principled neo-Luddite warrior trying to protect society from technology, but rather as a petty, childish murderer who killed to extract "personal revenge" (words he had used) on the kinds of people who annoyed him: women who rejected him; business travelers who flew in the planes above his home; campers who wandered onto his property. This petulant misanthrope, the prosecution argued in its sentencing brief, was the *real* Theodore Kaczynski.

The Unabomber promised an eventual reply: "At a later time I expect to respond at length to the sentencing memorandum. Meanwhile, I hope the public will reserve judgment against me and all the facts about the Unabomb case until another time." At that later time, Kaczynski implied, he will show the world the *real* Theodore Kaczynski—when he gets the day in court denied to him by his lawyers and the judge.

In the interest of space, I have not included footnotes in this chapter. Citations may be found in Michael Mello, The United States Versus Theodore John Kaczynski: Ethics, Power and the Invention of the Unabomber (1999); Michael Mello, The Non-Trial of the Century: Representation of the Unabomber, 24 Vermont Law Review 417 (2000).

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