

Ted Kaczynski's Diaries: Compelled Self-incrimination?

Attorney Michael Mello interviewed by Lydia Eccles

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Contents

Appendix: Excerpts from Ted Kaczynski's Diary	9
"DIARY IN FACT — DIARY IN FORM"	12
MIGRATIONS TO SOLITUDE	14

Michael Mello is a professor at Vermont Law School. Michael Mello and Paul Perkins recently wrote a law review article arguing that Ted Kaczynski's diaries are inadmissible as evidence because they would be, in effect, compelled confessions, in violation of the Fifth Amendment protection against self-incrimination. Ted Kaczynski's lawyers filed motions to suppress the diaries as evidence over the summer, and lost. I visited Michael Mello to discuss the article with him. Below is a partial transcript of the interview followed by excerpts from the article.

LYDIA: How did you first get involved in looking at the diaries issue?

MICHAEL: I teach an advanced constitutional law course on constitutional criminal procedure. One of my standard hypotheticals has always been a serial killer who keeps a diary.

LYDIA: Why?

MICHAEL: Because it raises such an interesting range of federal constitutional issues. If a law student—or a law professor, for that matter—can really work through and master the diary issue, then any other kind of Fourth Amendment search and seizure issue will be a breeze. And because there is something intuitively different about diaries.

One of my final exam questions in my constitutional procedure course for fall of '96 was Ted Kaczynski's diary. It's fairly rare when a law professor's classroom hypothetical ends up getting played out in a very high-profile case.

LYDIA: It didn't come out immediately that he had a diary.

MICHAEL: There was one little New York Times article that I focussed in on because of this diary hypothetical that I used. From the answers that I got to the final exam question, and from the classroom discussion about the Kaczynski case, the Kaczynski diary issue seemed to be a good vehicle that I could use to get the students to think about and talk about a wide range of issues of federal search and seizure law, privilege against self-incrimination, Fifth Amendment law.

LYDIA: The law review article that you wrote basically says that this case provides the first really clear-cut way of deciding whether *Boyd* has been overruled and whether there is any kind of privileged area of private expression that can't be invaded at any time. [*Boyd v. U.S.* is the 1886 landmark Supreme Court case that established that an individual's private papers cannot be used against him as evidence, on the basis that it would be compelled self-incrimination.]

MICHAEL: The Ted Kaczynski case presents the question of whether there is any zone of privacy into which the government cannot intrude, regardless of how much probable cause they have. Regardless of whether they have a search warrant. It presents the question of whether any area, any things, any zone, any place is off limits to government snooping.

LYDIA: In the article, you say that there's a relationship between the Fifth and Fourth and First Amendments, and that if there's this inviolate zone then there can be no reasonable search there.

MICHAEL: Right.

LYDIA: And if it's an unreasonable search then it's compelled self-incrimination?

MICHAEL: The diary question in the Kaczynski case implicates the confluence, the conjunction, between the Fourth Amendment guarantee against unreasonable searches and seizures and the Fifth Amendment guarantee against self-incrimination and the First Amendment guarantee of freedom of expression. And what's interesting and unique about the argument here — and it's a constitutional argument that goes back to an 1886 decision by a very, very conservative — not to say, reactionary— U.S. Supreme Court, *United States v. Boyd*, where the late nineteenth century, extremely pro-capitalist — I mean this is the same U.S. Supreme Court that enjoined Eugene Debs' American Railway Union, that struck down the Child Labor laws (maximum hours laws) and other pieces of the Progressive Era legislation in the early twentieth century...

This was no bleeding-heart-liberal, soft-on-crime Warren court. But this also was a court that took the language and the history of the Bill of Rights very, very seriously. And often times in death penalty cases and in conversations about the protections of the Bill of Rights and the protections of the right of criminals, or the citizen-accused, there isn't a whole lot of support directly in the language of the constitution. But what's unique here is that the language —the plain old common sense 'what the words say' reading of the Fourth Amendment and the Fifth Amendment — I think, and the *Boyd* court more than a century ago thought — carved out an inviolate zone of privacy. And if there is such an inviolate zone of privacy in the United States of America of the Renquist-Thomas-Scalia Court, diaries have got to be in there.

There may be nothing else in there. The sole occupant of that inviolate zone of privacy might be one's diary. But the idea that in 1997, more than a century and a quarter after the court decided *U.S. v. Boyd*, the federal government can lawfully send an American citizen to death row based largely on the content of their private journals just strikes me as unAmerican. I know I'm probably not supposed to read things?

LYDIA: Oh, go ahead! What are you going to read?

MICHAEL: To some great extent one of the catalysts for the law review article that Paul Perkins and I wrote was Steve Thayer's novel *The Weatherman*. It was published a couple of years ago before Ted Kaczynski was ever identified as the alleged Unabomber, much less before anyone knew that the alleged Unabomber kept a diary. One of the narrative themes of the novel is a guy is put on trial for his life, and the government's main piece of evidence against him is his private diary. The two paragraphs I'd like to read are from the closing argument at the penalty phase of the protagonist's capital trial.

Jim Fury [Jim Fury was the capital prosecutor] stormed back to the evidence table and grabbed the diary. He waved it in the air. "This book I hold in my hands is not a diary. This is a roadmap to the murders of seven women, maybe more. A map drawn in code by the mind of a psychopath and then followed to the last inch. The sick, demented mind of Dickson Graham Bell, a schizophrenic, clairvoyant, sociopathic weatherman."

Dickson Bell [who of course was the capital defendant] made no attempt to match Jim Fury in volume, but he more than made it for it in raw intensity. "Go ahead and start a diary, Mr. Fury. Write down what you truly think of your wife or your neighbors or your boss. Put into words your real politics, believing in your heart that noone will ever see those words. Then I'll take your words, and I'll leak them to the newspapers one page at a time. I'll read your words with a sarcastic voice on national television, and we'll see if you don't look like a madman or an idiot or a killer. Let's see how long you keep your job. You perverted my diary. You've used my words in a way that should be illegal. People don't read books anymore. They watch television." He pointed to the cameras, the red light glowing like a warning. "The words you read from my diary are probably the only reading most of these couch potatoes in the jury will get all year." He then turned his attention to that jury. "If you jurors are going to judge me by what I wrote in my diary, for God's sake read the whole book. Read it yourself. Crawl into bed with it at night and turn the pages. That's how books are meant to be read. That's the spirit I wrote it in.

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MICHAEL: That's better than I could ever write why Paul Perkins and I wrote this law review article about Ted Kaczynski's diary. It's really not an article about Ted Kaczynski's diary. It's about my diary.

LYDIA: And both of you are diary keepers.

MICHAEL: Yeah, and have been for a number of years.

LYDIA: What's the nature of your diary? What function does it perform for you?

MICHAEL: I started keeping it very early into death work [working as a public defender for death row defendants]. I had a pretty strong sense at the time that I was living through the fundamental experience of my life. I knew I had a lousy memory. I knew I would want to be able to recall things and people and events. Largely I think my diary is an extension of my memory and it's very much an extension of my mind and my heart, actually. I would burn it before I'd let anyone read it.

I have considered pretty carefully doing exactly that as things have progressed in the Kaczynski case over the last few months. Because if the government can get his diary, then they can mine and yours, and anything. If diaries aren't off-limits, then nothing is off-limits.

LYDIA: It seems to me like a diary is an externalization of your private mind. I started keeping a diary in elementary school, and I've had it pretty much continuously since then, although I threw out my diaries up until seventh grade, but I always feel that someone who doesn't keep a diary—in a sense they don't incriminate themselves so they don't have a right to judge someone who does keep a diary...

MICHAEL: And noone who keeps an honest diary would fail to understand what Steve Thayer is talking about in his novel, and would fail to understand what Paul Perkins and I are trying to accomplish in the law review article.

LYDIA: In keeping a diary, even knowing that I don't intend anyone to read it, I still have a fear of being honest in it, because —what if I killed myself and my family read it? It's like, do you have a right to express things that you don't want anyone to read at all?

MICHAEL: If anything is a fundamental right in the United States of America, it's got to be that.

LYDIA: Because if writing is your thought process, then it's a matter of freedom of thought.

MICHAEL: If the government isn't allowed to pry open your mouth and force a confession out of you, it's not allowed to split open your skull and stick in a probe and extract your thoughts that way, I see no difference between that and an honest diary. As we approach the millenium I think in this country it's a very troubling and frightening message that the Kaczynski case sends out to Americans, which is, if you keep a diary, burn it! If you don't want the government not only to *read* it, but to be able to *use it against you*, to use it as a basis of a criminal prosecution of you, you better burn your diary and make damn sure noone can read the ashes.

LYDIA: I think that the population in general is being taught to assume surveillance of everything they write at this point. The moment someone starts using e-mail, they're assuming that they're under surveillance at all times.

MICHAEL: That's part of why there's no e-mail in my office or in my house.

LYDIA: You were saying that Kaczynski makes a perfect case because it is the backbone of the prosecution's case—

MICHAEL: According to the prosecutor.

LYDIA: It reduces it down exactly to that issue, where everything's at stake, this is the convicting evidence, and not only that, but the fact that he is clearly an intensely private person...Noone could come across as someone who desired solitude and privacy more than Ted Kaczynski. So noone could say that it was not intended to be private, as opposed to desk diaries and office calendars...

MICHAEL: And he's entitled to it. Even if he's the Unabomber, he's entitled to that. Because if he's not, then none of us are.

LYDIA: What is the status of the right against self-incrimination? You were mentioning blood tests...The main thing is that where the First Amendment is involved, where it's communicative — in other words, a bloody knife is a piece of property [not expression protected by the First Amendment] that would incriminate him..

MICHAEL: The Burger court and the Renquist court have made a hash of both the Fourth Amendment and the Fifth Amendment. The law now is fairly clear that neither the Fourth Amendment guarantee against unreasonable searches and seizures standing alone, nor the Fifth Amendment guarantee against compelled self-incrimination standing alone, protects the diary. If the U.S. Supreme Court today doesn't recognize— as the *Boyd* court did in the nineteenth century — an intimate relationship, an intimate connection, between the Fourth and Fifth Amendment then we lose this case. Then the government can send him to death row based on the content of his private diaries.

LYDIA: And furthermore that will mean that for all those people who are in cyberspace, they're accumulating evidence against themselves that's usable in criminal proceedings against them...

MICHAEL: The historical irony is extraordinary, here. A few weeks before the federal district court in the Kaczynski case said the federal government can use his diaries against him at his capital trial, the U.S. Supreme Court issued what's been characterized as its First Amendment Magna Carta of cyberspace. The First Amendment clearly applies to electronic media. And what an irony if the same year that the U.S. Supreme Court issues its First Amendment Magna Carta in cyberspace, a lower federal court severs the intimate connection between the First Amendment and the Fourth Amendment and the Fifth Amendment by allowing the government to use Ted Kaczynski's diary.

LYDIA: The status of this precedent case is that it's never been explicitly overruled by the Supreme Court, but that the lower courts have made decisions that imply that it's overruled?

MICHAEL: Well, there has never been a majority of the U.S. Supreme Court to overrule *Boyd*, which means that *Boyd* remains the law of the land. The U.S. Supreme Court has sharply limited the scope of *Boyd*. Originally *Boyd* applied to all records, not just diaries, and not just private papers, but all property. The U.S. Supreme Court has said that *Boyd* doesn't apply to property. [i.e. a bloody knife.] *Boyd* doesn't apply to certain kinds of business records. And the Court has implied that *Boyd* might not apply to certain kinds of private records.

LYDIA: Such as letters intended to be read by one other person?

MICHAEL: Exactly. But the one issue that the U.S. Supreme Court has never decided, and I think very carefully never decided, has been the diary question. Because if the government is right about Ted Kaczynski's diary, then *Boyd* is dead...

LYDIA: Because it is the very ultimate private zone — there's nothing more private externalized than a diary.

MICHAEL: Exactly.

LYDIA: Now what was the nature of the response of the Kaczynski court to the motion to suppress the diary?

MICHAEL: The George Bush-appointed judge just missed the boat.

LYDIA: He just didn't engage with your argument?

MICHAEL: Not in the slightest. It was a remarkably superficial misreading of the arguments that Kaczynski's lawyers were making.

LYDIA: It seems like the prosecution on the one hand has been leaking stuff from the diaries, and on the other hand really not exposing much *except* damaging leaks. Can you talk about that?

MICHAEL: Well, it's an unfortunately typical prosecutorial tactic in capital cases, especially high profile capital cases, to selectively leak information to the media, which unfortunately the media then feels obligated to pick up on and report. What that's

done, it seems to me, is to make it virtually impossible for Ted Kaczynski to get a fair trial.

LYDIA: Well even within ten days after he was caught there were books out listing everything taken from the cabin. How did they get those lists of evidence?

MICHAEL: Two groups of people had access to that information: law enforcement—the cops — and the prosecutors. So one or the other or both leaked. I think to some extent American culture has become desensitized after O.J. Simpson and the au pair trial and the other high-profile criminal prosecutions recently. The public and the media have become desensitized to the problem of trial by media. But that's exactly, it seems to me, what's going on in Sacramento.

LYDIA: So the prosecution is incorporating the media as a pretty basic part of their strategy? Is that designed to pressure the judge, do you think? In other words, if they leak these diaries, doesn't that make it harder for the judge to suppress them?

MICHAEL: It does make it harder for the judge to suppress them. The one legal issue that the defense has raised that the judge seems to have taken pretty seriously is the problem of pre-trial publicity. Both sides are supposedly under a gag order. They're not allowed to talk to the media. And yet this stuff keeps leaking.

LYDIA: Is the jury going to be sequestered?

MICHAEL: I don't think that decision has been made yet. I would be very surprised if the jury wasn't sequestered.

LYDIA: So once the jury is sequestered, what reason is there to have a gag order on the lawyers?

MICHAEL: That's a good question.

LYDIA: The reason I ask that is because I'm politically concerned with the Unabomber, I'm really sensitive to the idea that the government might want to prevent the public from becoming emotionally involved in the trial and with him.

MICHAEL: Me too. I think that is a very legitimate fear. And so far the government has been able to do that. The demonization of him, at least up until recently, has been pretty complete.

LYDIA: His personal presence is one of his best arguments in his favor, and if they can — I was wondering about the whole business about the trial not being televised.

MICHAEL: I have such mixed feelings about that. Believe it or not, I'm something of a First Amendment absolutist. And part of me—the First Amendment part of me — thinks that televising trials is a wonderful idea and it really is in our electronic age the only way to provide meaningful access to the criminal justice process to the people.

LYDIA: I tend to think that just the way that juries undergo an education in process of being jurors, that when people get involved in watching these trials, they may never have realized about the right against self-incrimination. On the other hand..

MICHAEL: On the other hand television proceedings — especially criminal proceedings — convert the jurors and the judges and the witnesses to some extent into actors. I've done oral arguments in courts where the proceedings were televised and I've done oral arguments in courts where the proceedings weren't televised, and there's

a difference. It's hard to articulate what the difference is, and to some extent the difference is a good thing. Judges tend to behave –everyone tends to behave– differently, and I think in general better, when they know that they're being scrutinized.

Appendix: Excerpts from Ted Kaczynski's Diary

by Michael Mello and Paul Perkins
Vermont Law Review (Vol. 22:000, 1997)
(Footnotes have been omitted)

Michael Mello introduces the article with some personal comments:

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

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

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

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

*[" A few days before Christmas, 1989, a racist coward with a grudge mailed a shoebox-sized bomb to federal appellate Judge Robert S. Vance. The bomb, which detonated in the kitchen of Judge Vance's home on the outskirts of Birmingham, Alabama, killed him instantly...When I graduated from law school in 1982, my first job was as

Judge Vance's law clerk. Judge Vance, a genuine hero of the civil rights wars of 1960s Alabama, became much more than a boss to me; he was mentor, confidante, personal and professional role model. I would have taken a bullet for him..." *Capital Punishment Is A Curse Upon the Living*, Michael Mello, Rutland Daily Herald (November 5, 1997).]

In this essay we shall suggest that the contents of Theodore Kaczynski's diary are entitled to absolute protection from governmental intrusion — regardless of how much probable cause the government possesses, and regardless of how many procedurally valid search warrants the government obtained. In other words, the Constitution marks out an inviolate zone of privacy into which the government may not intrude, regardless of the government's compliance with the procedural requirements (i.e. they had both probable cause and a search warrant). Given the present personnel on the United States Supreme Court, this inviolate zone of privacy has only one possible occupant: the private diary of a citizen-accused, in which the diary includes inculpatory information the government characterizes as "confessions" and wants to use against the citizen-accused's capital trial in federal court. The jurisprudential basis for this inviolate zone of privacy is the 1886 case of *Boyd v. United States*.

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

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

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

Louis Brandeis (1928)

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

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

“We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the “unreasonable searches and seizures” condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man “in a criminal case to be a witness against himself,” which is condemned in the Fifth Amendment, throws light on the question as to what is an “unreasonable search and seizure” within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms.”

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

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

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

Nor are these expressions of allegiance to the concept that a man ought not to be compelled to produce his private papers for use against him in a criminal action without relevance to modern American society. Our society is premised on each person’s right to speak and think for himself, rather than having words and ideas imposed upon him. This fundamental premise

should be fully protected. Committing one's thoughts to paper frequently stimulates the development of an idea. Yet, persons who value privacy may well refrain from reducing thoughts to writing if their private papers can be used against them in criminal proceedings. This would erode the writing, thinking, speech tradition basic to our society.

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

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

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

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

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

“DIARY IN FACT — DIARY IN FORM”

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

Edmund Wilson (1972)

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

C. Vann Woodward (1981)

What is a diary? why do people keep them?

To understand the continued viability of *Boyd*, the question of what counts as a diary becomes an issue of some doctrinal and jurisprudential importance. For Theodore

Kaczynski — and for all of us who call our diaries “journals” or something other than the magic word “diary” — the issue is of profound significance.

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

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

In literature, the word denotes “a day-to-day record of the events in a person’s life, written for personal use and pleasure, with little or no thought of publication.” Diarists record to fashion their lives in letters, secretly, lest anyone know them quite. Nellie Ptashkina writes, “[My diary] is a record of my thoughts and feelings. It was the wish to write them down that gave me the idea of this diary...” Emily Carr: “Yesterday I went to town and bought this book to enter scraps in...to jot me down in, unvarnished me, old me.” A diary is her confessor and confessional. It alone receives her purgation, lest she betray herself or another.

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

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

Diaries record what alone out of her life the diarist keeps unto herself. Naturally then toward diaries is felt a companionship not extended to other objects or even persons. Anne Frank: “I hope I shall be able to confide in you completely, as I have never been able to do in anyone before, and I hope that you will be a great support and comfort to me.” And: “[To prepare to go into hiding] Margot and I began to pack

some of our most vital belongings into a school satchel. The first thing I put in was this diary...memories mean more to me than dresses.”

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

The question why diarists write is entwined with the questions why writers write — and why anyone writes. Perhaps the existentialist poet Rainer Marie Rilke, in his *Letters to a Young Poet*, put it best: “Can you avow that you would die if you were forbidden to write? Above all, in the most silent hours of your night, ask yourself this: *Must I write?*” That, we believe, in the end is why writers write and why diarists keep diaries. It is why Anne Frank kept her journal in the face of the Third Reich...

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MIGRATIONS TO SOLITUDE

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

Anthony Amsterdam (1974)

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

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

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

Like *Boyd* itself, this essay has stressed the “intimate relation” between the Fourth and Fifth Amendments. We have also suggested that, in the case of a personal diary,

there might as well be an intimate relation between the First, Fourth and Fifth Amendments. Finally, at the risk of allowing this essay to begin to resemble a constitutional grab-bag opinion written by Justice Douglas, we suggest one, final intimate relation: the Eighth Amendment's guarantee against cruel and unusual punishment.

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

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

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

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

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

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ABOUT MICHAEL MELLO

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The Ted K Archive

Attorney Michael Mello interviewed by Lydia Eccles
Ted Kaczynski's Diaries: Compelled Self-incrimination?
Late November, 1997, South Royalton, Vermont

<www.web.archive.org/.../www.paranoia.com/unapack/legal/diaries.htm>

www.thetedkarchive.com