TED KACZYNSKI'S DIARY

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My coauthor and I are deeply grateful to Judy Hilts, Laura Gillen and Virginia Fifield of Vermont Law School, who word processed the manuscript, and to Lydia Bottome and the other students on and off the staff of the *Vermont Law Review*, whose hard work and good ideas are reflected on every page of this Essay; to Steve Thayer, whose elegant and prescient novel, *The Weatherman*, crystalized for us a number of the themes of this Essay; to Professors Allen and Kuhns, whose casebook on constitutional criminal procedure has inspired seven generations (so far) of Vermont Law School students to struggle with matters of *Boyd* and diaries; and to those students whose struggles with, and labor over, the ideas presented in this Essay were absolutely indispensable. Thank you.

A few disclaimers: 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 am 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 an appellate attorney for death row prisoners (mostly in Florida, where I worked full time 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 forthcoming book DEAD WRONG (Univ. Wisconsin Press forthcoming Nov. 1997), 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." (quoted in Michael Mello, *A Letter on a Lawyer's Life of Death*, 38 S. TEX. L. REV. 121, 204 (1997)).

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 the 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. As I described in Michael Mello, *Rough Justice: Reflections on the Capital Habeas Corpus (Anti) Jurisprudence of Judge Robert S. Vance*, 42 ALA. L. REV. 1195 (1991) and in DEAD WRONG, as well as in the Epilogue, in 1989 a man I loved as a father was murdered by just such a mail bomb.

** J.D. candidate, Vermont Law School, 1998. Fellow diarist. This Essay is for my wife, Denise, for her patience and forbearance during composition. Her contribution beggars all tribute: Risking uxory, she makes defect perfection, and breathless, power breathe forth.

I. INTRODUCTION: THE KACZYNSKI DIARY

> But we seldom hear it from a Luddite point of view. In Gertrude Himmelfarb's *The Idea of Poverty: England in the Early Industrial Age*, they don't even rate a mention in the index. Not that they left a lot to work with: In 1812, unions themselves were illegal—not until 1824 were they allowed to negotiate on wages and working hours; not until 1871 could they strike—and machine-smashing was a capital offense. To put anything down on paper was suicidal. And it was almost as dangerous, later on, to reminisce. No firsthand account of Luddite activity has survived for historians to construe, no periodicals, Minute Books or memoirs. "Luddism," as E.P. Thompson reminds us, "ended on the scaffold."
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> John Leonard (1993)[1]

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1. John Leonard, *Machine Dreams*, THE NATION, May 17, 1993, at 667 (reviewing GLYN HUGHS, THE RAPE OF THE ROSE (1993)). Of the Luddite rebellion of 1811-1812, Leonard writes:

> The Luddites have come down to us in our high school history texts as mindless vandals, nineteenth-century smashers of machines as the Iconoclasts were ninth-century smashers of images. From 1811 to 1812, disaffected artisans and redundants destroyed a thousand mills in the Nottingham area alone—as if, by

Hard cases make bad law, or so goes the adage. Recent high-profile cases make almost no law, or so might go a corollary adage. The murder cases that in recent years have captured the public's imagination—the Oklahoma City bombing and O.J. Simpson, for instance—have tended not to present *legal* issues of importance comparable to their human dramas.

The Theodore Kaczynski case, however, is the exception that proves the rule. The case presents one of the most fascinating open questions in the law of constitutional criminal procedure: Can the American government use an accused's private diary against him in a capital prosecution in federal court?[2] Diary cases are rare.[3] The facts of the Kaczynski case make it an ideal vehicle through which to explore this constitutional conundrum. The courts might

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> breaking a spinning jenny, a shearing frame or a power loom, they could stop "progress" in its technological tracts. From the point of view of the Industrial Revolution, Luddites were reactionary and obstructionist. From their own point of view, the perspective of the workshop, factory floor and village green, something had gone terribly wrong in a depressed and war-weary England of bad harvests, rising prices, redoubled population, rackrenting, food shortages, landlessness and mass unemployment.

Id. For a "straight" history of the Luddite rebellion, see KIRKPATRICK SALE, REBELS AGAINST THE FUTURE (1995).

2. One recent article summarized:

> The opinions of the circuit courts since [1984] have split on the issue of protection afforded by the Fifth Amendment to the contents of any documents. Four of the circuits have concluded that no document, personal or business, is protected if it is voluntarily prepared. Four others remain undecided on the extent of protection afforded private papers. Three remaining circuits continue to recognize some Fifth Amendment protection based on the contents of the document. While it is possible that one's private diary will be protected from public scrutiny, depending on which circuit the action arises in, the contents of one's business records will receive no such protection. Until the Supreme Court definitively rules that the contents of a document are immaterial for granting the privilege of Fifth Amendment protection, there remains no certain answer to the dilemma faced by a defendant seeking to protect his private papers from scrutiny.

Raymond G. Keenan, *To Act or Not? That Is the Question: Self-Incrimination and the Sole Proprietor*, 13 TOURO L. REV. 265, 274 (1996); *accord In re* Steinberg, 837 F.2d 527, 529-30 (1st Cir. 1988); United States v. Lang, 792 F.2d 1235, 1238-39 (4th Cir. 1986); Anne DeMarco & Elissa Scott, *Confusion Among the Courts*, 9 ST. JOHN'S J. LEGAL COMMENT 219 (1993).

3. One court offered the following explanation:

> We suspect the reason for the paucity of cases dealing with genuinely "private" or personal records, such as diaries or personal letters, is that there is rarely an occasion to subpoena documents of that kind. The government is usually in search of documents which will prove tax fraud or some illegal business operation. Records which are strictly "personal" would usually have no relevance to the conduct of a business operation, or to its tax liability. Thus, the "private" papers language of *Boyd* usually does not apply to the facts of cases in which it is invoked; the claim of privilege is defeated simply on the basis that, regardless of the status of private or personal records, business records are not protected.

In re Trader Roe, 720 F. Supp. 645, 647 (N.D. Ill. 1989).

find it so as well. The issue has been squarely raised, in a pretrial motion, filed by Kaczynski's counsel.

Theodore ("Ted") Kaczynski is an American citizen. He may or may not be the "Unabomber."[4] Our federal government says he is, and soon Kaczynski will be put on trial for his life. At that capital trial in federal court our government will attempt to convict Kaczynski and send him to death row based on his "admissions"—that is the prosecutor's characterization of what they were—contained in his diary.[5] The government found Kaczynski's diary during a search of his cabin located in the remote and wild country of Montana.

Theodore Kaczynski was charged with offenses arising out of four bombings between 1985 and 1995. According to the government's pretrial motion, pursuant to Federal Rule of Evidence 404(b), these four bombings

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4. Theodore Kaczynski is accused of sending a total of 16 bombs that killed three people and injured 23 others in his alleged 17-year career as the "Unabomber," so-called because the first bombs targeted universities and airlines. After the anonymous attacker's 35,000-word manifesto on the ills of modern industrialization and technology was published by the WASHINGTON POST and NEW YORK TIMES, Kaczynski's brother began to suspect him and eventually turned him in. *See* David Johnston & Scott Janny, *The Tortured Genius of Theodore Kaczynski: From Child of Promise to Unabom Suspect*, N.Y. TIMES, May 26, 1996.

Even before the government captured Kaczynski and accused him of being the Unabomber, the mysterious bomber made the covers of NEWSWEEK and THE NATION. *See* Tom Morganthau, *Chasing the Unabomer*, NEWSWEEK, July 10, 1995; Kirkpatrick Sale, *Is There a Method to the Madness?*, THE NATION, September 25, 1995. Both cover stories include a police artist's sketch of the face of the Unabomber during his one and only known sighting by an eyewitness who gave his description to the police. The face on the covers of NEWSWEEK and THE NATION are strikingly dissimilar to the face of Theodore Kaczynski.

Once the government had decided that Kaczynski was their man, and once Kaczynski was arrested for the bombings, the media's attention to the case "went O.J.", as one Vermont Law School student put it. Ted the (accused) Unabomber instantly entered the realm of cultural mythology, a uniquely *American* cultural mythology: the mad math-professor genius, the recluse waging war upon technology and industrialization. The title of a front page article, *Special Report: Prisoner of Rage*, in the NEW YORK TIMES says it all. The story, written by Robert McFadden (and, according to the TIMES story, involving the "participation" of 23 reporters and 11 others) published on Sunday, May 26, 1996, began on page one and consumed three *entire* pages inside the newspaper. And then there was the Cain and Abel dimension of the case. *See e.g.*, Richard Lacayo, *A Tale of Two Brothers: No One Expected the Unabomber Saga to Encompass a Parable as Old and as a Poignant as Cain and Abel*, TIME MAGAZINE, April 22, 1996, at 44. At least he did not go to law school. *Cf.* MICHAEL MELLO, DEAD WRONG (Univ. Wisconsin Press forthcoming 1997) (observing the media's preoccupation with the fact that suspected serial killer "Ted" Bundy had attended law school).

Of course, such public fixation is not new. From Leopold and Loeb in the 1920s, through Theodore Bundy in the 1970s and 1980s, to Theodore Kaczynski today, the American media culture has had a special fascination for "geniuses" who are thought to have become murderers. On Leopold and Loeb, see IRVING STONE, CLARENCE DARROW FOR THE DEFENSE (1941). On Bundy, see MICHAEL MELLO, DEAD WRONG (Univ. Wisconsin Press forthcoming 1997).

5. We should note at the outset that neither of us has ever seen Theodore Kaczynski's diary, in whole or in part. All of our knowledge of the diary's contents comes exclusively from the sources cited in this Essay. In addition, since we are not privy to the evidence in the case, we remain agnostic on the matter of Kaczynski's guilt or innocence. Again, the law presumes him innocent. So do we.

formed part of an eighteen-year campaign in which Kaczynski mailed or placed sixteen bombs.[6] In its motion, the government sought a ruling on the admissibility of evidence relating to the thirteen bombs that had not been charged in the indictment.

The motion described in some detail the complex geometry of its interrelated elements of proof against Theodore Kaczynski. The government's evidence that Kaczynski committed the charged offenses falls into "three categories."[7] The first category consists of Kaczynski's own writings, which were seized during an extensive search of Kaczynski's cabin. The government's second category of proof consists of "non-documentary physical evidence found at the various UNABOM crime scenes, including Kaczynski's cabin."[8] The government's final category of proof includes "documentary and testimonial proof showing the defendant's resources and opportunities to travel from his Montana cabin to the locations where he placed or mailed his explosive devices."[9]

At a motions hearing on September 20, 1996, Prosecutor Robert Cleary advised the court of the critical value of the diaries to the government's case:

> Those documents, Judge, stand—and I'll tell you right now, and I've informed the defense of this—those documents are the backbone of the Government's case. It will be the documents that we're going to rely upon in proving the charges in the indictment. We will then round out our proof and corroborate our proof with other evidence. What are those documents? Those are documents, by and large, in Mr. Kaczynski's handwriting, in which he's keeping day-to-day journals of his activities for years and years. Many of them are just, you know, my day in the woods, what I ate for dinner—that sort of thing. A much, much smaller set of those documents, a stack maybe this big (indicating), and I'm holding my hands maybe about a foot apart, are what we call the key documents in the case.[10]

Cleary was not exaggerating the importance of the diaries to the government's case. In its motion the government observed: "[O]ne of the foundations of the government's case will be the defendant's written *admissions* to the charged offenses, contained in the documents seized from

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6. *See* Government's Motion in Limine for Admission of Evidence Under FED. R. EVID. 404(b) (redacted), at 4, United States v. Kaczynski, (CR No. S-96-0259 GEB) (E.D. Cal. filed July 11, 1997).

7. *Id.* at 3.

8. *Id.*

9. *Id.* at 4.

10. Reply to Government's Opposition to Motion to Preclude Use of Defendant's Private Diaries, at 5 n.5, United States v. Kaczynski, (CR No. S-96-0259-GEB) (filed July 22, 1997).

his cabin."[11] The motion described Kaczynski's "extensive handwritten journals," which "consist of thousands of pages of handwritten material in English, Spanish, and a numeric code."[12] The earliest entry is dated 1969; the latest is February 1996. "In the late 1970s," the government continued, "Kaczynski recorded the details of his first bombing, and he continued memorializing his bombing activities through the final entries."[13]

"The journals contain extensive discussions of Kaczynski's . . . ideology and motivations, and expressions of his intent to kill his victims,"[14] the government continued. "Briefly stated," the government argued that the journals would show that Kaczynski "despised anyone who interfered with the solitude that he craved, and he harbored a deep-seated hatred of certain aspects of modern technology and industrial society."[15]

Throughout its motion, the government refers to and emphasizes that Kaczynski's writings contain *admissions*. For example, on the same page, the government notes that, "in particular, Kaczynski's written admissions to the charged bombs"[16] ought to be admissible and that, "the government seeks to introduce three types of evidence under Rule 404(b): . . . Kaczynski's written admissions to having built and placed or mailed the uncharged bombs . . . ."[17]

In some sections of the motion it is not clear whether the "written admissions" attributed to Kaczynski occur in his journals or in his other writings, such as letters.[18] In many instances, however, the government clearly is relying on "admissions" contained in Kaczynski's extensive journals, even though most of the quotes from the journals themselves have been redacted from the motion. For example, a footnote to an otherwise blank page explains: "This admission, as well as several others the government seeks to introduce, is from Kaczynski's coded journals."[19] Eight pages later, under a rubric titled "Corroboration of Kaczynski's Admissions to the Charged Bombings," the government notes that, "in particular the government will seek to emphasize those admissions that provide specific, previously undisclosed

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11. Government's Motion in Limine for Admission of Evidence Under FED. R. EVID. 404(b) (redacted), at 4, United States v. Kaczynski, (CR No. S-96-0259 GEB) (E.D. Cal. filed July 11, 1997), [hereinafter Government's Motion in Limine].

12. Reply to Government's Opposition to Motion to Preclude Use of Defendant's Private Diaries, at 4, United States v. Kaczynski, (CR No. S-96-0259-GEB) (filed July 22, 1997).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 9.

17. *Id.*

18. *E.g., id.* at 3.

19. *Id.* at 23 n.18.

details about the construction of the bombs."[20] This sentence ends with a footnote, which reads:

> For example, in his journals Kaczynski memorialized the fact that he used match-heads, lead pellets, and a cigar box to construct bomb 2; constructed bomb 4 by sealing the ends of the pipe bomb with wooden plugs that he fastened with epoxy and nails; made bomb 9 by using a substantial amount of epoxy and four size D Duracell batteries, by wrapping the pipe in wire, and by designing a trigger system that consisted of a trap door, pistons, and springs; utilized split shot, four size D and six size AAA batteries, 18 gauge copper wire, iron collars to reinforce the pipe ends, plastic electric tape and strapping tape in the construction of bomb 10; made bombs 11 and 12 by inserting one pipe inside another and by filling the space between the pipes with a piece of metal sheet; used potassium chlorate, aluminum end plates, pivot switches, 30 gauge iron wire, and pipe wrapped in wire and strapping tape to construct bombs 13 and 14; and created bomb 15 using an aluminum pipe wrapped in steel wire, aluminum end plates, 18 gauge copper wire, sodium chlorate and aluminum, and four 9-volt batteries.[21]

The motion rarely quotes from Kaczynski's journals. One exception is the following: "a journal entry describing the fifth bombing, at the University of Utah Business School, explains, 'Last fall I attempted a bombing and spent nearly three hundred bucks just for travel expenses, motel, clothing for disguise, etc. Aside from cost of materials for the bomb. And then the thing failed to explode. Damn.'"[22]

According to a *New York Times* news story, at a pretrial hearing in September 1996, Cleary disclosed that Kaczynski's detailed journals contained entries such as, "I mailed that bomb," and "I sent that bomb."[23] Cleary was quoted as saying the journals, along with a typewriter found in Kaczynski's cabin, would constitute the "backbone of the government's case."[24]

The government had a mountain of circumstantial evidence against Kaczynski, but Cleary was quoted as saying that the journals held Kaczynski's "detailed admissions" of the bombings and expressed his "desire to kill."[25]

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20. *Id.* at 31 (defining as admissions, "the defendant's written admissions to the charged offenses contained in the documents seized from his cabin").

21. *Id.* at 31-32 n.21.

22. *Id.* at 29.

23. Carey Goldberg, *Diaries Disclosed in Unabom Hearing*, N.Y. TIMES, Sept. 21, 1996, at 1.

24. *Id.*

25. *Id.* at 7.

The *Times* characterized the journals as "amount[ing] to handwritten confessions."[26]

In this Essay we make several factual and legal assumptions solely for purposes of clearly framing the issue we wish to discuss. First, we assume that federal law enforcement had a legal right to be present in Kaczynski's cabin: The search of the cabin itself was conducted pursuant to a valid search warrant issued by a proper federal district court and pursuant to sufficient probable cause. In other words, we assume that the procedural requirements of the Fourth Amendment were satisfied.[27]

Second, we assume that Kaczynski's journal does indeed constitute a "diary" for purposes of the constitutional questions raised in this Essay.[28] Third, we assume that Kaczynski's diary contains confessions of, not mere admissions to, at least some of the bombings attributed to the "Unabomber." We further assume that these "confessions" are, as the government has argued, an essential ingredient of the government's case; without them conviction would be problematic and condemnation—a punishment ultimately unforgiving of erroneous convictions—would be difficult and perhaps inappropriate.

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

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26. *Id.*

27. On April 3, 1996, the United States District Court for the District of Montana issued a search warrant for Theodore Kaczynski's cabin in Lincoln, Montana, at the request of FBI agents. The application for a search warrant was supported by a 104-page affidavit describing the results of the Unabom investigation.

The search warrant was signed on April 3, 1996. The search continued through April 11, 1996. A second search warrant for Kaczynski's property was issued on May 9, 1996. In a Notice of Motion and Motion to Suppress Evidence and Accompanying Memorandum of Law, filed on March 3, 1997, counsel for Kaczynski moved to exclude the evidence obtained from the two searches of his cabin. *See* Notice of Motion and Motion to Suppress Evidence and Memorandum of Points and Authorities in Support of Defendant's Motion to Suppress, at 2, United States v. Kaczynski, (CR No. S-96-0259 GEB) (E.D. Cal. filed March 3, 1997). The motion was argued on May 16, 1997. It was denied, in a 48-page order, filed on June 27, 1997.

On July 3, 1997, Kaczynski's counsel filed a suppression motion directed specifically at the diary evidence and relying on Boyd v. United States, 116 U.S. 616 (1886). *See* Notice of Motion and Motion to Preclude Use of Defendant's Private Diaries, United States v. Kaczynski, (CR No. S-96-0259-GEB) (E.D. Cal. filed July 3, 1997). On July 16, 1997, the government responded to Kaczynski's diary motion based on *Boyd*. *See* Government's Brief Opposing Defendant's Motion to Preclude Use of Private Diaries, United States v. Kaczynski, (CR No. S-96-259-GEB) (E.D. Cal. filed July 16, 1997). On July 21, the defense replied. These motions were scheduled to be argued on August 22, 1997.

28. *See infra* Part V.

government's compliance with the procedural requirements (i.e., they had both probable cause and a search warrant).[29] 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 at the 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*.[30]

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

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29. The fact that the Kaczynski prosecution is *federal* implicates the federal courts' "supervisory power" over the administration of federal criminal justice. Excluding Kaczynski's diaries based on this supervisory power—rather than on constitutional authority—would allow the federal judiciary to avoid the thorny constitutional issues raised by Kaczynski's diaries and discussed in this Essay.

The classic definition of the federal courts' supervisory power over the administration of federal criminal justice was provided by Justice Frankfurter in *McNabb v. United States*: "While the power of this Court to undo convictions in *state* courts is limited to the enforcement of those 'fundamental principles of liberty and justice' . . . secured by [Fourteenth Amendment due process]," the standards of *federal* criminal justice "are not satisfied merely by observance of those minimal historic safeguards . . . ." McNabb v. United States, 318 U.S. 332, 340-41 (1943) (emphasis added). Rather, "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts, [this Court has] formulated rules of evidence to be applied in federal criminal prosecutions." *Id.* Thus, in *McNabb*, the Court held incriminating statements obtained during prolonged—and hence unlawful—detention (i.e., while the suspect was held in violation of federal statutory requirements that he be promptly taken before a committing magistrate) inadmissible in federal courts "[q]uite apart from the Constitution." *Id.* at 341.

For a long, hard look at *McNabb* itself and the federal "supervisory power" generally, see Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984). Professor Beale maintains, inter alia, that "the supervisory power . . . or doctrine has blurred the constitutional and statutory limitations on the authority of the federal courts and has fostered the erroneous view that the federal courts exercise general supervision over federal prosecutors and investigators"; and that "there is no statutory or constitutional source of authority broad enough to encompass all of the supervisory power decisions." *Id.* at 1434-35.

McNabb was a signpost on the road to *Miranda v. Arizona* in 1966 and, like *Miranda* after it, *McNabb* was an unpopular decision. *See* Miranda v. Arizona, 384 U.S. 436 (1966); James E. Hogan & Joseph M. Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958). However, *McNabb* was resoundingly reaffirmed by the Court in *Mallory v. United States*, 354 U.S. 449 (1957). *McNabb-Mallory* remained controversial even after they had been superceded by *Miranda*. *See, e.g.*, LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 235 (1985) ("Mallory!" Senator Strom Thurmond had thundered during Abe Fortas' confirmation hearings, "I want that name to ring in your ears . . . Mallory, a man who raped a woman, admitted his guilt, and the Supreme Court turned him loose on a technicality . . . . Can you as a Justice of the Supreme Court condone such a decision as that?").

30. Boyd v. United States, 116 U.S. 616 (1886).

the greatest—at least as foundationally important as *Miranda v. Arizona, Gideon v. Wainwright, Bram v. United States*, and *Palko v. Connecticut*.[31]

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.

This Essay proceeds in nine Parts. Following this introductory section on the diary question presented in the *Kaczynski* case, we summarize the relevant doctrinal development from *Boyd* to the Rehnquist Court. The remainder of the Essay explores what diaries are and why diaries are—and should be recognized by our law as being—different from business papers and even from personal letters. Notwithstanding the Court's progressive dumbing down of the law of search and seizure, diaries should remain inviolate.

II. THE GAP BETWEEN THE FIFTH AND FOURTH AMENDMENTS

> It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience.
>
> Oliver Wendell Holmes (1881)[32]

Based upon prevailing constructions of the Fourth and Fifth Amendments, the government appears constitutionally able to convict and condemn Theodore Kaczynski based on the confessions contained in his diary. Briefly, the Fifth Amendment's prohibition against compelled self-incrimination does not present an insurmountable obstacle to the government, because, as the Supreme Court held in *Schmerber v. California*, "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. . . ."[33] The Court in *Schmerber* held that the compulsory blood test at

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31. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Palko v. Connecticut, 302 U.S. 319 (1937); Bram v. United States, 168 U.S. 532 (1897).

32. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Dover Publications 1991).

33. Schmerber v. California, 384 U.S. 757, 761 (1966). *Bram v. United States* was decided eleven years after *Boyd*. Bram v. United States, 168 U.S. 532 (1897). Prior to *Bram*, an involuntary confession would have been one in which torture, or some other form of physical coercion, was used to extract a confession from a suspect. *Bram* recognized other forms of coercion. Coercion might be physical or mental, anything which engendered either "hope or fear" in the mind of a suspect. *Id.* at 549. The test of *Bram* is that a confession is made voluntarily if there is no inducement or compulsion of any kind. *See id.* at 548. In the years following *Bram* an even higher standard was set, especially during the Warren Court era, as the high Court sought to remove any element of subtle coercion in the process of questioning

issue there was not "testimonial" or "communicative" in nature. Justice Brennan's opinion for the Court explained in a footnote:

> A dissent suggests that the report of the blood test was "testimonial" or "communicative," because the test was performed in order to obtain the testimony of others, communicating to the jury facts about petitioner's condition. Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a "testimonial" or "communicative" act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.[34]

In addition, records "voluntarily committed to writing" do not constitute "compelled" self-incrimination prohibited by the Fifth Amendment.[35] The Fifth Amendment, rather than existing to shield certain private writings from discovery by the government, "applies only when the accused is compelled to make a testimonial communication that is incriminating."[36] In effect, the focus of the Court's modern Fifth Amendment jurisprudence focuses not on privacy, but rather on the process of compulsion.[37] Unless the "act of producing evidence in response to a subpoena [possesses] communicative

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suspects. This led to the establishment of the *Miranda* rule.

Now, however, the pendulum seems to have swung back to the *Bram* era notion of voluntariness. *Colorado v. Connelly*, decided exactly 100 years after *Boyd*, was a case in which a mentally ill individual confessed to murder. Colorado v. Connelly, 479 U.S. 157 (1986). The Supreme Court upheld the conviction, suggesting that nothing short of actual police coercion would render a confession invalid. *See id.* It is a narrow conception of voluntariness which will not aid Mr. Kaczynski's case, and which raises interesting questions. Are the diaries reliable, or are they the ramblings of an unbalanced mind? What is the nature of the evidence against Mr. Kaczynski absent the diaries?

Kaczynski's case is unique. His confessions in diary form—if that is what they are—were not the product of coercion. However, neither were the diaries voluntarily given to the police. They were seized from Mr. Kaczynski's cabin under what appears to be a valid search warrant. An argument might be made that they were compelled by reason of the seizure, but this does not comport well with existing doctrine. For a more detailed discussion of Fifth Amendment issues, see *infra* Parts II and III.

34. *Schmerber*, 384 U.S. at 761 n.5.

35. Andresen v. Maryland, 427 U.S. 463, 473 (1976).

36. Fisher v. United States, 425 U.S. 391, 408 (1976).

37. *See* Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, 95 HARV. L. REV. 683 (1982) [hereinafter *Criminal Defendants*].

aspects of its own, wholly aside from the contents of the papers produced," the Fifth Amendment is not violated.[38]

Today's Fourth Amendment also appears to allow introduction into evidence of Kaczynski's diary. This is so, given our assumptions, because the government complied with the procedural requirements of the Fourth Amendment. The government had probable cause to search the cabin and its contents, including the diary, and the government searched pursuant to a presumptively valid search warrant.

Thus, under what Anthony Amsterdam aptly calls the "monolithic" approach to the Fourth Amendment, Kaczynski's diaries are likely to come into evidence.[39] Similarly, under the balancing of interests approach—so popular with the Burger and Rehnquist Courts—we assume that the government would win as a practical matter; when the present justices "balance" interests, the government's interests in crime-stopping are typically found weightier than the citizen's interest in being left alone.

However, as a theoretical matter this need not be so. Justice White's opinion for the Court in *Zurcher v. Stanford Daily* held that "prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search."[40] Justice White also observed that the press is "not easily intimidated—nor should it be"[41] and, indeed, *Zurcher* generated federal and state legislative action.[42] We doubt that America's diary-writers would have the organizational lobbying muscle to do the same.

In *Zurcher*, the First Amendment values at issue seemed to come into the balance against the government. Even though the government satisfied the procedural requirements of the Fourth Amendment—the government had probable cause and a valid warrant—and the search of the Stanford Daily's newsroom was held proper, at least two commentators have suggested that

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38. *Fisher*, 425 U.S. at 410.

39. *See* Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974).

> The fourth amendment . . . is ordinarily treated as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings. To label any police activity a "search" or "seizure" within the ambit of the amendment is to impose those restrictions upon it. On the other hand, if it is not labeled a "search" or "seizure," it is subject to no significant restrictions of any kind. It is only "searches" or "seizures" that the fourth amendment requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them.

Id.

40. Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978).

41. *Id.*

42. *See* RONALD J. ALLEN & RICHARD B. KUHNS, CONSTITUTIONAL CRIMINAL PROCEDURE 875 (3d ed. 1991).

"despite its holding the court acknowledges that 'reasonableness is the overriding test' and that the existence of a warrant supported by probable cause will not necessarily be sufficient to make a search reasonable."[43]

The First Amendment overtones of *Zurcher* suggest that in the case of Ted Kaczynski's diary, the scales might tip the other way.[44] Based on

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43. *Id.*

44. At least one court has "balanced" to require greater Fourth Amendment protection the procedural minima when a private diary was at issue. *See infra* Part VII.

Similarly, police searches of an attorney's law office might require that the Fourth Amendment's "sliding scale" of protection ought to slide the other way—to require *more* than governmental compliance with the procedural minima of the warrant requirements and probable cause requirement. Such raids are rare but not unprecedented. At 3:00 a.m. one night in June 1995, agents of the FBI and DEA raided the home/law office of Vermont civil rights attorney William Hunter. Hunter's wife, April Hensel, described the nighttime raid:

> At 3 a.m. on Friday morning, I was awakened by a loud banging on the front door of our home. My first thought was that perhaps one of our dogs had been barking and had awakened the neighbors. In fact, in trooped seven federal agents, some wearing bulletproof vests, and bearing a search warrant. My husband and I were dumbfounded that the government would use such a technique to obtain files from an attorney's office.
>
> My husband looked at the search warrant and complied, pulling the requested files from their cabinets and providing them to the agents. The agents videotaped the rooms in the house and in my husband's office, which is downstairs, shone flashlights in the bedrooms of my three sleeping children and visiting parents and followed me around while I made Ovaltine and my daughter's lunch to take to school.
>
> Once I saw that they were not going to brandish any weapons, I bemusedly introduced one agent to the two turtles in the upstairs bathroom and had to keep reminding them to shut the door to the basement so that the cats wouldn't come up and bother the baby chicks in my daughter's bedroom. After several hours of searching, they left with the client files identified in the warrant, as well as four computers my husband uses daily in his business.
>
> Later that day, we were shocked to learn from a Free Press reporter that my husband was a suspect in a money-laundering operation. We were even further jolted the next day when a friend called to read us the article, which quoted federal agent James Bradley as saying, "It is clear that (Frank) Sargent and Hunter had worked together to launder Sargent's money and that they used CRT (Connecticut Realty Trust) for that purpose."

April Hensel, *A Knock on the Door, A Shocking Charge*, RUTLAND HERALD (Vermont), June 14, 1995, at 15.

Hunter's neighbors were stunned. The NEW YORK TIMES described why:

> The target of the drug raid that went down here three weeks ago was not your usual suspect. Will Hunter is [the] son of two ministers, graduate of Exeter, Yale and Harvard Law School, a Rhodes scholar, a former Vermont state legislator, a newspaper publisher, and low-paid lawyer for the down and out.
>
> He drives a rusty, secondhand Mazda, buys his clothes at rummage sales and runs his law practice out of his basement. He says he earns about $20,000 a year and has accepted payment in maple syrup, cheese, cups of coffee and the tie-dyed cummerbund he wore at his wedding three years ago to April Hensel, a district coordinator for the state environmental board.
>
> . . . .

> No charges have been filed, though there are suggestions that a grand jury is meeting on the matter, and people in this mountain town of 1,500 and in surrounding towns are standing behind Mr. Hunter their 41-year-old neighbor. The Cavendish P.T.A. sent him flowers. The local newspapers are filled with letters to the editor vowing support.
>
> Joe Allen, the owner of the Cavendish General Store and a client of Mr. Hunter, said the other day: "He's the crusader for the little guy. Money is not his issue. I personally have faith in him."
>
> One of Mr. Hunter's longtime friends, Peter Welch, a lawyer and former president of the Vermont Senate, said: "Will's an eccentric. He's disorganized, charming, brilliant—and he's not a crook."

Sara Rimer, *Town Rises to Defend a Lawyer*, N.Y. TIMES, July 3, 1995, at A6; *see also* Geeta Anand, *Probe of Lawyer in Vt. Leaves Some Stunned*, BOSTON GLOBE, June 18, 1995, at 23; Sarah Strohmeyer, *The Many Trials of Will Hunter*, VALLEY NEWS (Vermont), June 25, 1995, at 1.

The raid of an attorney's law office was unprecedented in Vermont. *See* Sarah Strohmeyer, *Raid of Hunter's Law Office Unprecedented in Vermont*, VALLEY NEWS (Vermont), June 13, 1995, at 1. One leading local newspaper editorialized:

> When the government accuses a citizen of a serious crime, attention generally turns to the accused to hear what he has to say in his defense. But now that law enforcement officials have claimed that lawyer Will Hunter was involved in laundering drug money and have raided his law office to secure evidence, we're more interested in hearing what the government has to say about its behavior. It's not that money-laundering is a trivial activity. Rather, we can think of few more alarming developments than the prospect of authorities kicking down the doors of lawyers and searching files.
>
> Last week's search of Hunter's home and office followed the arrest of Frank Sargent Jr., a Windsor resident who was indicted on four counts of cocaine distribution. Before the arrest, federal agents seized several of Sargent's properties and alleged they had been acquired or financed with profits from drug-dealing.
>
> Hunter, a former state senator, served as Sargent's lawyer for real estate transactions. In court affidavits, federal prosecutors say that Hunter and Sargent established the Connecticut Realty Trust, Inc. and used that corporation to launder drug profits. They have not indicted Hunter. . . .
>
> This is frightening business, to say the least. The confidentiality of the lawyer-client relationship is sacrosanct. If the government feels free to go rummaging around the files of lawyers, how can clients feel free to fully consult with their lawyers—and how can lawyers adequately defend their constrained clients? How can we be assured that government agents won't be tempted to not only look for evidence of wrongdoing by the lawyer, but just for the heck of it, of the client, too? Such evidence might be tossed out in court, but it wouldn't necessarily have to show up. It could provide useful guidance to prosecutors looking for admissible evidence. And what about records concerning other clients? Can we be sure that government agents will resist the urge to take a peek at them, too? If enough of these raids are conducted, maybe the government will win its drug cases by default—defendants won't be able to find lawyers willing to risk such searches.
>
> But what if a lawyer is guilty of criminal activity involving a client? Should he or she be shielded from prosecution simply out of respect for the confidential nature of client relationships?
>
> No. But prosecutors and judges need to recognize that raids on lawyers' offices are so fraught with risk that they should be sanctioned only under the most extraordinary circumstances. Government officials might eventually make a convincing case that they had no other choice in their investigation of Hunter, but

Zurcher, the Supreme Court could, indeed, rule in Kaczynski's favor when balancing the relevant societal interests at stake in the case. That is both the beauty and the curse of balancing as a mode of Fourth Amendment adjudication: Unless one identifies *in advance* the relative weights to be allocated to the various interests to be balanced, balancing is nothing more than an intellectual artifice used to clothe the desired outcome in something that looks neutral and rational.

Because "balancing" is, as Amsterdam has suggested, nothing more than an "immense Rorsarch blot,"[45] we do not believe it provides a sufficiently principled way of deciding the diary case.[46] However, *Zurcher*'s use of the

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> they certainly haven't made one so far. The fact that they chose to conduct their raid at 3 a.m. only raises additional questions. Did they honestly believe they wouldn't have produced the same results if the operation had been conducted at a more reasonable hour, or were they more interested in intimidating Hunter and his family and perhaps maximizing publicity?
>
> Federal law enforcement officials could greatly reassure the public if they explained what guidelines exist to govern this type of operation. Are there certain internal tests that must be made before they launch a raid? And what sort of procedural safeguards exist to minimize abuse? Instead of appointing a federal prosecutor to oversee the search, as was done in this case, wouldn't it make more sense to allow the person being investigated to have a lawyer present?
>
> Too much is at stake to allow policy to be established on the fly by prosecutors and judges.

Searching Lawyers, VALLEY NEWS, June 14, 1995, at A6. *See generally* Kevin Reitz, *Clients, Lawyers and The Fifth Amendment: The Need for a Protected Privilege*, 41 DUKE L.J. 572 (1991); Gregory I. Massing, *The Fifth Amendment, The Attorney-Client Privilege, and The Prosecution of White-Collar Crime*, 75 VA. L. REV. 1179 (1989). For two years following the raid, the government investigated the allegations that Hunter laundered drug money. Although the investigation was called "confidential," leaks to the media were not uncommon. *See, e.g.*, Dan Billin, *Hunter "Laundering" Meeting Disputed*, VALLEY NEWS, June 23, 1995; Liz Anderson, *Witness Credibility Key to Hunter Case*, RUTLAND HERALD, July 18, 1995, at 1; John Gregg, *Hunter Actions Probed by Feds*, RUTLAND HERALD, March 7, 1996 at 1; David Ferch, *NH Ties Suspects to a Hunter Client*, VALLEY NEWS, July 20, 1995. Hunter attempted to respond to the government's investigation in William Hunter, *My Mistake: Becoming Too Personally Involved With My Clients*, VALLEY NEWS, March 11, 1996.

Almost two years to the day after the raid, Hunter was finally indicted—but not for "laundering" drug money. Rather, he was indicted on 10 counts of mail fraud and one count of bankruptcy fraud (an idea his prosecutors got perhaps from the Tom Cruise character in the movie *The Firm*). *See* Ed Ballam, *Will Hunter is Charged With Fraud*, VALLEY NEWS, July 9, 1997, at A1; John Gregg, *Hunter is Indicted on Fraud Counts*, RUTLAND HERALD, July 9, 1997, at 1; John Gregg, *Hunter Indictment Greeted With Skepticism*, RUTLAND HERALD, July 10, 1997, at 13; THE FIRM (Paramount Pictures 1993).

Your tax dollars at work.

45. Amsterdam, *supra* note 39, at 375.

46. For critiques of balancing as a constitutional methodology, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-95 (1987); Laurent B. Frantz, *Is the First Amendment Law? A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 744-53 (1963); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1440-49 (1962); Paul W. Kahn, *The Court, the Community, and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 47-59 (1987); Symposium, *When Is a Line as Long as a Rock is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication*, 45 HASTINGS L.J. 707 (1994). *See also* William Stuntz,

First Amendment, in the ostensibly exclusively Fourth Amendment context, does provide a useful clue. *Zurcher* may be read as recognizing an "intimate relation" between the First Amendment and the Fourth Amendment in searches of newsrooms. Similarly, the confluence of values underlying the First and Fifth Amendments suggests a connection between those two amendments as well. The classic listing of the "policies and purposes" underlying the Fifth Amendment privilege against self-incrimination is that provided by Justice Goldberg in his opinion for the Court in *Murphy v. Waterfront Commission*.[47] The *Murphy* Court's fifth cited policy was "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.'"[48] Thus, one could argue that there is a connection between First Amendment, Fourth Amendment and Fifth Amendment interests in the diary case. And, for a century, the United States Supreme Court recognized an "intimate relation" between the Fourth Amendment and the Fifth Amendment.[49]

Thus, Ted Kaczynski's diary appears to fall between the legs of the constitutional stool. Something else is needed to bridge the gap between the two amendments.

III. THE MISSING LINK: *BOYD V. UNITED STATES*

> *Boyd v. United States* [is] a case that will be remembered as long as civil liberty lives in the United States.
>
> Louis Brandeis (1928)[50]

Between the creation of the Republic[51] 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."[52] This principle, which had its genesis in the English tradition preceding adoption of

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Privacy's Problem and the Law of Criminal Procedure, 93 MICH. L. REV. 1016, 1047 (1995) ("[O]pen-ended judicial balancing of privacy interests against the government's regulatory needs . . . is akin to what courts did in the *Lochner* era.").

47. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). For a discussion of how the Court in *Fisher* and *Doe* has narrowed significantly any "private enclave" protected by the Fifth Amendment, see *infra* Part III.

48. *Murphy*, 378 U.S. at 55 (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (1956)). *See also* Ullmann v. United States, 350 U.S. 422, 440 (1956) (Douglas, J., dissenting).

49. *Boyd*, 116 U.S. at 633.

50. Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

51. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 405 (1968).

52. Bellis v. United States, 417 U.S. 85, 87 (1974).

the U.S. Constitution, was endowed with explicit constitutional stature more than a century ago in *Boyd v. United States*.[53] In *Boyd*, the Supreme Court held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" violated the Fifth Amendment.[54] "Papers are the owner's . . . dearest property," the Court reasoned; forcing their production "would be subversive of all the comforts of society."[55]

Boyd and Sons was charged with federal tax fraud for failing to pay import tax on thirty-five cases of plate glass. The government wanted the invoices for the plate glass. Since those invoices were in Boyd and Sons' possession, the government went to court for an order compelling the Boyds to produce the invoices.

When the case reached the United States Supreme Court, the Boyds won. A *very* conservative Supreme Court held that the Boyds could not be compelled to produce the incriminating invoices. That was a nice result for the Boyds, but that is not why the case is important here. The case is important for the *reasons* the Boyds prevailed before a court slightly to the political right of Attilla the Hun.

The Boyds did not win based on the Fourth Amendment's guarantee against unreasonable searches or seizures, or on the Fifth Amendment's guarantee against compelled self-incrimination. Rather, 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

53. Boyd v. United States, 116 U.S. 616 (1886).

54. *Id.* at 630.

55. *Id.* at 627-28; *see also In re* Grand Jury Empanelled March 19, 1980, 680 F.2d 327, 331 (3d Cir. 1982) (Prior to 1976, "an unbroken line of cases repeated the axiom that an individual's private papers were protected from compelled disclosure by the[F]ifth [A]mendment.").

> 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.[56]

The "intimate relation" between the two amendments led the *Boyd* Court to recognize two zones of privacy, one at the core of the other. Think of it as a Venn diagram: Beyond the outer limit, the government can do whatever the hell it wants, even without probable cause or warrants. If the governmental activity isn't a "search" or "seizure," for instance, then the Fourth Amendment simply doesn't apply. Beyond the outer perimeter is the Wild West.

Within the outer limit, but not at the core, is an intermediate zone of privacy. This zone isn't inviolate; if the government satisfies the procedural requirements of the Fourth Amendment—probable cause and warrant—then it could search and seize within this zone. In the nomenclature of the Fourth Amendment, searches or seizures were "reasonable" within this intermediate zone of privacy—and "reasonableness" was defined by the government's compliance with the probable cause and warrant requirements.

At the core of the *Boyd* Court's graduated zones of privacy is the inviolate zone of privacy that decided the Boyds' 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 Boyds' invoices fell within this zone. So would their diary. So, we believe, would Theodore Kaczynski's diary.

To understand why Kaczynski's diary—and nothing else, except another criminal defendant's personal diary—would likely be held to fall within the inviolate zone of privacy requires an extensive discussion of doctrinal and jurisprudential history beyond the scope of this Essay. Briefly, the 111 years since *Boyd* have seen a gradual severing of the "intimate relation" between the Fourth and Fifth Amendments, along with an expansion of the intermediate zone of privacy and a concomitant contraction of the core zone of inviolate privacy. Today, the core zone has as its sole occupant a person's diary.

The *Boyd* Court defined the core zone in terms of property rights: your inviolate zone of privacy was coextensive with your property rights. Because your property was part of you, the government couldn't force your property to "testify" against you.

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56. *Id.* at 633.

This "you are your property" idea[57] made historical sense, because the rights of "property" and "contract" were of paramount importance to the *Boyd*-era Court: This was a precursor to the *Lochner* era, when the Court enjoined Eugene Debs' American Railway Union[58] and, later, struck down minimum age laws as offensive to "substantive" due process.[59] In other words, if the citizen-accused had a superior property interest in the item (an invoice, say, or a diary), then it fell within the zone of inviolate privacy. If the government had a superior property interest in the thing, then it did not.

With the demise of the *Lochner* era of substantive due process as a protection of fundamental *economic* interests, the property rights-grounded principle of *Boyd* became a casualty. *Boyd*'s "intimate relation" idea was finally done in by two landmark decisions of the Warren Court. In *Warden v. Hayden* and *Schmerber v. California*, the Court purported to bury *Boyd*.[60] No longer would property law define the limits of constitutional protections against unreasonable searches and seizures. The Constitution "protects people, not places," the Warren Court wrote as *Boyd*'s epitaph.[61]

It was Justice Brennan's opinion for the Court in *Schmerber* that severed *Boyd*'s "intimate relation" between the Fourth and Fifth Amendments. The language and logic of the *Schmerber* opinion divide the two constitutional amendments, but perhaps the structure of Brennan's opinion brought the point

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57. For a fascinating discussion of the nexus between personhood and property, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

58. *See generally* PHILLIP FONER, HISTORY OF THE AMERICAN LABOR MOVEMENT IN THE UNITED STATES (1955); FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930); RAY GINGER, THE BENDING CROSS: A BIOGRAPHY OF EUGENE DEBS (1949); ELIAS LEIBERMAN & GERALD EGGERT, RAILROAD UNIONS BEFORE THE BAR (1950); LABOR DISPUTES: THE BEGINNINGS OF FEDERAL STRIKE POLICY (1967); ALMONT LINDSEY, THE PULLMAN STRIKE (1942); JOSEPH G. RAYBACK, A HISTORY OF AMERICAN LABOR (1966).

59. *See generally* GERALD GUNTHER, CONSTITUTIONAL LAW 439-65 (12th ed. 1992) (explaining the effects of Lochner v. New York, 198 U.S. 45 (1905)). For example, in 1918, the Court held that Congress' power to regulate interstate commerce did not authorize it to ban the products of child labor. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918). In 1935 the Court invalidated the centerpiece of the New Deal legislation, the code-making process of the National Industrial Recovery Act, as an unconstitutional delegation of Congress' authority. *See* Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). Commentators—including Jeffrey Rosen, THE NEW REPUBLIC's astute legal affairs writer—have argued cogently that the *Lochner*-era Court's substantive due process approach, as well as its corollary doctrines of dual sovereignty and states' rights, are devices deployed by activist, rather than principled conservative, courts. *See, e.g.*, Jeffrey Rosen, *Dual Sovereigns: Who Shall Rule—Congress or the Court?*, NEW REPUBLIC, July 28, 1997, at 16.

60. *See* Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, 384 U.S. 757 (1966).

61. Katz v. United States, 389 U.S. 347, 351 (1967). Rejecting the property-based reasoning of *Boyd*, the *Katz* Court held that the relevant Fourth Amendment inquiry is whether the police practice at issue "violated the privacy upon which [the defendant] justifiably relied." *Id.* at 353. Or, as Justice Harlan explained in his famous concurrence in *Katz*, the right Fourth Amendment question is whether the police violated a subjective "expectation of privacy" that society is prepared to recognize as "reasonable." *Id.* at 361 (Harlan, J., concurring).

home most graphically. Each amendment received its own separately-captioned and separately-numbered place in the *Schmerber* opinion. Divide and conquer.

To be sure, the Burger Court inexorably but carefully narrowed *Boyd*'s zone of inviolate privacy. In 1976, the Court held in *Fisher v. United States* that compelling an individual to produce her accountant's workpapers does not abridge the Fifth Amendment.[62] *Fisher* involved a subpoena requiring a defendant-taxpayer to produce an accountant's workpapers in the taxpayer's possession: The accountant's workpapers did not belong to the taxpayer, were not prepared by him, and contained no testimonial declarations by him.[63] The Court concluded that the subpoena would not violate the Fifth Amendment, regardless of how incriminating those papers might be to the taxpayer, because "the privilege protects a person only against being incriminated by his own compelled testimonial communications."[64] In addition, inasmuch as their preparation was "wholly voluntary," the records "cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else."[65]

Justice White, who wrote the principal opinion in *Fisher*, asserted that "[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time."[66] Among them, White opined, was "[t]he pronouncement in *Boyd* that a person may not be forced to produce his private papers."[67] That this portion of *Boyd* had been repeated in subsequent decisions was mere "dictum" according to Justice White.[68] Such dictum of dictum was not persuasive to White: "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him."[69] Of course, as to purely private papers—a diary, say—Justice White's *Fisher* opinion purporting to bury *Boyd* was itself dictum (third-degree dictum at that) if one agrees with White's treatment of *Boyd* and its progeny: dictum on dictum of dictum.[70] That *Fisher* did not involve private papers such as a diary was acknowledged even by *Fisher* itself: "Special problems of privacy which might be presented by subpoena of a personal diary are not involved here."[71]

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62. *See* Fisher v. United States, 425 U.S. 391, 405-14 (1976).
63. *See id.* at 391-92.
64. *Id.* at 409.
65. *Id.* at 409-10.
66. *Id.* at 407.
67. *Id.* at 408.
68. *Id.*
69. *Id.* at 409. Of course, the private papers rule *did* have a rationale; it was set out in *Boyd*, and it was based on the confluence of both the Fifth *and* Fourth Amendments.
70. We do not.
71. *Fisher*, 425 U.S. at 401 n.7.

Yet in his concurring opinion, Justice Marshall stated that the majority's opinion might provide the most complete protection yet against compulsory production of private papers.[72] He explained that the majority was concerned that if the government were to compel certain documents, the act of production itself would establish their existence, making it, not the documents, testimonial.[73] The existence of personal documents is proved solely by the act of production, but the existence of business or other non-personal documents is not.[74] This is because of the inverse relationship between the privacy of a document and the possibility of assuming its existence: the more personal, the less possible it is to verify its existence.[75] Therefore, although maintaining a diary may not be incriminating, the Fifth Amendment would protect the diary to the extent that it would incriminate the diarist.[76]

Likewise, in 1984, the Court held in *United States v. Doe* that compelled production of "business records" does not offend the Fifth Amendment.[77] Nor does compelling a bank to produce an individual's account records, as the Court held in *United States v. Miller* in 1976.[78] On the Fourth Amendment front, the Court held, in *Andresen v. Maryland* in 1976 that the Fourth Amendment did not preclude seizing a person's business records under a valid search warrant.[79]

In separate concurring opinions in *Doe*, Justices O'Connor and Marshall (joined by Brennan) disagreed over whether *Doe/Fisher* applied to private papers as well as business records, and thus over the continued existence of *Boyd*. Justice O'Connor observed:

> I write separately . . . to make explicit what is implicit in [the majority's] opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd v. United States*, but our decision in *Fisher v. United States* sounded the death knell for *Boyd*.[80]

Is "sounding the death knell" the same thing as declaring a case dead?

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72. *See id.* at 432 (Marshall, J., concurring).
73. *See id.*
74. *See id.* at 432-33.
75. *See id.* at 433.
76. *See id.*
77. *See* United States v. Doe, 465 U.S. 605, 606 (1984).
78. *See* United States v. Miller, 425 U.S. 435, 440-45 (1976).
79. *See* Andresen v. Maryland, 427 U.S. 463, 470-77 (1976).
80. *Doe*, 465 U.S. at 618 (O'Connor, J., concurring).

Justice O'Connor seems to think so, and her willingness to overturn constitutional cases is apparent today.[81] Justice O'Connor seems to have concurred in *Doe* in order to revisit her concurrence in *Fisher*, where she originally declared *Boyd* dead. Yet the Court itself had never made such a declaration, and, in *Fisher* no other justice joined her opinion. Further, her lone stance in both *Fisher* and *Doe* may be the reason that at least one federal appellate court has declined to use her concurrences to overlay the majority opinions in those cases.[82]

Justice Marshall, also concurring in *Doe*, shot back: "This case presented nothing remotely close to the question that Justice O'Connor eagerly poses and answers."[83] Like *Fisher*, the documents at issue in *Doe* were business records, "which implicate a lesser degree of concern for privacy interests than, for example personal diaries."[84] Had the majority opinion said what O'Connor said it implied, Marshall noted that "I would assuredly dissent."[85]

Doe, Fisher and *Andresen* have spawned big academic literature of doctrinal analyses grounded in the Fifth or Fourth Amendments, much of it excellent,[86] some of it awful. In a superb student Note, published in the

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81. *See, e.g.*, Agostini v. Felton, 117 S. Ct. 1997 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985)).

82. *See In re* Jeffrey Steinberg, 837 F.2d 527, 530 (1st Cir. 1988).

83. *Doe*, 465 U.S. at 619 (Marshall, J., concurring).

84. *Id.*

85. *Id.*

86. *See, e.g.*, Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1986); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Akhill Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995); Susan Rosenthal Brackley, *Now Its Personal: Withdrawing the Fifth Amendment's Content-Based Protection for All Private Papers in* United States v. Doe, 60 BROOK. L. REV. 553 (1994); Craig M. Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461 (1981); Demarco & Scott, *supra*, note 2; Ken Gormley, *One Hundred Years of Privacy*, 1992 WISC. L. REV. 1335; Robert Heidt, *The Fifth Amendment Privilege and Documents: Cutting* Fisher*'s Tangled Line*, 49 MO. L. REV. 439 (1984); Keenan, *supra* note 2; Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49 (1995); Gregory I. Massing, *The Fifth Amendment, the Attorney-Client Privilege, and the Prosecution of White Collar Crime*, 75 VA. L. REV. 1179 (1989); Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1 (1987); Jana Nesterlode, *Re-"Righting" the Right to Privacy: The Supreme Court and the Constitutional Right to Privacy in Criminal Law*, 41 CLEV. ST. L. REV. 59 (1993); Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, 41 DUKE L.J. 572 (1991); Mitchell Lewis Rothman, *Life After Doe? Self Incrimination and Business Documents*, 56 U. CIN. L. REV. 387 (1987); Katherine Scherb, *Administrative Subpoenas for Private Financial Records: What Protection for Privacy Does the Fourth Amendment Afford?*, 1996 WIS. L. REV. 1075; Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869 (1985); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727 (1993); Sara Denise Trujillo, *Are a Taxpayer's Private Papers Protected From an IRS Summons Under the Fifth Amendment?*, 59 TEMPLE L.Q. 467 (1986); Daniel B. Yeager, *Search, Seizure, and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249 (1993);

Michigan Law Review in 1977, *Boyd* was declared dead.[87] However, we do not believe *Boyd* to be dead quite yet—dismembered, diminished, disrespected by some members of the current Court, but not dead.

In 1988—only four years after *Doe*—the First Circuit observed in wry understatement, "The lower courts, interpreting *Doe*, have expressed diverging opinions" regarding Justice O'Connor's conclusion that *Doe* "sounded the death knell of *Boyd*."[88] This ought not be surprising. After all, "[o]nly Justice O'Connor . . . 'sounded the death knell of *Boyd*.'"[89] The Court's opinions in *Fisher, Doe* and *Miller* took pains to distinguish *Boyd* by pointing out that the writings in question were *business* records—not the "private papers" of the persons whom they incriminated.[90] As mentioned above, *Fisher* noted that the "[s]pecial problems of privacy which might be presented by subpoena of a personal diary are not involved here."[91]

Suzanne M. Berger, Note, *Searches of Private Papers: Incorporating First Amendment Principles Into the Determination of Objective Reasonableness*, 51 FORDHAM L. REV. 967 (1983); Gary R. Clouse, Comment, *The Constitutional Right to Withhold Private Information*, 77 N.W. L. REV. 655 (1982); Bruce I. Shapiro, Note, *From* Boyd *to* Braswell: *The Restriction of the Fifth Amendment Privilege Against Self-Incrimination Pertaining to Custodians of Corporate Records*, 11 WHITTIER L. REV. 295 (1989); Sharon Worthy-Bulla, Note, *An Analysis of* In Re Grand Jury Subpoena Duces Tecum *(United States v. Doe), Does the Fifth Amendment Protect the Contents of Private Papers?*, 15 PACE L. REV. 303 (1994).

87. Note, *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 MICH. L. REV. 184 (1977):

> Thus, in light of *Andresen* and *Fisher, Boyd* is dead. No zone of privacy now exists that the government cannot enter to take an individual's property for the purpose of obtaining incriminating information. In most cases, the zone can be entered by the issuance of a subpoena; in the rest, it can be breached by a search warrant.

Id. at 211. Not all commentators have mourned the alleged death of *Boyd*. *See, e.g.*, Henry J. Friendly, *The Fifth Amendment Tomorrow*, 37 U. CIN. L. REV. 671 (1968); Robert S. Gerstein, *The Demise of Boyd: Self-Determination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343 (1979).

88. *In re* Jeffrey Steinberg, 837 F.2d at 529.

89. *Id.*

90. *See Fisher*, 425 U.S. at 414; *Doe*, 465 U.S. at 610 n.7; *Miller*, 425 U.S. at 440.

91. *Fisher*, 425 U.S. at 401 n.7 (citations omitted). *See generally*, Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 985-87 (1977) [hereinafter *Formalism*]:

> While the premises of formalist jurisprudence were both overinclusive and underinclusive in equating personality with property, the legal realist assumption that all individual claims to right are relative to other societal interests is too extreme. Both positions are inadequate insofar as they neglect the dual nature of human experience: one is apart from as well as a part of society. The conclusion that the fourth and fifth amendments should protect absolutely a core of one's expressions and effects is impelled by the moral and symbolic need to recognize and defend the private aspect of personality.
>
> Belief in the uniqueness of each individual is one of the fundamental moral tenets of Western society. Such uniqueness inheres in being human and is not an entitlement to be granted or withheld by the state. In fact, one of the primary purposes of law is to ensure respect for this belief by preserving each person's right to a private life free from unwanted intrusion and disclosure. Justice Brandeis saw this as the purpose underlying the fourth amendment:

The lower courts, struggling to sort out *Boyd*, *Fisher*, *Andresen*, *Doe*, and the difference between "private papers" and non-private papers (such as business records) have mirrored the incoherence in the Supreme Court's opinions themselves. By 1986, only two years after *Doe* was decided, the Fourth Circuit lamented that the demise of the "[once-]clear division between production of papers with personal content and corporate content has been blurred by recent court decisions shifting the focus away from the privacy interest of an individual in his personal papers and toward protection against testimonial self-incrimination[,]" and noted that "[c]ircuits have split over the proper application of *Fisher* and *Doe* to the question [of private papers]."[92] But perhaps most notable about the circuit courts' treatment of the issue is the courts' squeamishness in confronting and deciding it. For example, the Eleventh Circuit, in a 1991 opinion, observed that:

> [A]lthough a few circuits have held that even personal papers are subject to [the reasoning of *Andresen*]. . ., this circuit has not yet

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> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone. . . ."
>
> A record of one's private beliefs and emotions tells a good deal about the person. Similarly, when one intimately and privately shares such thoughts and feelings with others he reveals much of the inner person he is. Such experiences may include the exchange of letters, tapes, or phone conversations as well as actual gathering and conversation. Just as recognition of the relationship between private reflection, socialization, and personality has led the Court to block legislative attempts to control intimate private conduct, interference with the private life by search or subpoena should be proscribed under the fourth and fifth amendments rather than tolerated as a necessary incident of criminal law enforcement. The privacy value should not suffer abridgement simply because there is reason to believe a person is involved in criminal activity.
>
> . . . .
>
> Once the right to personal privacy and the value of self-realization and private socialization informing it are acknowledged and accorded their appropriate preferred position in the constitutional hierarchy, the meaning of the cryptic observation in *Boyd* that the fourth and fifth amendments "run almost into each other" becomes clear. The amendments must be interpreted in "sufficiently varied ways to accommodate to the various contexts in which these crucial rights may be challenged."
>
> For the reasons already discussed, the fourth and fifth amendments should protect absolutely a core of personal communications, papers, and effects from nonwilled government procurement and disclosure. In determining the scope of this privilege the Court should secure a significant range of human experience intimately related to the private aspect of personality and impose limitations on the protection afforded in a principled manner consistent with the values underlying the right.

Id. (citations omitted).

92. United States v. Lang, 792 F.2d 1235, 1238-39 (4th Cir. 1986) (citations omitted).

> addressed the remaining vitality of *Boyd* with regard to personal documents. The Supreme Court's own reluctance to overrule *Boyd*, and the government's failure to press this point here counsel in favor of continuing to leave this question open in this circuit.[93]

A carefully reasoned 1993 Second Circuit decision burying *Boyd* drew an equally carefully reasoned dissent arguing that *Boyd* lives as applied to purely private papers.[94] At least two other circuits have concluded that the Fifth Amendment does not protect the contents of voluntarily prepared documents, business or personal.[95]

Other courts, before and after *Doe*, have grounded the Fifth Amendment's protection of "private papers" firmly in *Boyd*. In an excellently reasoned and widely cited 1980 case, *In re Grand Jury Proceedings*, the Third Circuit held that "the fifth amendment protects an accused from government-compelled disclosure of self-incriminating private papers, such as purely personal date books."[96] The court noted that "[a]lthough some commentators have predicted the demise of [*Boyd*], we explicitly reject the prophecy."[97]

The constitutional firewall between private papers and business records "can hardly be characterized as novel," the Third Circuit wrote.[98] Quoting the Supreme Court's opinion in *Bellis v. United States*, and citing *Boyd*, the court noted that the "Supreme Court has said that 'the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects . . . .'"[99] The court explained its reasoning:

> No case has held to the contrary. In *Fisher v. United States*, the Supreme Court held that production of an accountant's papers did not violate the taxpayer's fifth amendment rights. Plainly, the question whether the compelled production of the taxpayer's own papers would have violated his fifth amendment [sic] was not before the *Fisher* court. The fifth amendment doctrine protecting

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93. *In re* Grand Jury Investigation, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991) (citations omitted). *See also* United States v. Mason, 869 F.2d 414, 416 (8th Cir. 1989) ("The Masons argue that *Doe* and *Andresen* involved business records and that the fifth amendment continues to protect the contents of personal papers such as diaries. We need not decide this matter . . . [because the records at issue in that case were] not personal diaries.").

94. *See In re* Grand Jury Subpoena Duces Tecum, 1 F.3d 87, 95-96 (2d Cir. 1993) (Altamari, J., dissenting).

95. *See* United States v. Wujkowski, 929 F.2d 981, 983 (4th Cir. 1991); *In re* Sealed Case, 877 F.2d 83, 84 (D.C. Cir. 1989).

96. *In re* Grand Jury Proceedings, 632 F.2d 1033, 1042 (3d Cir. 1980).

97. *Id.* at 1044 n.23 (citations omitted).

98. *Id.* at 1042.

99. *Id.* (quoting Bellis v. United States, 417 U.S. 85, 87 (1974)).

an accused from producing incriminating private papers manifests its vitality by virtue of the *Fisher* court's explicit efforts to distinguish its facts from the facts in *Boyd.*

Moreover 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."

The idea that an accused is entitled to certain rights developed slowly. But the Anglo-American theory of criminal justice has taken many steps, albeit one at a time, since the days of Star Chamber and the High Commission. In *Entick v. Carrington,* an English decision issued in 1765, the foundation was laid disallowing conviction on the basis of government seized private papers of the accused. It was not just the intrusion of the search which offended the Court, but the compelled use of a man's private papers as evidence used to convict him. As Lord Camden, writing for a unanimous court recognized, "papers are often the dearest property a man can have."

> The American origins of this right may be seen as early as 1776 in the constitution of Virginia. Section 8 of the Virginia Declaration of Rights, in the midst of the enumeration of the rights of criminally accused, declared: Nor can he be compelled to give evidence against himself. Since an accused person at that time in Virginia was not permitted the right to testify at his trial, "he could neither be placed on the stand by the prosecution nor take the stand if he wished", [sic] the guarantee secured by the Virginia constitution would have been meaningless, unless it meant that by not being "compelled to give evidence against himself" that an accused could not be forced to give his private writings to be used as evidence against him in a criminal trial.
>
> But even if the somewhat obscured origin of this right dates back only one century, to the decision in *Boyd*, it has been staunchly heralded as a basic right of an accused. We believe that failure to continue to preserve this right, which we believe basic, would be a step backward in what has been a long and bitterly contested battle to accord rights to persons who stand accused of crime.
>
> Therefore, we do not believe that the government can compel production of the pocket date books of Johanson, which are his wholly personal papers, without violating his guarantees under the fifth amendment. These books were his own, kept on his person, with all entries recorded by him, not by third persons. We believe he had a rightful expectation of privacy with regard to these papers. His fifth amendment privilege is transferred to protect the same documents when in Johanson's attorneys' hands by an effective merger with the attorney-client privilege. For this reason, we affirm the district court decision to quash the portion of the subpoena duces tecum ordering production of Johanson's private papers, his personal date books.[100]

And, in *Butcher v. Bailey*, a bankruptcy records case decided shortly after *Doe*, the Sixth Circuit observed that although *Fisher* and *Doe* had "eroded" *Boyd*, the court did "not read either of these cases as holding that the contents of private papers are *never* privileged."[101] Instead, "it is evident from the dialogue between Justice Marshall and Justice O'Connor, in their concurring opinions in *Doe*, that if contents are protected at all, it is only in rare situations, where compelled disclosure would [as Marshall put it] break 'the heart of our sense of privacy.'"[102] Because the records at issue were "not so

100. *Id.* at 1043-44 (citations omitted).

101. Butcher v. Bailey, 753 F.2d 465, 469 (6th Cir. 1984).

102. *Id.* (quoting *Doe*, 465 U.S. at 619 n.2 (Marshall, J., concurring)).

intimately personal as to evoke serious concern over privacy interests," they were held not privileged.[103]

The Ninth Circuit, the court that might well decide the Theodore Kaczynski diary issue, implied, in the 1985 post-*Doe*, post-*Fisher*, post-*Andresen* case of *In re Grand Jury Proceedings (Terry)* that because a subpoena demanding "personal journals, files related to the purchase of fishing boats, stock transactions, escrow statements, and receipts . . . could . . . relieve the government of proving the existence, possession, or authenticity of the records, and, thus could be incriminatory," the act of production would violate the Fifth Amendment.[104] The *Terry* court also opined, however, that "private papers" received no special constitutional protection.[105]

Similarly, in *United States v. MacKey*, a case decided after *Fisher* but before *Doe*, the Ninth Circuit relied upon the distinction between private papers and business "entity" papers, which involved a corporate executive's "diary" planner and desk calendar.[106] The court held that, notwithstanding some "indicia that might point to a conclusion that the documents were MacKey's personal papers, other facts persuade us that they are properly discoverable corporate papers."[107] The papers were not personal because they "were kept in his office there [at the corporation] and used by him in the day-to-day management of the corporation;" he "used the diary and calendar to record business meetings and transactions that he conducted as an executive of" the corporation.[108] "The fact that he also made some personal notations of a non-business nature is not sufficient to *shroud them with the Fifth Amendment protection reserved only for purely personal papers.*"[109] In recognizing that the Fifth Amendment does indeed "shroud" papers that are "purely private," the Ninth Circuit in *MacKey* perhaps anticipated *Doe* and the constitutional line separating truly private papers from business records.[110]

Several cases stand for the proposition that if a criminal defendant, without being compelled to do so, creates inculpatory writings in a diary, and the government obtains them without compelling the defendant to authenticate

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103. *Id.*

104. *In re* Grand Jury Proceedings, 759 F.2d 1418, 1421 (9th Cir. 1985).

105. *Id.* at 1419.

106. United States v. MacKey, 647 F.2d 898 (9th Cir. 1981).

107. *Id.* at 901.

108. *Id.*

109. *Id.* (emphasis added). The *MacKey* court quoted with apparent approval the Pennsylvania district court's opinion in *United States v. Waltman*: "If this personal record [diary] was mingled with notations of a corporate nature, the document loses the cloak of protection and privilege guaranteed by the Fifth Amendment." *Id.* at 900 (quoting United States v. Waltman, 394 F. Supp. 1393, 1394 (W.D. Pa. 1972). As the *MacKey* court noted, *Waltman* was reversed on other grounds by the Third Circuit.

110. Whether *MacKey* survives *Terry* remains an open question in the Ninth Circuit.

or vouch for those writings, then the Fifth Amendment is not violated.[111] The First Amendment isn't either.[112]

Yes, but . . . these cases, notwithstanding their sometimes passionate defense of *Boyd*'s recognition of an inviolate zone of privacy for private papers, miss what we believe to be the central teaching of the *Boyd* opinion itself: The constitutional source of this core zone is not the Fourth Amendment *alone*, nor is it the Fifth Amendment *alone*, but rather it is the intersection—the "intimate relation," as *Boyd* put it—between the Fourth Amendment *and* the Fifth Amendment. When the two tap roots of *Boyd* are divided from one another, the inviolate zone withers.

These circuit cases tend to treat *Boyd* as nothing more than a Fifth Amendment case. Those decisions usually turn on whether a subpoena compels the act of production of private (or business) papers. In Kaczynski's case, however, he was not being compelled to "produce" his private diary. He had already produced it, over the years, as he was writing it. The government didn't need him to "produce" it: The government already *had* it. They *had* it because they had searched and ransacked his home pursuant to a presumptively valid search warrant. Thus, a court might forget the private nature of the diaries and rule against Kaczynski under the Fifth Amendment alone because he was not compelled by the government to "produce" the diary. He loses under the Fourth Amendment alone because the procedural requirements were met: There had been a warrant and probable cause.[113]

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111. *See, e.g.*, People v. Frank, 700 P.2d 415 (Cal. 1985) (search warrant for defendant's diary invalid because affidavit failed to provide probable cause that the diary existed and was present at the search location); People v. Sirhan, 497 P.2d 1121 (Cal. 1972) (holding that defendant's private journals were properly admitted, but Fifth Amendment not addressed); People v. Miller, 60 Cal. App. 3d 349 (1976) (holding defendant's diary properly admitted); State v. Barrett, 401 N.W.2d 184 (Iowa 1987) (holding that it was not a violation of Fifth Amendment to admit defendant's 143 page personal journal). *See generally, e.g.*, JOHN M. BURKOFF, SEARCH WARRANT LAW AND DESKBOOK § 18.3, at 18-15; 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE (2d ed. 1987); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2263, 2264, at 378-86 (John T. McNaughton rev. ed., 1961).

112. *See, e.g.*, Moody v. United States, 977 F.2d 1425 (11th Cir. 1992). For a discussion of *Moody* see *infra* Part IX.

113. Other courts have held that *Boyd*'s core "zone of privacy" for personal papers has survived the narrowing of *Fisher* and *Doe*. *See In re* Grand Jury Subpoena Duces Tecum, 741 F. Supp. 1059, 1068 (S.D.N.Y. 1990) ("Indeed, such papers and statements are statements of the witness and thus among the most powerful forms of proof in the law."). As the district court noted:

> Implicit in *Boyd* are the corollary realities that one's papers can be an extension of oneself and may exist to some extent because of the limitations of one's faculties—the ability to remember and the need or desire to write down thoughts to clearly formulate and to record them for future use. If all minds could recall perfectly . . . there would be little need to write but for the desire to share these mental processes with others or to see the satisfaction of words on paper.

Id.

"If the Fifth Amendment is to stand for our constitutional preference for an accusatorial system, it must protect the divulgence of the contents of one's mind, one's thought processes, when those testimonial

Ted Kaczynski's diaries were not subpoenaed. Rather, government agents seized them from his cabin. In the cases cited *supra*, the courts decided whether the government could merely *subpoena* documents, not whether it could seize them.[114] Subpoenas contain the "substance and essence," and "effect[] . . . [the] substantial purpose" of the incidents of searches and seizures.[115] They constitute a "figurative" or "constructive" search.[116] Thus, while subpoenas fall within a category of searches and seizures, they are "divested of many of the aggravating incidents" thereof.[117] Concern for privacy should therefore be even greater in actual seizures.

These cases suggest that, although certain kinds of papers might be difficult to pigeonhole as either "personal" papers or "business" papers, *Boyd* and the Fifth Amendment still—even in the post-*Fisher* and *Doe* world—carve out an inviolate zone of protection for purely private papers. The issue for us now becomes: If such an inviolate zone of privacy exists, does a personal diary fit within it?

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.

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divulgences—be they oral or written communications—would self-incriminate." *Id.* at 1068-69 (citations omitted). Among other fundamental values, the Fifth Amendment reflects "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.'" Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

Fifth Amendment considerations aside, the balance of "the interests of privacy, the desire to preserve the autonomous functioning of the individual, and practical considerations outweigh the need for incriminating evidence and support the retention of the privilege for private papers." *In Re* Grand Jury Subpoena Duces Tecum, 741 F. Supp. at 1069. A combination of the First, Fourth, and Fifth Amendments safeguard not only privacy and protect against self-incrimination, but also conscience, human dignity, and freedom of expression of our most personal thoughts. *See* Stanford v. Texas, 379 U.S. 476, 485 (1965). Thus, even if a zone of privacy is not imputed into the Fifth Amendment, the fundamental right to privacy buttresses an exemption for personal and intimate thoughts and expressions. *See In Re* Grand Jury Subpoena Duces Tecum, 741 F. Supp. at 1071.

Boyd's core zone of privacy still protects the private personal nature of our thoughts and ideas—as written in a citizen's journals, notes or diaries. It cannot be invaded by a search warrant or other process of the court.

114. *See supra* notes 33 to 113 and accompanying discussion.

115. *Boyd*, 116 U.S. at 635.

116. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 202 n.28 (1946) (citations omitted).

117. *Boyd*, 116 U.S. at 635.

Further, to a great extent, the Warren Court and its successors have, indeed, buried *Boyd*. Today, in almost all instances, Fourth Amendment "reasonableness" is defined solely in terms of the government's satisfying the *procedural* requirements of the Fourth Amendment: So long as they have probable cause and a warrant, the search and seizure is "reasonable" and therefore constitutional. 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.

IV. PRIVATE PERSONAL DIARIES ARE DIFFERENT: *BOYD*'S LAST STAND

> [T]he essential principle of *Boyd*—that the compulsory production of a man's private papers to establish a criminal charge against him violates the Fifth Amendment—has been frequently reaffirmed by the United States Supreme Court.
>
> Maine Supreme Court (1990)[118]

> Indeed, it would be difficult to imagine what "papers and effects" should be more entitled to privacy than one's personal diary.
>
> Colorado Supreme Court (1976)[119]

The United States government rarely seeks to base capital prosecutions on the private diaries of defendants. In at least one recent murder trial in federal court—the trial of Walter Leroy Moody for the mail bomb assassination of Eleventh Circuit appellate Judge Robert S. Vance[120]—the government succeeded in introducing into evidence a diary in a non-capital murder prosecution.[121] According to the opinion, Moody's appellate counsel did challenge use of the diaries, which may not even have been genuinely private.[122] In any event, Moody's challenge apparently was based solely on the First Amendment—not on the Fourth Amendment and not on the Fifth Amendment, much less on *Boyd*'s bridge between the two.

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118. State v. Andrei, 574 A.2d 295, 298 (Me. 1990) (dictum).

119. People v. Williams, 557 P.2d 399, 403 (Colo. 1976) (en banc) (citations omitted).

120. *See infra* Part VIII.

121. *See* Moody v. United States, 977 F.2d 1425, 1432-33 (11th Cir. 1992). Subsequent to Moody's conviction and life sentences on federal charges, the State of Alabama successfully prosecuted Moody for the capital murder of Judge Vance. At that capital trial in state court, Moody represented himself pro se; presumably his diaries were again introduced into evidence against him.

122. One book about the Moody case observes that "the Moodys [Walter and his wife Susan] kept a handwritten journal." MARK WINNE, PRIORITY MAIL 138 (1995). Susan Moody was the government's star witness against her husband at the federal trial.

Diary-dependent capital prosecutions in state court are also rare.[123] Perhaps the rarity of such cases indicates a widespread societal repugnance towards the governmental practice.[124]

In an important article published in 1993, Professors Christopher Slobogin and Joseph E. Schumacher took an empirical look at the understandings of privacy recognized and permitted by society.[125] Their study included a table of "Intrusiveness Rankings and Means of Search and Seizure Scenarios."[126] The fifty actions listed ran from "looking in foliage in public park" to"body cavity search at border." "Reading a personal diary" was ranked forty-eighth—more intrusive than "search of a bedroom," "boarding a bus and asking to search luggage," "searching a mobile home," "needle in arm to get blood," and "hospital surgery on shoulder."[127] Only two items were found to be more intrusive than "reading a personal diary"—"monitoring phone for 30 days" and "body cavity search at border."[128]

The most germane case was a 1990 judgment of the Maine Supreme Court, *State v. Andrei*.[129] In that case, the lower court cited *Boyd* "for the proposition that the production of a defendant's private papers against her will is compelling that defendant to be a witness against herself within the meaning of the Fifth Amendment" and ruled that the introduction of Hope Ann Andrei's diary would violate her rights under the Fifth Amendment.[130] The Maine Supreme Court reversed, holding that Ms. Andrei had not been "compelled" to incriminate herself. This was so because of the circumstances under which the police came to possess her diary (her husband had given it to them, pointing out the inculpatory passage).[131] Because the diary "was

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123. In *State v. Barrett*, a murder case, the defendant had left his 143-page journal at Burger Palace, an eatery in Iowa City. Restaurant employees read portions of the journal and called police. *See* State v. Barrett, 401 N.W.2d 184 (Iowa 1987). In dicta, the Iowa Supreme Court "reject[ed] the continuing application of *Boyd*-type fifth amendment protections formerly [i.e., prior to *Andresen v. Maryland*] accorded seizure of private books and papers, some lingering fifth amendment protection remains with regard to personal diaries." *Id.* at 190. The court also summarily rejected a First Amendment argument against use of the diary. These comments were dicta, however, because the appellate court reversed the conviction on other grounds. Likewise, relying on *Andresen*, a 1981 Michigan appellate court decision upheld a manslaughter conviction against a Fifth Amendment claim that the trial court erred in admitting into evidence excerpts from defendant's diaries. *See* People v. Willey, 303 N.W.2d 218 (Mich. Ct. App. 1981).

124. *Cf. In re* Trader Roe, 720 F. Supp. 645, 647 (N.D. Ill. 1989).

125. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727 (1993).

126. *Id.* at 738-39 tbl.1.

127. *Id.*

128. *Id.*

129. State v. Andrei, 574 A.2d 295 (Me. 1990).

130. *Id.* at 299.

131. *See id.* at 296.

delivered to the police in the absence of any form of compulsion," the court held that her Fifth Amendment rights were not implicated.[132]

In interesting dicta, however, the *Andrei* court found it "worth noting" that "the essential principle of *Boyd*—that the compulsory production of a man's private papers to establish a criminal charge against him violates the Fifth Amendment—has been frequently reaffirmed by the United States Supreme Court."[133] The State's challenge "focus[ed] on a reading of *Boyd* that would extend Fifth Amendment protection to a document obtained in the absence of some form of 'compulsion.'"[134]

No American who has ever kept a diary should fail to intuit the differences between diaries and business invoices or other such sorts of private papers—not even personal letters intended to be read only by the intended recipient.[135]

There is something special about a diary, and there is something especially unsettling to the American spirit in the government sending a man to death—via a court-ordered drug overdose—on the basis of his *diary*. Diaries aren't invoices. Diaries are different from business records. As Steve Thayer wrote in his lovely novel *The Weatherman*:

> [Capital prosecutor] Jim Fury 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 road map to the murders of seven

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132. *Id.* at 299.

133. *Id.* (citations omitted).

134. *Andrei*, 574 A.2d at 298.

135. *See* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles*, 93 MICH. L. REV. 857, 922 (1995).

> [W]hat protection should diaries enjoy? Unlike bodies, diaries are clearly communicative and testimony-like. At a minimum, the search for and seizure of diaries should be governed by a Fourth Amendment reasonableness test. This test should be informed by the probability that a search for a diary will be intrusive, the broad freedom of thought principles of the First Amendment, and the special treatment the Fourth Amendment accords to "papers." What's more, reading a person's diary (even if lawfully obtained) in open court, civil or criminal, can be seen as an additional invasion of privacy—an incremental "search" of a man's soul, an additional "seizure" of a woman's most intimate secrets—that once again calls for a careful judicial inquiry into the reasonableness of this public reading. Above and beyond these Fourth Amendment concerns is a key Fifth Amendment concept —reliability. Writers of diaries often fantasize or write in a personal shorthand easily misinterpreted. Though not compelled testimony in exactly the same way that forcing the witness to take the stand is compelled testimony, diaries may raise sufficiently distinct reliability issues to justify treating them differently from all other voluntarily created documents that the government wants to search for or subpoena. Therefore, we can see why the Court has intuited that diaries might differ on Fifth Amendment grounds from, say, voluntarily created business records.

Id. at 921 (footnotes omitted).

> 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 Dixon Graham Bell. A schizophrenic, clairvoyant weatherman."
>
> [Capital defendant] Dixon Bell made no attempt to match Jim Fury in volume, but he more than made up 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 nobody 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 sound like a madman. Let's see how long you keep your job. You've 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 at the camera, the red light glowing like a warning. "The words you read from my diary are probably the only reading most of these couch potatoes will get all year." He turned his attention to the jury box. "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."[136]

It feels odd for us to attempt to articulate a neutral, legal, rational principal distinguishing diaries from business papers. Charles Black, editing a brief in *Brown v. Board of Education*, made this point with spare eloquence:

> These infant appellants are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born. We have discovered no case in which such rights, once established, have been postponed by a cautious calculation of conveniences. The nuisance cases, the sewage cases, the cases of the overhanging cornices, need not be distinguished. They distinguish themselves.[137]

Boyd, a product of the late-nineteenth century, did not use the constitutional rhetoric or conceptual framework of "privacy" that sounds so familiar to us today. The view that our constitution provides a fundamental

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136. STEVE THAYER, THE WEATHERMAN: A NOVEL 353 (1995).

137. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 645 (1975).

"right to be let alone"[138]—a right to privacy—can be traced to the famous *Harvard Law Review* article written by Brandeis and Warren in 1890, four years after *Boyd* was decided.[139]

Still, the tiered zones of privacy have a contemporary resonance about them. *Boyd*'s core zone of inviolate privacy can be analogized to a woman's absolute constitutional right to an abortion during the first trimester of pregnancy—a right that cannot be encumbered by direct or indirect governmental regulation—recognized in *Roe v. Wade*[140] and reaffirmed in *Planned Parenthood v. Casey*.[141] Later in the developmental stages of fetal life, the Constitution does allow limited governmental regulation—much as *Boyd*'s zone of intermediate privacy allows governmental intrusion, but only if the procedural requirements of the Fourth Amendment are satisfied.

For example, Justice Douglas wrote in *Griswold v. Connecticut* that "[v]arious [constitutional] guarantees create zones of privacy," among them the Fourth Amendment: The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers and effects from unreasonable searches and seizures."[142] And Justice Blackmun, in *Roe v. Wade*, wrote:

> The Constitution does not explicitly mention any right of privacy. [But] the Court has recognized that a right of personal privacy, or a guarantee of certain areas of zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments.[143]

The modern Court's privacy cases—*Griswold* as well as *Roe*—are, of course, controversial among legal scholars,[144] largely because of the lack of textual support for the generalized "right to be let alone" recognized by *Roe* and *Griswold* and their progeny.[145]

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138. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

139. Samuel O. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

140. Roe v. Wade, 410 U.S. 113 (1973).

141. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

142. Griswold v. Connecticut, 381 U.S. 779 (1965).

143. *Roe*, 410 U.S. at 152 (citations omitted).

144. The scope of the right to privacy in *Griswold* and *Roe* are as hazy as their sources in the Constitution. One student commentator distinguished between two definitions of privacy: (1) A "right of selective disclosure," or interest in control of information; and (2) a "private autonomy" of choice about performing acts or undergoing experiences. Tyler Baker, Note, *Paris and Roe: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161 (1974).

145. In *Griswold*, Justice Douglas denied that he was "Lochnerizing": "Overtones of some arguments suggest that [*Lochner*] should be our guide. But we decline that invitation . . . we do not sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems,

The discussion in *Griswold* and *Roe* of "penumbras" and "emanations" from explicit constitutional guarantees has also made those privacy decisions controversial with the courts, perhaps justly so.[146] But the constitutional quicksand in which *Griswold* and *Roe* grounded the right to contraception and

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business affairs, or social conditions. This [contraception] law, however, operates directly on an intimate relation of husband and wife . . . ." *Griswold*, 381 U.S. at 481-82. *But see* John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920 (1973).

Gunther has cited *Griswold* and *Roe* as possible examples of a "revival of substantive due process for noneconomic rights," including privacy, autonomy, family relations, and a right to die. GERALD GUNTHER, CONSTITUTIONAL LAW 491 (12th ed. 1992). Indeed, Gunther suggests, *Griswold* and *Roe*

> built on an aspect of the *Lochner* tradition that never wholly died. . . . The *Lochner* era's protection of 'fundamental values' was not wholly limited to economic rights: to the Court of that era, there was no sharp distinction between economic and noneconomic, 'personal' liberties; some of the *Lochner* era decisions did protect personal rights; and the modern court has no qualms about citing those decisions.

Id. at 491.

Even the aspect of *Lochner* that curtailed economic regulation at times seems no deader than *Boyd*. Witness the Court's recent "takings" cases, for instance. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

It has been argued cogently that the liberty of contract and right to use property—the dominant rights in the *Lochner* era—possess at least as much textual and historical support as the privacy rights recognized in *Griswold* and *Roe*, and perhaps they possess more. The condemnation clause of the Fifth Amendment specifically mentions "property." So does the language of the Fourteenth Amendment. *See* Paul G. Kauper, *Penumbras, Peripheries and Emanations, Things Fundamental and Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965).

A court protective of the right to property (because that right is located in the text and history of the Constitution) and skeptical of the privacy rights established by *Griswold* and *Roe* (because that right lacks support in the Constitutional text and history) ought to find the property-based reasoning of *Boyd* more recognizably legitimate than the privacy-based reasoning of *Katz*, a *Griswold*-era case. Katz v. United States, 389 U.S. 347 (1967).

In fact, perhaps the time has come to give *Katz*, rather than *Boyd*, a decent burial. *See* Morgan Cloud, *The Fourth Amendment During the Lochner Era*, 48 STAN. L. REV. 555 (1996) (arguing for a return to a property-based rights theory of the Fourth Amendment). Perhaps *Katz*, not *Boyd*, is dead. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 456-57 (1989) (Brennan, J., joined by Stevens & Marshall, JJ., dissenting) ("The opinion of the plurality of the Court reads almost as though *Katz v. United States* had never been decided . . . . In taking this view, the plurality ignores the very essence of *Katz*.").

Burying *Katz*, with its rootless question-begging, subjective standard of "expectations of privacy," and praising *Boyd*'s textually—and historically—grounded constitutional frames of reference is a tantalizing possibility. Certainly *Boyd* has seniority; it was the law of the land for a century, whereas *Katz* and its mid-1960s companions are relative newcomers. Perhaps a melding of *Boyd* and *Katz* could generate a synthesis in which the scope of one's legitimate expectation of privacy is defined, or at least animated, by the legal principles of property. *Boyd* can fairly be read as a privacy case in the first place. *See* Yeager, *supra* note 86 (arguing that privacy was a protected value from the start and criticizing the false dichotomy between privacy and property); *In re* Grand Jury Investigation, 921 F.2d 1184, 1186 n.6 (11th Cir. 1991) (referring to "the privacy-based rationale of *Boyd*"). A *Katz/Boyd* hybrid could be seen as nothing more than updating the core principles of *Boyd* with the modern rhetoric of privacy. In any event, *Boyd* and *Katz* need not require different outcomes in similar fact patterns. *Compare* Hester v. United States, 265 U.S. 57 (1924), *with* Oliver v. United States, 466 U.S. 170 (1984). But that is for another essay.

146. In *Griswold*, Justice Douglas argued that "specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance." *Griswold*, 381 U.S. at 484.

abortion ought not obscure the fact that, in the *Boyd* context, the rights being protected *are* rooted in the specific textual language and history of two reasonably clear amendments to the United States Constitution: the Fourth and Fifth Amendments.

The most persuasive criticism of "substantive due process" as a conceptual and analytical device is its vagueness—and the perceived tendency of that vagueness to empower judges to impose their own personal views upon the organic document that is the supreme law of our land. This was the critique of the *Lochner* Court by progressives, it is the critique of *Roe* by the Religious Right, and it is the Court's self-critique. The Court, most notably in *Bowers v. Hardwick*, has hesitated to expand the scope of due process to privacy rights.[147]

Often the Court relies on history to support the rationale. Yet "historical evidence alone is not a sufficient basis for rejecting a claimed liberty interest" in privacy.[148] Furthermore, "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[149]

Moreover, *Bowers* is riddled with weaknesses. The case was decided by a five-to-four margin. Former Justice Powell has repeatedly announced his regret for supporting the opinion.[150] The Court has refused to apply the central holding of *Bowers*.[151] One significant commentator has suggested that the decision was based on animus rather than on principled grounds, posing "less of a threat to other privacy precedents than would otherwise be the case."[152]

The argument that substantive due process—whether deployed at the turn of the century to protect the economic rights of capitalists, or today to protect the privacy rights of adult women to choose to terminate early pregnancies—has power because the concept of "substantive due process" does indeed lack directive content. Gunther writes that the question raised by substantive due process analysis is "whether due process authorizes the Court to resort to fairly open-ended modes of constitutional adjudication: to pour

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147. *See* Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

148. Compassion in Dying v. Washington, 79 F.3d 790, 805 (9th Cir. 1996), *rev'd*, 117 S. Ct. 2258 (1997). *See also* Roe v. Wade, 410 U.S. 113 (1973) (holding that a woman has a fundamental liberty interest to choose an abortion although not historically protected); Loving v. Virginia, 388 U.S. 1 (1967) (holding historical anti-miscegenation statutes unconstitutional).

149. Planned Parenthood v. Casey, 505 U.S. 833, 848 (1993).

150. *See Compassion in Dying*, 79 F.3d at 803.

151. *See, e.g.*, Romer v. Evans, 116 S. Ct. 1620, 1631 (1996) (Scalia, J., dissenting) (noting that the case most relevant to the present decision, *Bowers v. Hardwick*, was not even mentioned in the majority opinion).

152. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21 at 1430 (2d ed. 1988).

into the due process clause fundamental values not traceable to constitutional text or history or structure."[153]

"Not traceable to constitutional text . . . ." But that is not a problem here. Indeed, *Boyd* itself provided a careful and persuasive analysis of *two* provisions in the constitutional text, as well as a treatment of the historical circumstances that gave rise to those two provisions—history much closer in time to the justices who decided *Boyd* in 1886 than it is to us today.

In the Fourth Amendment context, particularly, the language and history of the organic document support a citizen's right to be free of unreasonable searches or seizures by his or her government—a right to be "let alone" from such unreasonable governmental intrusions into the privacy of this nation's citizens. Indeed, in *Griswold* and *Roe,* when the Court was searching the constitutional text for "penumbras" from enumerated rights that might support a generalized right to privacy, the court turned to the Fourth Amendment.[154]

Boyd was written in the language of property because, in the Nineteenth Century, property was the heartland of personhood. In the Twentieth Century, privacy has become the heartland of personhood, and so it is unsurprising that *Katz* substituted privacy for property as the touchstone of Fourth Amendment protection. In the wake of *Katz*—and in the face of the futures forecast by Orwell's *1984* and Sinclair Lewis' *It Can't Happen Here*[155]—perhaps the best way to frame the issue is the way Anthony Amsterdam did in 1974:

> The ultimate question [of the permissibility of any peculiarly invasive criminal surveillance or investigative practice is whether,] . . . if the particular form of surveillance . . . is permitted to go unregulated by the constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.[156]

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153. GUNTHER, *supra* note 145, at 491.

154. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

155. *See* GEORGE ORWELL, 1984 (1949); SINCLAIR LEWIS, IT CAN'T HAPPEN HERE (1935).

156. Anthony Amsterdam, *supra* note 39, at 58 (quoted in *Riley*, 488 U.S. at 456 (Brennan, Marshall, Stevens, JJ., dissenting)). Amsterdam's article has been quoted close to 700 times by various state and federal courts. At least six courts have quoted his statement from page 403.

In 1980, Federal District Judge Douglas W. Hillman, in a suppression motion, determined that "isolated instances of aerial surveillance over 'open fields' do not offend the Constitution." United States v. DeBacker, 493 F. Supp. 1078, 1081 (1980). Judge Hillman used Amsterdam's article to determine that, in open fields cases under the Fourth Amendment, the "ultimate question . . . is not whether the surveillance . . . occurred in 'open fields,'" but whether "the particular form of surveillance practiced by the police," if unregulated, would diminish the amount of "privacy and freedom" each citizen enjoys to a degree inconsistent with a "free and open society." *Id.*

Judge Hillman ruled that open fields are not afforded the special recognition of privacy by the courts that other areas are. *See id.* Additionally, he ruled that aerial surveillance from 50 feet above ground, in an area where airplanes frequently fly over the property at low altitudes, did not violate the defendant's

interest in privacy. *See id.*

In 1985, a panel of Eleventh Circuit judges ruled on appeal of a suppression motion that the defendant did not have a reasonable expectation of privacy in his briefcase which had been stolen three days earlier and discarded near a trash dumpster. *See* United States v. O'Bryant, 775 F.2d 1528 (11th Cir. 1985). The court quoted from Amsterdam's article and then ruled that evidence discovered in the briefcase could not be suppressed because, although authority supported the proposition that there is a privacy interest in discarded garbage within the curtilage of one's home, that privacy interest does not exist in items that are discarded outside curtilage. *See id.* at 1533-34.

The Supreme Court of Oregon, in 1988, upheld a circuit court decision to suppress evidence obtained by police in a burglary prosecution. *See* State v. Campbell, 759 P.2d 1040 (Or. 1988). The police had surreptitiously attached a radio transmitter to the defendant's car and traced the signal emissions, by plane, to observe the defendant entering and leaving a series of residences. *See id.* at 1048.

The court in *Campbell* upheld the lower court's decision to suppress the evidence, based on the Oregon Constitution. *See id.* The court framed its decision with Amsterdam's article:

> In deciding whether government practices that make use of these developments are searches, we must decide whether the practice, if engaged in wholly at the discretion of the government, will significantly impair "the people's" freedom from scrutiny, for the protection of that freedom is the principle that underlies the prohibition on "unreasonable searches" set forth in Article I, section 9 [of the Oregon Constitution].

Id.

The court then answered its question of whether the practice would impair freedom from scrutiny in the affirmative:

> Without an ongoing, meticulous examination of one's possessions, one can never be sure that one's location is not being monitored by means of a radio transmitter. Thus, individuals must more readily assume that they are the objects of government scrutiny. Professor Amsterdam and Justice Harlan, among others, have observed that freedom may be impaired as much, if not more so, by the threat of scrutiny as by the fact of scrutiny.

Id. (citations omitted). Since Oregon courts decide constitutional issues based on its own constitution before relying on the U.S. Constitution, the Supreme Court did not address the Fourth Amendment. *Id.* at 1049.

In another Oregon case, the Court of Appeals of Oregon, in an *en banc* decision that was reversed by the Oregon Supreme Court, decided that surveillance by a helicopter, when hovering above a citizen's property for the specific purpose of determining whether he was growing marijuana, violated the Oregon Constitution. *See* State v. Ainsworth, 770 P.2d 58 (Or. App. 1989) *rev'd*, 801 P.2d 749 (Or. 1990). The court held that:

> [T]he hovering or circling of aircraft at low elevations, when engaged in for the purpose of finding out what is on, or what is happening on, a person's property, would diminish the privacy and freedom of citizens to a point that is inconsistent with the free and open society envisioned by the framers of Oregon's Constitution.

Id. at 61.

In 1990, the Supreme Court of New Jersey affirmed a superior court decision to suppress evidence of the defendants' garbage at trial. State v. Hempele, 576 A.2d 793 (N.J. 1990). The court framed as its "ultimate question" as whether, "if garbage searches are 'permitted to go unregulated by constitutional restraints,' the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." *Id.* at 802.

The court decided that, under the New Jersey Constitution, citizens do have a legitimate privacy interest in the contents of their garbage. *See id.* at 805. In reference to Professor Amsterdam's article, the court stated, "[w]e expect officers of the State to be more knowledgeable and respectful of people's privacy than are dogs and small children." *Id.*

Finally, in 1991, the U.S. Court of Appeals for the Eighth Circuit affirmed a district court opinion

Boyd's interpretation is not the only aspect of the Fourth Amendment that exists today gasping for breath on life support. The procedural protections of the Fourth Amendment—as defined by the Burger and Rehnquist Courts—are simply inadequate to vindicate the privacy interests of an American citizen in preventing his government from sending him to death row based on his private diary. The current Supreme Court's disrespect for the Fourth Amendment is no longer news, and over the past two decades the Court has inexorably deregulated police procedures when it comes to searches and seizures. Today, the procedural protections of the Fourth Amendment—the probable cause and warrant requirements—have less life in them than *Boyd*. As often as not, the police need neither probable cause nor a warrant. When they do, probable cause has been defined out of existence by *Illinois v. Gates*, and long ago the exceptions to the warrant requirement had been swallowed up by its multifarious exceptions.[157]

Perhaps, as some have suggested, the procedural safeguards of the Fourth Amendment have become casualties of the war on drugs.[158] Yet even the war on drugs may have limits that even the Supreme Court will recognize. In 1997, the Court did the unthinkable: it actually struck down a state's (Georgia's) drug-testing policy. The policy required candidates for political office to submit to drug testing, regardless of the existence of probable cause

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denying the defendant's motion to suppress evidence of firearms that were found by police in his rented storage shed. *See* United States v. Hendrickson, 940 F.2d 320 (8th Cir. 1991). In reference to Professor Amsterdam's article, the appellate court framed its question of whether a storage facility manager, reporting to police officers her suspicion of the defendant's actions, violated the defendant's privacy interest. *See id.* at 322. The court decided that the manager's observations did not. *See id.* at 323.

157. Illinois v. Gates, 462 U.S. 213 (1983).

158. Justice Brennan, joined in an eloquent dissent by Justices Stevens and Marshall, in a case involving aerial surveillance by police in a helicopter 400 feet above the defendant's greenhouse, wrote that the aerial observation did not constitute a "search or seizure" so as to trigger the procedural requirements of the Fourth Amendment:

> It is difficult to avoid the conclusion that the plurality has allowed it's analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of the current concern over drug trafficking, that the scope of the Fourth Amendment's protection does not turn on whether the activity disclosed by a search is illegal or innocuous. We dismiss this as a 'drug case' only at the peril of our own liberties.

Florida v. Riley, 488 U.S. 445, 463 (1988) (Brennan, J., dissenting). *See also* Paul Finkleman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); Stephen A. Saltzburg, *Another Victim of Ilegal Narcotics*, 48 U. PITT. L. REV. 1 (1986); David O. Stewart, *The Drug Exception*, 76 A.B.A. J. 42, May 1990.

For various fascinating discussions on the war on drugs, see generally Randy E. Barnett, *Bad Trip*, 103 YALE L.J. 2593 (1994); Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 8 CORNELL L. REV. 343 (1996); Stephen Glass, *Don't You D.A.R.E., An Anti-Drug Program Strong-Arms its Critics*, NEW REPUBLIC, March 3, 1997, at 18; Michael Pollan, *Opium Made Easy*, HARPERS, April 1, 1997, at 35; William F. Buckley, Jr., *Abolish the Drug Laws?*, NATIONAL REVIEW, Feb. 12, 1996, at 32.

or articulable suspicion.[159] Georgia's policy was laughably silly, but it is still significant that the Rehnquist Court struck it down.

If there is hope for candidates for political office in Georgia, then perhaps there is hope for our diaries. Perhaps the Court will recognize that, in terms of individual privacy values—the touchstone of Fourth Amendment analysis at least since *Katz*—a citizen's private diary is fundamentally different from a dime bag of crack cocaine.

Even this United States Supreme Court—five of them, anyway—must understand that diaries are different. And diaries are different in precisely the ways articulated by the language of the *Boyd* opinion itself. Much of the *Boyd* Court's rhetoric—the property rights stuff, for instance—sounds quaintly archaic today. But not when it's read with a *diary* in mind. Listen to *Boyd*:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but 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 or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.[160]

Some courts and commentators have predicted that diaries would receive no special protection from the Burger Court and its successor.[161] We remain optimistic, however: The diary issue cuts across the traditional categories of "liberal" versus "conservative" judicial philosophy. Even New York judge Harold Rothwax, no soft-on-crime bleeding-heart-friend-to-criminals-and-the-ACLU, wrote, in a 1993 opinion citing *Boyd*, that "there may be certain

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159. Oral Argument, Chandler v. Miller, No. 96-126, 1997 WL 19002; Chandler v. Miller, No. 96-126, 65 USLW 4243 (April 15, 1997).

160. *Boyd*, 116 U.S. at 630.

161. *See, e.g.*, State v. Barrett, 401 N.W.2d 184, 191 (Iowa 1987) (citations omitted).

personal documents, such as diaries, which because of their private nature remain protected from compelled disclosure to the government."[162]

Perhaps Judge Rothwax keeps a diary.

V. "DIARY IN FACT—DIARY IN FORM:"[163] MARY CHESTNUT'S DIARY

> [Mary Chestnut's book *A Diary From Dixie*] is an extraordinary document—in its informal department, a masterpiece . . . ."
>
> Edmund Wilson (1972)[164]

> [The] Diary is more genuinely literary than most Civil War fiction.
>
> C. Vann Woodward (1981)[165]

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.[166] The word first appeared in 1581: "Thus most humbly I send unto yor good Lo this last weeks Diarye."[167] 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 with ourselves by diaries."[168]

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."[169] Diarists record to fashion their lives in letters, secretly, lest

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162. *In re* Grand Jury Subpoena, 157 Misc. 2d 432, 437 (1993) (citing *Boyd*, 116 U.S. at 630).

163. "Diary in Fact—Diary in Form" was C. Vann Woodward's title for his introductory essay to his edited version of the classic Civil War diary of Mary Chestnut. MARY CHESTNUT'S CIVIL WAR xv (C. Vann Woodward ed. 1981).

164. EDMUND WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 279 (1962).

165. MARY CHESTNUT'S CIVIL WAR, *supra* note 163, at xv.

166. IV OXFORD ENGLISH DICTIONARY 612 (2d ed. 1989).

167. *Id.* (citing WILLIAM FLEETWOOD, ELLIS ORIGINAL LETTER SERIES I (1581)).

168. *Id.* (citing BENJAMIN D'ISREALI, CUR. LIT. DIARIES (1791-1823)).

169. M. H. ABRAMS, A GLOSSARY OF LITERARY TERMS 15 (5th ed. Holt, Rinehart & Winston

anyone know them quite. Nellie Ptaschkina writes, "[My diary] is a record of my thoughts and feelings. It was the wish to write them down that gave me the idea of this diary . . . ."[170] Emily Carr: "Yesterday I went to town and bought this book to enter scraps in . . . to jot me down in, unvarnished me, old me."[171] A diary is her confessor and confessional. It alone receives her purgation, lest she betray herself or another.

The diaries of Saint 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."[172] Florida Scott-Maxwell: "[My diary] is more restful than conversation, and for me it has become a companion, more a confessional."[173]

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."[174] Kaethe 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. "[175] 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] true autobiography is almost an impossibility . . . man is bound to lie about himself. . . . I am convinced that . . . sometimes one may, out of sheer vanity, attribute regular crimes to oneself."[176] 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

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1988).

170. NELLIE PTASCHKINA, THE DIARY OF NELLIE PTASCHKINA 25 (Pauline D. Chary, trans., 1923).

171. EMILY CARR, HUNDREDS AND THOUSANDS: THE JOURNALS OF EMILY CARR, November 20 (1966).

172. KATHERINE MANSFIELD, JOURNAL OF KATHERINE MANSFIELD 12/19/1920 (John Middleton Murray, ed., 1927).

173. FLORIDA SCOTT-MAXWELL, THE MEASURE OF MY DAYS 65 (1st ed. 1968).

174. MARIE BASHKIRTSEFF, MARIE BASHKIRTSEFF: THE JOURNAL OF A YOUNG ARTIST 437 (Mary J. Serrano, trans., 1919).

175. KAETHE KOLLWITZ, DIARIES AND LETTERS 111 (Hans Kollwitz, ed., Richard Winston & Clara Winston, trans., 1955).

176. *Fyodor Dostoyevsky, Notes From Underground, in* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 82 (Walter Kaufman ed., Meridian Books 1975).

> good enough to tell the truth to posterity in a document which he suppresses until there is nobody left alive to contradict him.[177]

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."[178] 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."[179]

Anne Frank's decision to carry her diary into hiding also demonstrates the kernel of terror a diarist conceals which would explode should one 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."[180]

The question why diarists write is entwined with the questions why writers write—and why anyone writes. Perhaps the existentialist poet[181] Ranier 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?"[182] 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.

The English and American language and legal lexicographical definitions of "diary" maintain a common theme: A diary is what a diary provides space for. This theme determines, in customs law, what the size, shape, and number of pages an item must have in order to be characterized as a diary.

In English usage, diary means "[a] daily record of events or transactions, a *journal*; specifically, a daily record of matters affecting the writer personally, or which come under his personal observation."[183] It also denotes

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177. *George Bernard Shaw, Sixteen Self-Sketches, in* THE GREAT THOUGHTS 382 (George Seldes ed., Ballantine Books 1985).

178. RUUD VAN DER ROL & RIAN VERHOEVEN, ANNE FRANK: BEYOND THE DIARY 4, June 12, 1942 (1993).

179. ANNE FRANK, THE DIARY OF A YOUNG GIRL 24, 8 July 1942 (B.M. Mooyaart-Doubleday trans., The Modern Library 1994).

180. CARR, *supra* note 171, at 20.

181. *See* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 134 (Walter Kaufman ed., Meridian Books 1975).

182. RANIER MARIE RILKE, LETTERS TO A YOUNG POET 9 (J. Burnham trans., 1920).

183. IV OXFORD ENGLISH DICTIONARY, *supra* note 166 (emphasis added).

"[a] book prepared for keeping a daily record or having spaces with printed dates for daily memoranda and jottings."[184]

The word has the same two meanings in American usage. The first, a record of events personal to the author: "A daily record, especially a personal record of events, experiences, and observations; a journal."[185] The second, anything suitable for writing that is prepared with the intent of keeping such personal entries: "A book for use in keeping a personal record, as of experiences."[186]

Customs decisions have relied on the second of these definitions to give legal meaning to the word: "Judicial authority . . . has adopted the crux of the lexicographic definitions that the 'particular distinguishing feature of a diary is its suitability for the receipt of daily notations.'"[187] Courts distinguish between substance and form in determining whether a particular item is a diary. So long as the book or compilation of papers is suitable for personal entries, it need not be in any particular manufactured form to fit the legal definition of diary. In close cases, courts query whether the item's "diary" portion is "essential or indispensable."[188] And "[e]ssential means something more than convenient, desirable, or preferable."[189] In other words, the "essential" test cannot rest "on outward appearances only;" rather, "[t]he resemblance to be essential must pertain to 'essence', and . . . essence is 'that which makes something what it is.'"[190]

No matter the form it takes, the essence of a diary is its provision for the daily notation of personal observations, reflections and feelings as described in the dictionary definitions *supra*: "[T]he particular distinguishing feature of a diary is its suitability for the receipt of daily notations."[191] The test for "suitability" is one of common-sense: can one make such notations in the space provided? For example, "a space of no greater size than three-eighths of an inch by 2 inches scarcely serves as a sufficient area for a register of daily events; a record of personal experiences or observations; or even a place for

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184. *Id.*

185. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 516 (3d ed. 1992); *cf.* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 351 (1990) ("a record of events, transactions, or observations kept daily or at frequent intervals: journal . . . a daily record of personal activities, reflections, or feelings").

186. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 516 (3d ed. 1992); *cf.* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 351 (1990) ("a book intended or used for a diary").

187. Brooks Bros. v. United States, 68 Cust. Ct. 91, 97 (1st Div. 1972) (quoting Baumgarten v. United States, 49 Cust. Ct. 275 (2d Div. 1962)).

188. *Id.* at 98 (citation omitted).

189. *Id.*

190. Borneo Sumatra Trading Co. v. United States, 311 F. Supp. 326, 337 (1970) (quoting WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, COLLEGE EDITION 478 (1962)).

191. Baumgarten v. United States, 49 Cust. Ct. 275, 276 (2d Div. 1962).

personal notes or memoranda."[192] Likewise, a bound item containing "fifty-three calendar pages, each bearing the month at the top and includ[ing] seven separate blocks of space devoted to one day of the week[,]" when the "space allocated to each block is . . . one-inch by 4 13/16 inches . . . was obviously not intended to be used primarily for extensive notations" and is not, therefore, a diary.[193]

To meet the suitability test, the diary must contain sufficient space for personal writings. For example, a book in which "there are more blank pages, used for recording events and appointments, than there are pages containing information [printed by the manufacturer]" measuring "4 1/4 by 7 3/8 inches in dimensions" with all but the first few pages consisting of "ruled pages allocated to the days of the year and the hours of the day and each headed with calendars for the current and following months . . . is a diary in fact and in law."[194]

A diary, then, is more than just a daily allowance, as its Latin name denotes. It is an item on which one's personal reflections, observations, and thoughts are recorded. The diary, in the words of D'Isreali, is a private matter for the author, in which he communicates with himself, not with absent others.[195] Customs courts agree with this definition, requiring sufficient space to be allocated in the pages of one's diary in order to record these very personal writings to oneself.[196]

Like Ted Kaczynski, Mary Chestnut, the incomparable Civil War diarist, called her *real* diary "journals" and "notes."[197] Married to a high-ranking member of the Confederate government, Chestnut traveled in aristocratic, patriarchal, and slave-owning circles.[198] She had a horror of slavery and called herself an abolitionist since early youth. Against male domination, she denounced it in some of the most passionate feminist writing of her time.[199]

Mary Chestnut was uniquely positioned to watch the South's headlong rush into a war it could not possibly win. "It was a way I had, always, to stumble in on the *real show*."[200] She saw a lot. And she took good notes.

She took very good notes. After the war, she used those notes—that was what she called them: "notes" and "[j]ournals"—to write a book manuscript

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192. Sormani v. United States, 33 Cust. Ct. 423, 424 (2d Div. 1954).

193. Charles Scribner's Sons v. United States, 574 F. Supp. 1058, 1063 (Ct. Int'l Trade 1983).

194. *Brooks Bros.*, 68 Cust. Ct. at 96-98.

195. *See* IV OXFORD ENGLISH DICTIONARY, *supra* note 166, at 612.

196. *See, e.g.*, *Brooks Bros.*, 68 Cust. Ct. at 91; *Baumgarten*, 49 Cust. Ct. at 275; *Sormani*, 22 Cust. Ct. at 423.

197. MARY CHESTNUT'S CIVIL WAR xvii (C. Vann Woodward ed., 1981).

198. *See id.* at xlvi.

199. *See id.*

200. *Id. at* xx (emphasis in original).

she called a "diary." When *Mary Chestnut's Diary* was published it went through several editions, and it was a critical success. "What the critics had before them," historian C. Vann Woodward wrote, was "clearly entitled a diary and was presented as such. . . . Moreover, it bore all the familiar characteristics of the genre."[201] Other than one fifteen-month gap, the diary runs from February 1861 to July 1865. Apart from the gap,

> the diary form is consistently maintained [t]hrough forty-eight copybooks of more than twenty-five hundred pages, the diarist is narrator of her own experiences, and they are 'real-life' experiences—flesh-and-blood people, real events and crises, private and public, domestic as well as historic. Recording them in her dated entries, Mary Chestnut adheres faithfully to the style, tone and circumstantial limitations of the diarist and conveys fully the sense of chaotic daily life.[202]

Most importantly, "[t]o all appearances she represents the Latin meaning of *diarium* and its denial of knowledge of the future . . . . Over all hangs endless speculation, suspense, and anxiety about the fortunes of the war and the outcome of the struggle for Southern independence. The diarist agonizes over these uncertainties."[203] Mary Chestnut's diary "therefore appears to embody the cherished characteristics peculiar to the true diary—the freshness and shock of experience immediately recorded, the 'real life' actuality of subject matter, the spontaneity of perceptions denied knowledge of the future . . . ."[204] The problem is, "we now know that the version of this work known to the public as 'diary' was written between 1881 and 1884, twenty years after the events presumed to have been reported as they happened."[205]

This is not to say that Mary Chestnut never kept a true diary. She did. She simply called it something else. "Mary Chestnut did keep an extensive diary intermittently during the years of the Confederacy, though she preferred to call it her 'journal' or 'notes.'"[206] It was "clear" to Woodward "that the Journal was never intended for publication and equally clear that from its inception the [Diary] book was."[207] Unlike the diary book, the journal was

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201. *Id.* at xv-xvi.
202. *Id.* at xvi.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at xvii.
207. *Id.*

"kept in tight security, under lock and key, and was clearly intended for no eyes but her own, not even those of her husband."[208]

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208. *Id.* at xix. In the Theodore Kaczynski case, one aspect of the government's response to the defendant's *Boyd* motion is worth a footnote. In a footnote to its brief, the government asserts that portions of Kaczynski's journal "addresses 'the reader,' suggesting that he intended to disseminate or publish the document at some point." *See* Government's Brief Opposing Defendant's Motion to Preclude Use of Private Diaries, United States v. Kaczynski, 3 n.1 (No. S-96-259-GEB) (filed July 15, 1997). Does a diarist's apparent intention that the diary address a third person, by, for example, use of language such as, "The reader will note," evince an intent, or at least a knowledge, that the journal will someday be read by others—thus possibly diluting a privacy claim grounded in *Boyd*?

We believe not. The journals of the first-listed author of this Essay contain some such language, although its purpose is to serve as reminders to the *author*—when he is reading over his own journals, he is indeed "the reader" rather than "the writer" he was when he wrote the journal in the first place. They are notes to myself—a self which, in this instance, has a poor memory. Hence the principal reason for keeping the journals or "memory books."

The history of the Anne Frank diaries reinforces our view on this score. Anne Frank wrote her diary entries to "Kitty," her name for her diary. A typical day's entry began "Dear Kitty" (or sometimes "Kit") and ended, "Yours, Anne." The daily entries suggest that Anne Frank was writing *to* her diary/Kitty. *See* THE DIARY OF ANNE FRANK: THE CRITICAL EDITION 248-51 (1989). In an early entry to her diary (June 6, 1942), Anne Frank explains:

> It's an odd idea for someone like me, to keep a diary; not only because I have never done so before, but because it seems to me that neither I—nor for that matter anyone else—will be interested in the unbosomings of a thirteen-year-old schoolgirl. Still, what does that matter? I want to write but more than that, I want to bring out all kinds of things that lie buried deep in my heart. There is a saying that paper is more patient than man; it came back to me on one of my slightly melancholy days while I sat chin in hand, feeling too bored and limp even to make up my mind whether to go out, or stay at home. Yes there is no doubt that paper is more patient and as I don't intend to show this cardboard-covered notebook, bearing the proud name of diary to anyone, unless I find a real friend, boy or girl, probably nobody cares.
>
> And now I touch the root of the matter the reason why I started a diary; it is that I have no such real friend.
>
> Let me put it more clearly, since no one will believe that a girl of 13 feels herself quite alone in the world, nor is it so. I have darling parents and a sister of sixteen. I know about thirty people whom one might call friends, I have strings of boy friends, anxious to catch a glimpse of me and who, failing that, peep at me through mirrors in class. I have relations, darling aunts and a good home, no I don't seem to lack anything, save "the" friend. But it's the same with all my friends, just fun and joking, nothing more. I can never bring myself to talk of anything outside the common round or we don't seem to be able to get any closer, that is the root of the trouble. Perhaps I lack confidence, but anyway, there it is, a stubborn fact and I don't seem to be able to do anything about it. Hence, this diary. In order to enhance in my mind's eye the picture of the friend for whom I have waited so long I don't want to set down a series of bald facts in a diary like most people do, but I want this diary, itself to be my friend, and I shall call my friend Kitty.

Id. at 180-81 (footnotes omitted).

Although Anne Frank's actual diary includes such apparent references to "the reader," she clearly intended neither her parents nor her neighbors—one of whom turned her and her family in to the Nazi occupiers—to read her diary. Her actual diary contained intimate, sometimes sexual, information that she never would have wanted her parents to read. Indeed, after the war and Anne's extermination in a Nazi death camp, her father, Otto Frank, published Anne's diary—but only after censoring it of personal information he considered offensive, in bad taste, or otherwise inappropriate for a book entitled *Diary of*

Woodward calls the journal "the genuine diary she did keep,"[209] and, in the introduction to the edition of Chestnut's diaries he edited—an introductory essay Woodward entitled *Diary in Fact—Diary in Form*—he described his editorial task as an attempt to "understand" the "true character" of Chestnut's published "diary" and therefore unpublished "journal."[210]

The journals "go far [in] explaining her concern" that "no one see it but herself."[211] While the diary book "became noted for its candor in many respects, her [j]ournal often goes much further."[212] In her journal, "Mary Chestnut permitted herself great frankness and freedom in expressing her feelings about friends, neighbors, in-laws, relatives, and immediate family, including her husband and his parents. It is here we learn, for example, that she believed her father-in-law, for whom she had mixed feelings, had sired children by one of his slaves."[213] But "[p]erhaps most closely guarded of all . . . were those secrets of Mary Chestnut's journal that concerned herself, particularly revelations of her vanity or evidence of her conceit, arrogance and ambition."[214] Mary Chestnut "was likely to mince no words in recording the quantity of human folly, pomposity, and charlatanary she encountered."[215] It is more nasty, petty, and self-aggrandizing than her published diary. Such is the nature of diaries—*real* diaries, regardless of whether their authors label them "diaries," "journals" or "notes."

Mary Chestnut finished writing her "diary" in 1884. Two years later, the Supreme Court decided *Boyd*. Four years after that, Warren and Brandeis published their classic right to privacy article in the *Harvard Law Review*.[216]

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a Young Girl. *See* Gerrold van der Stroom, *The Diaries, Het Achterhius and the Translations*, *in* ANNE FRANK: THE CRITICAL EDITION 59-75 (1989) (prepared by the Netherlands State Institute for War Documentation). For other versions of Anne Frank's diary, see, e.g., ANNE FRANK: THE DIARY OF A YOUNG GIRL (Simon & Schuster 1953); ANNE FRANK, THE DIARY OF A YOUNG GIRL: THE DEFINITIVE EDITION: A NEW TRANSLATION (Otto Frank & Mirjam Pressler eds., Doubleday 1995); ANNE FRANK'S TALES FROM THE SECRET ANNEX: THE COMPLETE VERSION—WITH NEW MATERIAL HER FATHER HAD WITHHELD FROM PUBLICATION (Doubleday & Washington Square Press 1983). For a sampling of the literature derivative of the diary, see, e.g., MEIP GIES, ANNE FRANK REMEMBERED (1987); MEYER LEVIN, THE OBSESSION (1973); WILLY LINDWER, THE LAST SEVEN MONTHS OF ANNE FRANK (Alison Meersschaert trans., 1991); CARA WILSON, LOVE, OTTO: THE LEGACY OF ANNE FRANK (1995); RUUD VAN DER ROL & RIAN VERHOEVEN, ANNE FRANK: BEYOND THE DIARY: A PHOTOGRAPHIC REMEMBRANCE (Tony Langham & Plym Peters trans. 1993). For a poignant account of Anne Frank's death at the Bergen-Belsen concentration camp, see Irma Sonnenberg Menkel, *I Saw Anne Frank Die*, NEWSWEEK, July 21, 1997, at 16.

209. MARY CHESTNUT'S CIVIL WAR, *supra* note 165, at xvi.
210. *Id.* at xvii.
211. *Id.* at xix.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at xx.
216. *See generally* Warren & Brandeis, *supra* note 139; *see also infra* Part VI.

There can be no reasonable doubt that the *Boyd* era Court would never have approved the ransacking of Mary Chestnut's home by police, the seizure of her "journal," and the use of that journal to send her to death row.

Thus, if it is lawful for the federal government to convict and condemn Ted Kaczynski based on his journals and notes, then *Boyd* is, truly, dead.

VI. "THE RIGHT TO BE LET ALONE:" LOUIS BRANDEIS' DIARY

> We are unutterably alone . . . .
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> . . . .
>
> [E]mbrace your solitude and love it. . . .
>
> . . . .
>
> What you really need is simply this—aloneness, great inner solitude.

Rilke (1903)[217]

We believe that there are two law review articles that are sufficiently, and timelessly brilliant to be indispensable to any meaningful understanding of the Fourth Amendment. Both are old, which is to say they are time-tested. The first is Amsterdam's 1974 article *Perspectives on the Fourth Amendment*.[218] In an area of constitutional law that changes rapidly and fundamentally—the only real competitor is capital punishment jurisprudence, one of Amsterdam's other specialties—his 1974 piece remains the best single articulation of basic Fourth Amendment principles. The second article—not, strictly speaking, a Fourth Amendment piece at all—is the Warren and Brandeis article, *The Right to Privacy*.[219]

It is no exaggeration to posit that the most important innovation in American jurisprudence during the last quarter of the Twentieth Century has been the constitutionalization of the right to privacy. It is also no exaggeration to situate the genesis of that right to privacy in the 1890 article by Warren and Brandeis, *The Right to Privacy*. It is perhaps no accident that the conceptual genesis of the constitutional right to privacy focused on diaries. A diary is perhaps the most potent metaphor for that which our government ought most clearly and completely "let alone."

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217. RILKE, *supra* note 182, at 17, 40, 54. Rilke defined genuine lovers as two people who serve as guardians of one another's solitude: "that love for which we must prepare painstakingly and with fervor, which will be comprised of two lonelinesses protecting one another . . . ." *Id.* at 72.

218. *See* Amsterdam, *supra* note 39.

219. *See* Warren & Brandeis, *supra* note 139.

Like most law review classics, the Warren and Brandeis piece was short. Unlike most such classics, this one was published in the *Harvard Law Review*.[220] At the time it was published, *Boyd* was only four years old.

Although published more than a century ago, the Warren and Brandeis article sounds strikingly contemporary. The piece begins:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. *Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.*[221]

And, in a passage that today's reader might reasonably think referred to the *National Enquirer*—or the trial by media of Ted Kaczynski[222]—Warren and Brandeis write:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to

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220. *See, e.g.*, Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1937) (criticizing the style and content of law review writing, and holding Harvard Law Review responsible for setting the standard).

221. Warren & Brandeis, *supra* note 139, at 193 (emphasis added).

222. In an order entered on June 29, 1997, the District Court in the Kaczynski case noted that the "pretrial publicity was substantial and some of it was of a nature inimical to Kaczynski's interests under the Sixth Amendment. . . . Kaczynski's concern about pretrial publicity is well founded." Order, United States v. Kaczynski, 2-3 (No. CR-S-96-259-GEB) (filed June 29, 1997). For an example of such pre-trial publicity, see David van Biema, *The Mounting Evidence: A Manuscript Discovered in Kaczynski's Cabin is Likely to Make the Prosecution's Job Much Easier*, TIME MAGAZINE, April 22, 1996, at 51.. On the matter of government leaks to the media in the Kaczynski case, see, e.g., Michael Taylor, *Kaczynski Lawyers Criticize FBI Over Search Warrant*, S.F. CHRONICLE, May 24, 1997, at A5.

be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons;[] and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. . . . The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability—indeed of the necessity—of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes

and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

. . . .

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public—in other words, publishes it.

. . . .

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, . . . the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against

theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.

. . . .

It may be urged that a distinction should be taken between the deliberate expression of thoughts and emotions in literary or artistic compositions and the casual and often involuntary expression given to them in the ordinary conduct of life. In other words, it may be contended that the protection afforded is granted to the conscious products of labor, perhaps as an encouragement to effort. This contention, however plausible, has, in fact, little to recommend it. If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater than that involved in painting a picture or writing a book; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life. If the test of deliberateness of the act be adopted, much casual correspondence which is now afforded full protection would be excluded from the beneficent operation of existing rules. After the decisions denying the distinction attempted to be made between those literary productions which it was intended to publish and those which it was not, all considerations of the amount of labor involved, the degree of deliberation, the value of the product, and the intention of publishing must be abandoned, and no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person,—the right to one's personality.

. . . .

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.

. . . .

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more

> important and far-reaching one. If casual and unimportant statements in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity. If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.[223]

The late twentieth century sensibility could be forgiven for forgetting that these words were published more than a century ago, only twenty-five years after the ending of our great Civil War, before either of this century's two World Wars, before Orwell's *1984* was ever written, much less realized by the invention of the parabolic microphone and the database and car faxes. If Brandeis had only known.

Perhaps the greatest legal and cultural enigmas presented by Theodore Kaczynski—and not just by the government's use of his diaries to kill him—are those raised by Sue Halpern in her haunting 1992 essay *Migrations to Solitude: The Quest for Privacy in a Crowded World*: "Why do we often long for solitude but dread loneliness? What happens when the walls we build around ourselves are suddenly removed—or made impenetrable? If privacy is something we count as a basic right, why are our laws, technology and lifestyle increasingly chipping it away?"[224]

VII. DIVIDE AND CONQUER: SENATOR BOB PACKWOOD'S DIARY

> The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.
>
> Anthony Amsterdam (1974)[225]

In the recent, forgettable debacle over former United States Senator Robert Packwood's diaries, many diarists in America were outraged that the

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223. Warren & Brandeis, *supra* note 139, at 193, 195-96, 198-200, 205-07, 213-214 (citations omitted).

224. SUE HALPERN, MIGRATIONS TO SOLITUDE: THE QUEST FOR PRIVACY IN A CROWDED WORLD (1993) (publisher's comment).

225. Amsterdam, *supra* note 39, at 403.

government could so easily profane their secrecy.[226] Yet the outrage was premature: The former senator consented to handing over the diaries.[227] He testified about the diaries in response to questioning by the Ethics Committee,[228] and he apparently did not oppose the Senate Ethics Committee's subpoena. He agreed that the *Boyd* principle had eroded.[229]

On October 21, 1993, the Select Committee on Ethics of the United States Senate served a subpoena duces tecum upon Senator Packwood. The Committee was investigating allegations that Senator Packwood had, over the years, sexually harassed women, had threatened potential witnesses to and complainants of such harassment to dissuade their coming forward with evidence, and had misused his senatorial staff to the same purpose. The subpoena commanded Packwood to produce, for the Ethics Committee's limited inspection, entries in his personal diary covering January 1, 1989, to the present. Since 1969, Packwood had kept a daily diary of his activities. According to the D.C. District Court, Packwood's diary "include[d] highly personal reflections and information about his private life."[230]

The District Court enforced the subpoena at the request of the Ethics Committee, treating the Fourth and Fifth Amendments as entities entirely separate and hermetically sealed from one another. Section III of the District Court's *Packwood* opinion dealt with the Fourth Amendment and Packwood's complaint that the subpoena authorized the Ethics Committee to "'rummage' through his most private thoughts and reflections and intimate details of his personal life."[231] The court agreed with Packwood's argument that "numerous courts have recognized the special nature of personal papers such as diaries to which they have accorded the greatest respect, and hence the broadest of constitutional protections."[232] Based on its "recognition of the peculiarly sensitive nature of personal diaries," the court purported to require more than the minimum procedural requirement of the Fourth Amendment (the probable cause and warrant requirement).[233] Rather, the court balanced interests.[234] Because the committee's subpoena proposed to conduct "a focused, temporally limited review of a fraction of the diaries of most recent origin with many passages masked to protect the most vital of Senator Packwood's

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226. *See* Lena Williams, *Private Thoughts, Public Revelations*, N.Y. TIMES, Dec. 16, 1993, at C1.

227. *See* 139 CONG. REC. S14726 (daily ed. Nov. 1, 1993) (statement of Sen. Bryan).

228. *See* Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 19 (D.D.C. 1994).

229. *See id.* at 23.

230. *Id.* at 18.

231. *Id.* at 21.

232. *Id.* at 22.

233. *Id.*

234. *Cf.* Zurcher v. Stanford Daily, 436 U.S. 547, 563-64 (1978) (balancing First Amendment interests of the press against the criminal investigation of the police).

interests in privacy," and because "the examination . . . occur[red] in the presence of Senator Packwood's counsel, . . . marked only to identify the entries perceived as relevant by the Committee," the court held the subpoena "reasonable" and therefore consistent with the Fourth Amendment.[235]

Section IV of the court's *Packwood* opinion dealt with the Fifth Amendment and *Boyd*, the case upon which Packwood was "relying principally."[236] Packwood argued that "the Supreme Court has never expressly overruled the case with regard to personal papers such as diaries."[237] Citing *Fisher* and *Doe*, the *Packwood* court concluded that Packwood's "act of producing" the diaries would "present[] no risk of incrimination beyond that he has already reduced to written or recorded form."[238]

The court in Bob Packwood's case recognized that "the material sought to be examined . . . [was] extremely personal and private in nature, and merits an appropriately exalted degree of constitutional protection, the manner in which the Ethics Committee will review these diaries respects Senator Packwood's legitimate expectations of privacy . . . ."[239] At least the FBI didn't ransack Packwood's home, search his diary, read every page, and leak selected portions to the media. Of course, Packwood wasn't the Unabomber. But, as of this writing, neither is Ted Kaczynski.

As in Justice Brennan's opinion in *Schmerber*, the District Court's opinion in *Packwood* erected a firewall between the Fourth and Fifth Amendments. Each constitutional amendment is analyzed without reference to, or mention of the other.[240] There was no connection, not even a phone line between the two vacuum-sealed chambers of the court's analysis, much less an "intimate relation." Divide and conquer.

After what happened to Bob Packwood's diary, and what will probably happen with Ted Kaczynski's diary, would you keep a diary? A *real* diary? An honest diary?

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235. *Packwood*, 845 F. Supp. at 22.
236. *Id.* at 22-23.
237. *Id.* at 23.
238. *Id.*
239. *Id.*
240. *Id.* at 21-23.

VIII. JOHN HINCKLEY'S DIARY AND RONALD REAGAN'S DIARY

Gimme Shelter.

The Rolling Stones (1968)[241]

On March 30, 1981, the President of the United States, his Press Secretary, a Secret Service agent, and a D.C. police officer were shot in an assassination attempt in Washington, D.C. A suspect, John Hinckley, was apprehended at the scene and taken into custody.[242]

On April 2, 1981, Hinckley was transferred to the Federal Correctional Institution at Butner, North Carolina to undergo psychiatric evaluation.[243]

> Formidable security measures were instituted during Hinckley's stay there: he was held in solitary confinement, kept under round-the-clock supervision, personally checked by guards every fifteen minutes, accompanied by three officers every time he left a secured area, restricted in his access to prison personnel, and even prohibited from receiving mail except from designated individuals.[244]

Hinckley was told he would be frequently searched and that his mail would be read.[245] After Hinckley ingested a large amount of Tylenol, in an apparent suicide attempt, the security measures were "further intensified[,] [s]earches were increased to twice daily, and he was transferred to a cell where he could be continually observed . . . ."[246] Thus,

> [U]nder continual observation, in solitary confinement, and with knowledge that all his personal correspondence would be read, Hinckley's exclusive outlet for private expression was his writing. He maintained a diary and wrote notes on pads provided by the prison authorities. Some of the correctional officers assigned to guard him read these papers during the cell searches—which were conducted in Hinckley's absence—although they had not been instructed to do so by anyone at Butner.[247]

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241. THE ROLLING STONES, *Gimme Shelter*, *on* GIMME SHELTER (Virgin Records 1968).
242. *See* United States v. Hinckley, 672 F.2d 115, 117 (D.C. Cir. 1982).
243. *See id.* at 126.
244. *Id.*
245. *See id.*
246. *Id.* at 127 (citation omitted).
247. *Id.* (citations omitted).

On the morning of July 23, 1981:

> [correctional] officers Meece and Stone conducted a "routine shakedown of [Hinckley's] cell while Hinckley was taking a shower." Meece searched the materials on a second bed which Hinckley used as a shelf to hold his personal effects, including writing papers and letters. The defendant kept many letters and personal papers, including attorney-client materials, in a large unmarked manila envelope. As Meece searched the contents of the envelope, item by item, his attention was drawn to certain words on a document in the defendant's handwriting. This document, written on several pages of notebook paper, was folded either in half or in thirds and was barely legible. Meece skimmed the document and handed it to Stone who was searching other portions of the cell. At that time, Hinckley knocked on the shower room door indicating that he was ready to be let out. Officer Meece showed Stone where he had found the document and then left to accompany Hinckley from the shower room. Stone quickly read the document, replaced it in the manila envelope and reported the incident to the manager of the Mental Health Unit later in the day.[248]

On July 24 and 27, 1981, corrections officers seized from Hinckley's cell several pages of his personal papers and a personal diary.[249] Hinckley's counsel moved to suppress use of the seized material as evidence at trial. Although "[i]n their motion papers counsel claimed First, Fifth and Sixth Amendment violations . . . these arguments were briefly mentioned in the papers and scarcely addressed at the hearing, the Court will consider only the Fourth Amendment claim."[250]

Solely on the basis of the Fourth Amendment, the *Hinckley* court found the search and seizure unreasonable:

> At the suppression hearing, testimony was offered by the manager of the Butner Mental Health Unit, the chief correctional supervisor and several correctional officers who were involved in the discovery and seizure of the materials. Because their testimony shows an indiscriminate, search and reading of the defendant's papers, the Court finds that the conduct of the Butner personnel was unreasonable. The seizure of the defendant's personal notes and

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248. United States v. Hinckley, 525 F. Supp. 1342, 1359 (D.D.C. 1981), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982).

249. *See id.* at 1358.

250. *Id.* at 1358 n.35.

> diary violated his Fourth Amendment rights and the government's use of the materials at trial is prohibited.
>
> . . . .
>
> [O]fficer Meece was leafing through Hinckley's papers looking for contraband when his attention was drawn to certain words at the top of a page of Hinckley's handwritten notes. These words alone neither suggested a threat of criminal activity nor does the Court find that such a reading was justified by "special considerations peculiar to the penal system." Indeed, at this point, officer Meece should have determined instantly that the document concerned Hinckley's case. He had no basis for unfolding the document and reading it in its entirety. The reading of the document, which was nearly illegible, required a close study that was unreasonable under the circumstances.
>
> The seizure of Hinckley's diary, similar to the situation in *Diguiseppe*, was an unreasonable invasion of the defendant's privacy. No member of the psychiatric staff instructed the correctional officers that a prisoner has a reasonable expectation of privacy in his personal diary unless the diary "contained information concerning imminent danger to inmate safety or prison security. . . ." The only entries in Hinckley's diary relating to his safety concern his depression, both before and after his attempted suicide. The Court does not find any legitimate government interest is served by the reading of the diary.[251]

Like his attempted assassin, President Reagan also kept a diary. The former President's diary became an issue in the criminal trial of John Poindexter, President Reagan's former national security advisor.[252]

The government charged Poindexter with conspiracy and substantive counts arising out of concealment of the National Security Counsel's Iran-Contra activities. Subpoenas decus tecum were filed for documents, including private diaries and notes, of the former President. The district court noted that:

> What is here involved is a clash between two sets of rights—that of an accused in a criminal case to relevant evidence needed for his defense, and that of a former Chief Executive to be free from coercion with respect to his papers containing both personal observations and comments on matters of state. The subject is one of both delicacy and difficulty, for significant constitutional and public policy considerations underlie both sets of

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251. *Id.* at 1358, 1362-63.

252. *See* United States v. Poindexter, 727 F. Supp. 1501, 1510-11 (D.D.C. 1989).

> rights. The Court has accordingly sought to fashion a procedure that will accommodate the interests of the defendant as well as those of the former President, and to minimize injury to both.[253]

In a section of the *Poindexter* opinion captioned "Lack of Specificity," the court explained:

> [R]elying upon decisions which condemn "fishing expeditions" and which require reasonable particularity, the former President contends next that the subpoena lacks adequate specificity. Defendant responds that, not having seen President Reagan's diaries and notes, it is impossible for him to be more specific. He goes on to contend that he has furnished sufficient circumstantial evidence upon which the Court would be justified to conclude that information relating to the categories listed in his subpoena is likely to be found in the former President's diary and notes.
>
> The Court agrees in general with that assessment. It will not place the defendant in the impossible position of having to provide exquisite specificity as a prerequisite to enforcement of the subpoena by the Court, while he is denied access to the documents in question, thus making it impossible for him to be more specific. At the same time, however, for the constitutional and privacy reasons alluded to above, the Court is not disposed to requiring President Reagan to make wholesale production of documents which ultimately may turn out to contain little or no material evidence.
>
> The obvious answer to this dilemma, and one to which all the parties hereto have agreed as appropriate with varying degrees of enthusiasm, is an *in camera* examination by the Court of the relevant excerpts from the former President's diaries, notes, and notebooks to determine whether they contain specific evidence that should be produced.
>
> Indeed, the legal and historical precedents indicate that in circumstances such as these a court should hold an *in camera* review of the Presidential papers at issue. Former President Reagan has already offered to submit to this Court the relevant portions of his diaries for such a review, and the Independent Counsel has urged the Court to accept the offer. Accordingly, President Reagan shall produce for the Court's *in camera* inspection the materials

253. *Id.* at 1502.

> sought by the subpoena, as that subpoena has been narrowed herein, by January 7, 1990.[254]

IX. WALTER LEROY MOODY'S DIARY

> I wish you what I wish myself: hard questions and the nights to answer them, the grace of disappointment, and the right to seem the fool for justice. That's enough. Cowards might ask for more. Heroes have died for less.
>
> Samuel Hazo (1996)[255]

There is one recent diary case we have not yet discussed. Walter Leroy Moody, the man convicted for the 1989 mail-bomb murder of federal appellate judge Robert S. Vance,[256] kept a journal.[257] The federal government introduced portions of Moody's journal against him at his noncapital trial in federal court, and the federal appellate court affirmed.[258]

We have reserved discussion of the Moody case until now because Moody's counsel did not base his diary challenge on either the Fifth Amendment or the Fourth Amendment, much less on *Boyd*, so it is not terribly relevant to the legal ideas set out in this Essay. Nevertheless, the factual similarity of Moody's case to the Unabomber's necessitates its inclusion here. Furthermore, explication of the Moody case is pertinent to the content of the epilogue.

Walter Leroy Moody was accused of sending letter bombs to federal appellate judge Robert Vance and to civil rights attorney Robbie Robinson. He was convicted of killing both men and sentenced to death in November 1996. According to the reported opinion of the federal appellate court affirming Moody's federal conviction, his counsel raised several challenges to the legality of the government's search of his home and pickup truck. Moody's first two arguments were generalized challenges to the quantity of probable cause and the particularity of the search warrant, matters not germane to the subject of this Essay.

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254. *Id.* at 1510 (citations omitted).

255. SAMUEL HAZO, *To a Commencement of Scoundrels*, *in* THE HOLY SURPRISE OF RIGHT NOW 22, 23 (1996).

256. *See* AP, *Mail Bomber Sentenced to Electric Chair*, L.A. TIMES, Feb. 11, 1997, at A13; *Mail Bomber Gets Death For Killing Judge*, CHI. TRIB., Feb. 11, 1997, §1, at 7. Moody was convicted in federal court and state court. He was sentenced to death in state court and life imprisonment in federal court. The definitive book about Robert Vance and his world will be published late this year: RAY JENKINS, BLIND VENGEANCE (U. Ga. Press forthcoming 1997).

257. *See* MARK WINNE, PRIORITY MAIL 138 (1995).

258. *See* United States v. Moody, 977 F.2d 1425 (11th Cir. 1992).

Moody's third argument was that "the government's searches violated his Fifth Amendment right against self-incrimination."[259] The appellate court, citing *Fisher* and *Andresen*, rejected Moody's Fifth Amendment argument, reasoning that the Fifth Amendment

> attaches only when the government compels an individual personally to incriminate himself. Because in this case all evidence seized was obtained pursuant to a valid search warrant and any statements made by Moody were voluntarily put to paper before the search, Moody cannot successfully challenge the searches under the Self-Incrimination Clause.[260]

Given *Fisher*, *Andresen*, and *Doe*, the court in *Moody* was correct in that Walter Leroy Moody loses under the Fifth Amendment alone.

Moody's fourth argument addressed the diary issue directly, but, according to the appellate court, Moody's diary challenge was based solely on the First Amendment—not on the Fifth, Fourth, or *Boyd*.[261] "Moody relies on an obscenity case, in which the defective warrant authorized executing officials to decide on their own which films were 'similar' to two films determined to be obscene by a local justice."[262] By contrast, the court explained—again correctly—that because Moody was suspected of sending threatening letters to the court upon which Judge Vance sat, and because "[t]he government also had evidence that Moody was keeping a journal or notebook about the bombings, which gave the government the cause to search for those items, Moody's First Amendment rights were in no way violated by the search."[263]

Thus, the *Boyd* issues were not raised by counsel for Moody. Because *Boyd* was not raised, the appellate court that affirmed Moody's federal conviction had no reason to engage the issues raised in this Essay. When defense counsel fails to raise *Boyd* in diary cases, judges can hardly be faulted for failing to address the issue.[264]

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259. *Id.* at 1432.

260. *Id.*

261. *See id.*

262. *Id.* at 1432 (citations omitted).

263. *Id.*

264. The divided California Court of Appeals' decision in People v. Sanchez, 30 Cal. Rptr. 2d. 111 (Cal. App. 2d 1994) provides a fascinating illustration of one court's difficulty when confronted with a diary issue that has not been adequately briefed by appellate counsel for the defense.

Arthur Anthony Sanchez was tried and convicted on first degree (noncapital) murder, and was sentenced to state prison for 26 years to life. That Sanchez strangled his estranged fiancé, "Ruth Huerta in his bedroom of his parents' house in the early afternoon of March 28, 1992, was not disputed. [Sanchez] admitted as much before and during trial. In dispute was only the degree of his culpability." *Id.* at 113.

The day the body was found in Sanchez' bedroom, he surrendered to police. About a week after the crime, Sanchez' sisters decided to air out Sanchez' bedroom and look for letters. Among Sanchez' papers were writings, in his handwriting, inculpating him in Ruth Huerta's murder. *See id.* at 114. The sisters gave the papers to an attorney, who in turn gave them to Sanchez' public defender. The public defender placed the writings in a sealed envelope and, without informing the prosecutor, delivered them—still under seal—to the clerk of the court. *See id.*

When the prosecutor learned—from other Sanchez family members—of the writings' existence and disposition, he filed a motion with the clerk "to produce and . . . unseal documents in the custody of the county clerk." *Id.* at 113. The court granted the motion. The judge personally turned the writings over to the prosecutor. *See id.* The majority of the California appellate court's panel held that neither the Fifth Amendment, nor California's reciprocal discovery statutes, were violated when Sanchez' defense attorney delivered the writings to the court. "Although defense counsel did not explain why he delivered, under seal, the inculpatory writings to the trial court, case law suggests an explanation," the appeals court majority wrote: counsel's ethical duties. *Id.* at 115-16.

The *Sanchez* majority then addressed the Fifth Amendment; the "solid authority" relied upon by Sanchez' appellate attorney was Izazaga v. Superior, 815 P.2d 304 (Cal. 1991). *Izazaga* was a Fifth Amendment case based on *Schmerber* and *Doe* (as well as Nobles v. United States, 422 U.S. 225 (1975)). However, the *Sanchez* majority observes, "in making this [5th Amendment] argument, [*Sanchez* appellate counsel] neither discusses the three cases cited by *Izazaga* [*Nobles, Schmerber,* and *Doe*] nor any other pertinent authority." *Sanchez*, 30 Cal. Rptr. 2d at 116.

On the crucial "obtained by compulsion" requirement of *Doe* and the other Fifth Amendment cases, the *Sanchez* majority dryly notes: Sanchez' counsel's "entire argument consists of this: 'they were obtained . . . by compulsion—i.e., they were obtained against [Sanchez'] will and over his objection.'" *Id.* The *Sanchez* majority, after discussing *Doe, Schmerber, Fisher,* and the other relevant Fifth Amendment cases, concludes—quite correctly, in our view—that Sanchez' Fifth Amendment argument was "mistaken." *Id.*

Judge Johnson dissented "from the majority's holding the defendant's diary was properly turned over to the prosecution." *Id.* at 123. "The majority affirms the trial court's order releasing the diary to the prosecution on a ground not raised in the parties' briefs: defense counsel had [an ethical] duty to voluntarily disclose the diary anyway." *Id.* According to the dissent, the parties' briefs "focused exclusively on the issues of whether disclosure of the diary was permissible under the criminal discovery statute" and the Fifth Amendment. *Id.* The dissent agreed with the majority's Fifth Amendment argument, but disagreed that "defense counsel had an ethical duty to disclose the diary to the prosecution." *Id.* at 124. According to the dissent, the three cases "relied upon by the majority involved physical evidence of the crime": in one case, "the victim's wallet"; in a second, "the alleged murder weapon"; and, in a third, "the boots with which the defendant allegedly tried to kick the victim to death." *Id.* Judge Johnson continues:

> I, for one, would like to hear argument on whether the defendant's private thoughts committed to paper are analogous to the evidence in the above cases. I would also like to hear argument on the ramifications of a holding incriminating writings must be voluntarily turned over to the prosecution. Would an attorney defending a tax evasion or other white collar crime involving hundreds or even thousands of documents have to make a determination as to each page of each document whether it should be revealed to the prosecution? What would the ramifications of such a rule be on the defendant's right to effective assistance of counsel? If, as the majority asserts, California law clearly holds that once defense counsel accepted the diary from defendant's sister he had a duty to turn it over to the prosecutor, we should also request additional briefing on the issue of whether defendant was denied effective assistance of counsel.

Id. at 124 & n.3.

> Although *Lee* involved evidence given to defense counsel by a third party, the court did not focus on the significance of that fact. I would like to hear argument on the consequences of a policy of revealing to the prosecutor information received in

IX. CONCLUSION: 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)[265]

"We Americans are the tell-all type," Shari Roan wrote recently in the *L.A. Times*.[266] "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."[267] We confess on "Sally and Ricki or Oprah," and we "write autobiographies that make readers blush and publishers wealthy."[268]

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 the issue—is anybody's guess.[269] Certainly the question, properly preserved, is a potential candidate for certiorari.[270]

> confidence from a third party. What effect would such a policy have on the willingness of third parties to come forward with evidence which might be helpful to the defense? What would be the effect on the defense attorney's willingness to receive such evidence? Will the mere risk that such evidence may turn out to be incriminating be sufficient to convince attorneys to adopt an attitude of calculated ignorance?
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> Before holding defense counsel owed a duty to voluntarily turn over defendant's diary to the prosecution, a duty which the trial court merely facilitated counsel in meeting, we should hear argument on the foregoing questions and other relevant considerations the parties may choose to bring to our attention.

Id.

265. Amsterdam, *supra* note 39, at 402.

266. Shari Roan, *Secrets and Lies, reprinted in* VALLEY NEWS (Vermont), June 29, 1997, at C1.

267. *Id.*

268. *Id.*

269. And this is so even if one agrees with Brandeis in *Olmstead* that *Boyd* "will be remembered as long as civil liberty lives in the United States." Olmstead v. United States, 277 U.S. 438, 474 (1928). The question is whether civil liberty still does.

270. As the LaFave and Israel treatise put it:

> The Court [subsequent to *Doe* in 1984] has not had occasion to rule on the forced production of documents that are more likely than business records to reflect the

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.[271] Finally, at the risk of allowing this Essay to begin to resemble a constitutional grab-bag opinion written by Justice Douglas, we suggest one, final intimate relation: the Eighth Amendment's guarantee against cruel and unusual punishment.

Specifically, we believe that the doctrinal formulation of the Eighth Amendment's constitutional frame of reference resonates here. According to the United States Supreme Court, a government practice offends the Eighth Amendment if it offends the "evolving standards of decency that mark the progress of a maturing society."[272] 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.[273] 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.[274] The

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> private thoughts of the subpoenaed party. Since the act of producing such personal documents is highly likely to constitute in itself a testimonial and incriminating communication, a self-incrimination challenge ordinarily will be sustainable . . . .

WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 8.12 at 438 (2d ed. 1991).

271. A 1977 Note in the *Harvard Law Review* proposed that the "paper search" rule of *Boyd* can be seen to survive *Fisher* as a function of the *Fifth Amendment*. If that point is recognized, the author suggests, the present state of the law provides reasonable protection for the central concerns expressed in *Boyd*.

> Properly read, *Fisher v. United States* stands for the proposition that no defendant may be compelled to authenticate evidence. Although this holding narrows the application of the self-incrimination clause, it adequately protects the rights of criminal defendants if the prohibitions of other amendments and evidentiary rules are properly applied. The implicit authentication doctrine of the fifth amendment prevents defendants from being forced to verify the case against them. The protection of the fourth amendment applicable to subpoenas duces tecum prohibits authorities from wholesale rummaging through a citizen's papers. Finally, the first amendment can prevent the government from probing into a defendant's most personal papers. Specific amendments answer specific concerns. Drawing on all of them, courts can forge a broad constitutional protection for all citizens' rights.

Criminal Defendants, *supra* note 37, at 702.

272. Gregg v. Georgia, 428 U.S. 153, 190 (1976) (citation omitted). *See also* Woodson v. North Carolina, 428 U.S. 280 (1976). In one California capital case decided during the Rose Bird era, the court held that, "[a]lthough the error in denying defendant's motion to suppress [his] notebooks was not prejudicial [in] the guilt phase, it had a very different effect on the penalty phase. In that stage of the trial the role of the notebooks was much greater . . . ." People v. Frank, 700 P.2d 415, 427 (Cal. 1985). *See also id.* at 433-34 (Bird, C.J., concurring).

273. *See* Reno v. ACLU, 117 S. Ct. 2329 (1997).

274. *See id.*

Court's impassioned defense of First Amendment values of free expression was a fitting way in which to usher in the *fin de siècle*. 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 siècle* 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*[275]—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.

EPILOGUE

As mentioned in the first footnote to this Essay, the first-named author clerked for Judge Vance. For this reason, the epilogue was written in the first person by Michael Mello alone. The Walter Leroy Moody case was personal to me. It was intensely personal. Judge Robert Vance was my first employer after I graduated law school.[276] Judge Vance was more than my boss, then and afterwards. He was wise man, professional mentor, hero of the civil rights wars in Alabama. To me, he was family.

His laugh was unforgettable. Judge Robert S. Vance laughed with his whole body, his entire being. It could change the barometric pressure of a courtroom or a barroom. The Judge's laugh summed up, for me at least, the

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275. *See* RANIER MARIE RILKE, LETTERS TO A YOUNG POET 18-19 (M.D. Hester Norton trans., 1993).

276. *See generally* MICHAEL MELLO, DEAD WRONG (Univ. Wisconsin Press forthcoming 1997).

way he once lived: dangerously, with brio in big gulps of Alabama Democratic politics during the bad old days when George Wallace reigned supreme and the Birmingham air around Kelly Ingram Park was filled with the sound of snarling police dogs and the threat of racist bombings. Bombings of churches, homes, offices. For a long time in Judge Vance's South, death was in the air.

But, by 1989, that had been a long time ago. Vance survived the Sixties to be appointed a federal appellate judge by President Carter in 1977. By then Judge Vance, Judge Vance's South, and Judge Vance's America, seemed safe from the haters' bombs.

In 1989, we learned that neither Judge Vance, nor Robert Robinson, another old warrior from the racial barricades of the Sixties, were safe from the haters' bombs. Now, after Oklahoma City and the World Trade Center and Pan Am 103 and Olympic Park, we know that none of us is safe from the haters' bombs.

The mail bomb that massacred Judge Robert S. Vance on the afternoon of Saturday, December 16, 1989, was probably the size of a shoebox. Upon returning to his home on the outskirts of Birmingham, Alabama, from routine weekend errands, his wife Helen remarked that he had just received in the mail a package from a fellow federal appellate judge in Atlanta who shared his interest in horses. As Judge Vance broke the package's seal, he detonated a pipe bomb packed with eighty nails. Fragments of metal and nails exploded into the Vances' kitchen at the bullet-speed of 1,300 feet per second—killing Judge Vance instantly and seriously injuring Helen Vance. Later, she would learn that a two-and-one-half-inch nail had penetrated her right breast, gone through her liver and lungs and almost exited her back.

Two days later and 400 miles away, in Savannah, Georgia, civil rights attorney Robert Robinson sat in his law office. He had just finished an exhausting day in court, and he had an hour before he was to be at a Christmas party. He took the opportunity to open the day's mail, including a box he doubtless took to be a gift. When he lifted the flap of the box, the bomb exploded with such force that his hands were blown off. Three hours later, as six surgeons worked to save his life, Robbie Robinson died.

Over the next few days, other mail bombs arrived at the NAACP office in Jacksonville, Florida, and at the federal courthouse in Atlanta. These bombs were detected before detonating. I had a capital case pending in the Eleventh Circuit, and I happened to be on the phone with a friend in the clerk's office when the bomb was discovered and the building ordered cleared. I'll never forget the sound of my friend's voice when he told me I had to get off the phone. After the bomb had been detected, someone inadvertently turned on the X-ray machine's conveyor belt. The bomb fell to the floor but did not explode. Later, when the bomb squad defused the thing, they learned

that their protective gear would have been entirely inadequate to shield them from the explosive force of the bomb and its shrapnel.

Although they never met, the white judge and the black lawyer were linked in life as they were connected in death. In 1963, Robbie Robinson became one of the first black students to enter a Savannah public high school. While he was still a teenager he was arrested, along with two companions, for challenging Jim Crow laws which reserved Savannah's beaches for whites only. Mr. Robinson became the first black student to graduate from the University of Georgia Law School. He returned to his hometown to practice civil rights law.

Meanwhile, Robert Vance, as chair of the Executive Committee of the Democratic Party of Alabama, had served with skill, courage and integrity in navigating the whitewaters of racial accommodation in Birmingham—the city where the bomb, the rope, and the gun had been used more eagerly to maintain segregation than in any other place in the South. When President Jimmy Carter appointed Robert Vance to the United States Court of Appeals for the Eleventh Circuit, Vance brought his passion for racial justice with him onto the bench.

It would be a crime against memory to remember Robert S. Vance only—or even mostly—as the federal appeals judge who was assassinated by a mail bomb detonated in the kitchen of his Mountain Brook, Alabama home a few days before Christmas in 1989. It would be equally criminal for Robbie Robinson to be remembered as the "other" fatal victim of the 1989 Christmas bombings, or even as the NAACP attorney who was murdered by a mail bomb sent to his law office two days after Judge Vance was destroyed. The way they lived is far more important and interesting than the way they were annihilated.

Ray Jenkins, a masterful storyteller, has written a superb book about the 1989 crimes and the police investigations that followed and led to the conviction of Walter Leroy Moody, a hater with a special loathing for the federal judiciary.[277] One cannot appreciate even the horror and magnitude of the former without the contextualizing biography of the latter. Without understanding the lives, one might mistakenly think that all we lost in December 1989 were a white federal judge and an activist black lawyer. We lost much, much more.

As with Thurgood Marshall before him, it seems likely that the best life gave to Robert S. Vance was not when he was a federal appeals court judge but when he was waging war with George Wallace for the soul of the Alabama Democratic Party. Marshall's vehicle was the general counsel's office of the

277. JENKINS, *supra* note 256.

NAACP Legal Defense and Educational Fund, Inc., and his battlegrounds were the federal courts. Vance's vehicle was the chairmanship of the Executive Committee of the Democratic Party of Alabama, and his battlefield was the fight for control of a party torn between George Wallace on one battlement and the national Democratic Party on the other. Vance was what was called, during the Wallace days, an Alabama Democratic Party "Loyalist"—meaning he was loyal to the national Democratic Party and its agenda (the 1964 Civil Rights Act; the 1965 Voting Rights Act, etc.) and its candidates.[278] In a lovely tribute to Judge Vance published in the *Washington Post* in early 1990, Patt Derian and Hodding Carter wrote:

> [The South] changed, changed because Southern blacks put their lives on the line to force change, . . . changed because a growing number of Southern whites decided that 'our way of life' was an affront to the teachings of their religion and the heritage of their country. Bob Vance was in the lead among them, not because he had to be there but because he loved both his state and his nation too much to live out his days in comfortable silence.[279]

Why did Robert S. Vance, of all unlikely heroes, take his stand against George Wallace and the politics of race? When so many white lawyers throughout the South sought refuge in uncomfortable silence—why did Robert Vance take Wallace on, in Wallace's own arena, of Alabama politics? Why was Robbie Robinson the one who broke the color lines at his high school and his law school?

If asked, I am certain Judge Vance—and I suspect Mr. Robinson as well—would have answered as the rescuers of Jews during the Shoah answered Kristen Monroe: that what they did was not extraordinary. It was, *for them*, the only normal response to the events going on around them. They acted only as people ought to behave when someone nearby is in need.[280] One such rescuer, an ethnic German, told Monroe, "One thing is important. I had no choice. I never made a moral decision to rescue Jews. I just got mad. I felt I had to do it. I came across many things that demanded my compassion."[281] I can hear Judge Vance responding, with eyebrow arched: "I did what I did because it was the right thing to do. I got mad, and I just did it." I also hear him wondering why I was asking him the "why" question in the first place, which might well explain why Mr. Jenkins did not attempt to

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278. *Id.*

279. Pat Derian and Hodding Carter, *Judge Vance's America*, WASH. POST, Dec. 22, 1989, at A19.

280. *See generally* KRISTEN MONROE, THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY (1996).

281. *Id.* at xi.

get inside the heads of Vance and Robinson as he did with Moody. The lives of the white judge and the black attorney speak for themselves. I wonder whether Mr. Moody's does as well.

And then there is the irony of Walter Moody's possible execution for the murder of Judge Vance. In November 1996 a Birmingham jury recommended to a state trial judge that Mr. Moody be put to death. Judge Vance's court spent an enormous amount of its time on capital cases. As a federal judge ruling on the legality of state-imposed death sentences, Judge Vance followed the rules laid down by the Supreme Court and let most such death sentences stand. This earned him a reputation among some capital punishment abolitionists as a "hanging judge."[282]

But I know that this particular hanging judge personally despised the death penalty. Mr. Jenkins writes that "despite the tragedy that Roy Moody's violent crime had brought to her family's life, Helen Vance still opposed the death penalty in principle, and knew that Bob Vance had died holding the same position."[283] Robert Vance, Jr., expressed the same sentiments at a 1990 tribute for his father held in Birmingham.

When I worked as Judge Vance's law clerk in 1982 and 1983, we disagreed often about his decisions in death penalty cases. My experiences as Judge Vance's "death clerk" led me into law practice as a public defender for condemned prisoners in Florida. As the years passed, and as (I hope) I grew up as a lawyer, I came to appreciate the judge's wisdom about capital punishment as a legal system—and to appreciate as well his own struggle between his heartfelt personal beliefs and his duties as an intermediate federal court of appeals judge. Still, Judge Vance's assassination forced me to re-examine and re-appraise my own personal and professional convictions about capital punishment. Judge Vance was the first person I loved and lost to murder, and I have to admit that when I heard on the news in January 1997 that Walter Leroy Moody's Alabama jury had recommended capital punishment, part of me silently cheered. Part of me is cheering still.

Walter Leroy Moody may be put to death—based in part on his diary—for the murder of the hanging judge who hated capital punishment. Only in my South. Which is to say: Only in America.

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282. MELLO, *supra* note 1. I always had to smile at such comments by my generational contemporaries. And I always wanted to ask: "So where the hell were *you* when Robert Vance was putting his life on the line for racial justice in Alabama in the 1960's?" My own answer would have been: "in kindergarten, elementary school, junior high and high school."

283. JENKINS, *supra* note 256.

What has Moody to do with Ted Kaczynski and *his* diary? The Moody *capital* case is now on appeal to the Alabama Supreme Court.[284] I now have to decide whether to send a copy of this Essay to Moody's appellate counsel.

My wife Deanna, whose research had located the *Moody* opinion on Westlaw, laid out the dilemma:

> I don't think you could make a principled distinction you could live with between death row prisoners you 'like' and those you don't 'like.' Maybe you should give the essay to Moody's lawyers, but end your involvement there: refuse to explain to them how it works; refuse to answer their questions; end of conversation. The *Boyd* issue is procedurally defaulted in *Moody*, since it wasn't raised at his trials—either in state or federal court. Even if Moody's lawyers tried to raise *Boyd* now, it's likely too late for them.

On the other hand, Deanna reasoned, giving the essay to Moody's lawyers

> might well screw up the *Boyd* issue for Kaczynski. The *Moody* people might rush to throw the issue together; they'd probably get it wrong; and the Alabama Supreme Court is about the worst audience I can think of, and Moody's case is the worst vehicle I can think of, to raise the *Boyd* claim. But then, when *Moody* loses the issue, it's precedent (persuasive only, but precedent nonetheless) when the Kaczynski courts get around to deciding the *Boyd* issue in his case. It's just like the Gross-Mauro study in Bob Sullivan's case.

Yes.

And this wasn't my first time. Bob Sullivan was an average white boy executed in November 1983, for committing a run-of-the-mill murder. Sullivan was never my client; he was represented by the Wall Street powerhouse law firm of Paul, Weiss, Rifkind, Wharton & Garrison. But as Sullivan's execution date approached, my capital punishment defender in Florida came into possession of an as-yet unpublished study of capital punishment in Florida. The study, years in the making, would have been extremely useful to Sullivan's New York lawyers in their efforts to win a stay

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284. The *Moody* case and the Unabomber case share at least one additional narrative thread: the FBI crime lab. According to published newspaper accounts, in April 1997, a Justice Department report had "found serious and significant deficiencies in three units of the FBI crime lab . . . FBI experts used flawed scientific methods to analyze bombs . . ." Ken Foskett, *Justice Study Finds "Serious" Flaws in FBI Crime Lab Investigators*, ATLANTA J. & CONST., April 16, 1997, at A11. The report "found only small problems with evidence in the case of convicted mail bomber Walter Leroy Moody." *Id.*

for their client. By the time the study would have been published, Sullivan would have been dead for six months. The study quite literally could have saved Bob Sullivan's life.

This was my public defender's dilemma: Should we give the unpublished study to Sullivan's New York lawyers? Or would we wait until one of our *own* clients has an execution date scheduled?[285] One of our cases provided a much better vehicle through which to raise the study in court—better than Sullivan's case, that is. By giving the study to Sullivan's lawyers now, we risk losing the issue for everyone else on Florida's death row, including our own clients. Still, the study *could* have saved Sullivan's life.

My office debated and discussed these ethical conundrums for days. My position was that we should give the study to Sullivan's lawyers. That's what we ended up doing. The lawyers tried to use the study as a basis for a stay of execution. It almost worked. In the end, however, the study bought Bob Sullivan no more than twenty-four extra hours of life. In the course of rejecting Sullivan's arguments, the courts set a precedent binding on all future cases: This particular study is not enough to win a stay of execution.

A few months later, one of my own office's clients received a death warrant. In arguing for a stay, we tried to use the study. But the court said no, based on the precedent in Bob Sullivan's case. Our client was executed on schedule.

285. Three of our clients were executed during 1984.