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# **The Big Chill: The Stifling Effect of the Official Response to the Kent State Killings**

**Bill Whitaker**

*against perception so solidly in place  
it is all but useless to assert anything  
so subversive as fact.*

—Lewis Lapham

The official version of the events of May 4, 1970, were contained in the report of the Special Grand Jury issued on October 16, 1970, on behalf of the State of Ohio. The Report also indicted twenty-five people, including students and one faculty member, and completely exonerated the State and National Guard for the consequences of their actions. The Report played to public perceptions, was orchestrated to further solidify those perceptions, and was completely unencumbered by fact. The most startling example of the State's refusal to deal with the truth is that the Grand Jury, despite making seventy findings, did not find, acknowledge, or even mention that four students had been shot and killed and that nine others had been wounded.

The manipulation of public perceptions was not new then and has since, of course, been raised to an art form. What makes the successful manipulation of perceptions in 1970 most insidious, however, is the fact that it in effect condoned the murder of those engaged in dissent, condoned the criminal persecution of the survivors, and created an immediate chilling effect on the exercise of fundamental Constitutional rights which continues to this day.

Although two credible investigative bodies produced reports more consistent with the facts, i.e., that the shootings were unjustified, unwarranted, and inexcusable criminal acts, their effect on public perceptions was carefully minimized. The first report prepared by the FBI was sealed from the public and never published, except for a short summary which was leaked to the press. The second report, prepared by the President's Commission on Campus Unrest, chaired by William Scranton and hereafter referred to as the Scranton Commission, was released to the media and thus the public in two carefully thought-out stages. The main body of the report, which contained general nice-sounding findings about student dissent

without conclusions or accusations, was initially released at a press conference amid great fanfare. The findings about Jackson State and Kent State were released in two separate reports at later dates after Mr. Scranton and other Commission members had left town and were unavailable to the press. At the time one commentator, I.F. Stone, made a remarkably accurate prediction. Commenting on the fact that the Scranton Commission Report honestly and thoroughly showed that the killings were unjustified and unnecessary, he went on to say:

*And yet there is not the slightest chance that anything will be done about it. The Chairman of the Commission William Scranton will turn up at the White House one of these days to be photographed with the President, an innocuous statement will issue from the White House, and that will be the end of the finding.<sup>1</sup>*

As it turns out there were photographs with the President; and innocuous statement was issued, and twenty years later *absolutely nothing has been done about it*.

It was against this background that the official story emerged from the Special Grand Jury in Portage County, Ohio. The extent of the distortions and the viciousness with which the Grand Jury reported them is as startling today as it was twenty years ago. A review of the official story and its effect is in order.

The main purpose of the report appears to have been the complete exoneration of the National Guard, thus clearing Governor James Rhodes and other State officials responsible for permitting the troops to commit murder. The report's central conclusion:

We find however that those members of the National Guard who were present on the hill adjacent to Taylor Hall on May 4th fired their weapons in the honest and sincere belief and under circumstances which would have logically caused them to believe that they would suffer serious bodily injury had they not done so.

They are not, therefore, subject to criminal prosecution under the law of this State for any death or injury resulting therefrom.

This most complete exoneration was in direct contradiction to the Scranton Commission's Report, the FBI's Report, and all available evidence. The Scranton Commission found unequivocally that "the indiscriminate firing of rifles into a crowd of students and the deaths that followed were unnecessary, unwarranted, and inexcusable." The FBI found that "six Guardsmen, including two sergeants and Captain Srp of Troop G stated pointedly that the lives of the Guardsmen were not in danger and that it was not a shooting situation." The FBI report which was available to the prosecuting official running the Grand Jury also noted: "We have some

reason to believe that the claims by the National Guard that their lives were endangered by the students was fabricated subsequent to the event.”

The Grand Jury went on to support its conclusion with “facts.” That “58 Guardsmen were injured by rocks and other subjects,” that the Guardsmen were “surrounded by several hundred hostile rioters,” and that 200 bricks taken from a nearby construction site were used. The FBI, after interviewing every Guardsman and checking all the medical records, found that only one Guardsman, Lawrence Shaffer, was injured on May 4, 1970, seriously enough to require any kind of medical treatment. That injury occurred ten to fifteen minutes before the shooting (and apparently did not hinder the said Mr. Shaffer when he shot Joseph Lewis shortly thereafter because, according to Mr. Shaffer, Mr. Lewis, who had nothing in his hands, gave him the finger). Photographs, the Seranton Report, the FBI Report, and every other study of the May 4 shooting established that the Guard was not surrounded at any time.<sup>2</sup> No bricks were ever found on the Commons or on the hill that day.

That the Grand Jury so flagrantly distorted facts and exonerated the Guard should not have been surprising. The Grand Jury was called for by Governor Rhodes and he appointed his good friend and political associate, Attorney General Paul Brown to direct and supervise the grand Jury. Paul Brown then hired as Special Assistant Prosecutors for the Grand Jury, the Chairman of the Portage County Republican Party, Seabury Ford, and another close friend, Robert Balyeat. The local Republican Judge, Edwin Jones, presided and gave the Grand Jurors their instructions. Although most jurors were selected randomly, Judge Jones and Prosecutor Balyeat handpicked the Grand Jury Foreman, a Mr. Robert Hastings who was a former client of both men. The tenor and tone of the direction the Grand Jury received was revealed in an interview given by Seabury Ford to a reporter for the *Detroit Free Press*, William Schmidt. The interview was published in both the *Free Press* and the *Akron Beacon Journal*. Mr. Ford stated, “They should have shot all the troublemakers,” and he asked, “Why didn’t the Guard shoot ore of them?” He went on to justify it all with what he perceived to be brilliant logic: “The point about the shooting is, it stopped the riot—you can’t argue with that. It just stopped it flat.”

Many of the falsehoods contained in the Grand Jury Report are obviously deliberate, beginning with the preface which was designed to influence public perceptions about the fairness of the Report. The Grand Jury claimed that it had available the FBI Investigative Report, and that the report was examined in detail. The truth, as one of the prosecutors later testified under oath, was that the prosecutors did not show the FBI report to the Grand Jury. The Grand Jury also claimed that the witnesses called had “fairly represented every aspect, attitude, and point of view concerning the events” and further claimed that this “clearly indicated an effort at complete impartial-

ity with a full and complete disclosure of all available evidence.” In fact, the Grand Jury failed to call the Commander of one of the units that fired the fatal shots. The Commander was one of those who had told the FBI pointedly that the lives of the members of the National Guard were not in danger and that it was not a shooting situation. There were also many other witnesses in a position to provide objective information about the shootings that were not called.

The Grand Jury found it somehow probative to write: “It is obvious that if the order to disperse had been heeded, there would not have been the consequences of that fatal day.” It did not explore the fundamental question of by whom and by what authority the prohibition against the exercise of Constitutional rights was issued. It appears from all reports that the prohibition and the subsequent order to disperse was issued by the National Guard even though there was no declaration of martial law. By what authority is another question. The State attempted, after the fact, to give the Guard such authority by claiming that a proclamation issued April 29, 1970, empowering the Guard to act against a Teamsters’ strike, provided the authority. That proclamation, however, did not mention Portage Country, Kent, or the University. It read:

Whereas, in Northeast Ohio particularly in the Counties of Cuyahoga, Mahoning, Summit and Lorain, and in other parts of Ohio in particular Richland, Butler, and Hamilton Counties, there exists unlawful assemblies and roving bodies of men acting with intent to commit felonies and do violence to persons or property in disregard of the laws of the State of Ohio and of the United States of America.

... The Commanding Officer of any organization of such militia, is authorized and ordered to take action necessary for the restoration of order throughout the State of Ohio.

That order was amended on *May 5, 1970*, to include Kent and Kent State University.

Obviously, there was no authority permitting the military to prohibit the exercise of Constitutional rights. The significance of this issue is that Constitutional law and fundamental Democratic principle clearly forbid the military from usurping civilian authority. On May 4, there had been an absolute abdication of civilian authority and Kent became “a model of exactly the kind of military suppression of civil disorders that the historical principle of due process forbids.”<sup>3</sup>

Notwithstanding the clear violation of due process under color of State law, and notwithstanding the clear violation of State and Federal law, all of which resulted in the direct deprivation of the most sacred of all Constitutional rights—the right to life—the perpetrators remain today untouched by the criminal justice system. The Grand Jury Report exonerating the Guard

carried the day and the Justice Department, following the State's lead, declined to present any violations of federal law to a federal grand jury.

The State Grand Jury was not content to merely exonerate the Guard in its deliverance of the official story. It felt the need to lay the blame and further chill the exercise of First Amendment freedoms. The manner in which the blame was cast as well as the fact that most of the observations were not supported by fact says much about the mindset of those directing the process. The report found many to blame:

Those who were present as cheerleaders and onlookers, while not liable for criminal acts, must morally assume a part of the responsibility for what occurred.... protesters...engaged in their usual obscenities, rock throwing, and other disorderly conduct.... [Those who when ordered to disperse on May 4th] quickly degenerated into a riotous mob.... [A group of] intellectual and social [misfits called the Yippies].

The Grand Jury was clearly affected by matters of lifestyle. In noting that epithets came from male and female rioters alike, the Grand Jurors found it "hard to accept the fact that the language of the gutter has become the common vernacular of many persons posing as students in search of higher education."

In an attempt to profoundly and adversely effect change in the manner in which a university is run, the Grand Jury cast much of the blame on the administration and the faculty. In attacking the administration the report stated:

The administration at Kent State University has fostered an attitude of laxity, over-indulgence, and permissiveness with its students and faculty to the extent that it can no longer regulate the activities of either and is particularly vulnerable to any pressure applied from radical elements within the student body or faculty.

The Grand Jury made this finding despite the fact that the University in April of 1969 had banned SDS from campus, expelled most of its members, initiated prosecutions which resulted in four of its leaders spending six months in Portage County Jail, and one of its leaders being sentenced to prison. As the FBI Report noted, the University had experience no problems with student unrest since that time. What the Grand Jury was suggesting to the University remains unclear (assuming Seabury Ford was not positing their solution in his interview in which he also suggested that "this country won't simmer down until the police have orders to shoot to kill") but the threat of draconian penalties was obviously implied. The attack on unspecified members of the faculty was particularly chilling: "The faculty members to whom we refer teach nothing but the negative side of our institutions of government and refuse to acknowledge that any positive good has resulted during the growth of our nation." The Grand Jury also accused the faculty

of attempting to inflame their students in the hopes of inciting unrest. As one of the twenty-five indicted was a faculty member, and as the charge against him was inciting to riot, the message was clear: such behavior on the part of the faculty would not be tolerated.

The immediate power of the Grand Jury was the threat to send twenty-five people to prison. For nearly a year the lives of a group of people called collectively the "Kent 25" were disrupted by this very real threat (given the atmosphere at the Portage County Courthouse the judges, who must be elected, were not about to consider probation). The uncertainty of the future, the difficult and all-consuming task of preparing the defense, and the disgrace and ridicule many felt created an enormous and often psychologically damaging burden. It was later revealed, after this punishment was inflicted, that, as with the rest of the Grand Jury Report, the indictments were not based upon fact.

By the time the trials began a new prosecution team had been installed. The Republican administration had been defeated in the fall of 1970, and the new Governor and Attorney General appointed three new special prosecutors. In order for the new prosecutors to prepare for trial, they needed to read the transcript of the Grand Jury's proceedings, including the testimony of the witnesses. Upon completion of that reading the new prosecutors realized that there was not a shred of factual evidence to support the charges. That fact, however, did not dissuade these folks from attempting to obtain convictions.

The prosecution team devised a strategy by which they would begin the trials with their strongest cases involving the most serious charges. They had hoped these early cases would result in such severe sentences that the remaining defendants would, out of fear, negotiate pleas for lesser sentences. The plan did not work. Under the expert guidance of attorneys Benjamin Sheerer of Cleveland and David Scribner from the Center for Constitutional Rights in New York, a thorough and effective defense was prepared.

The prosecutors chose the case of Jerry Rupe to begin the trials. They chose Mr. Rupe, a former student, because he was charged with arson in the burning of the ROTC building on May 2, 1970—a crime sure to incite the passions of the jury—and, more importantly, because Mr. Rupe had been convicted of selling marijuana—a fact that they were sure would cause the jury to convict regardless of the evidence. Their strongest case, however, did not result in the necessary conviction; the jury was hung, the felony charges dismissed. The second case, also an arson charge, had to be dismissed when the only prosecution witness testified that he was not sure the defendant was the man he had seen at the ROTC building on May 2. This witness later explained that he had been attempting to tell the prosecutors since the time of his testimony before the Grand Jury that he could not

identify the defendant, but no one would listen. The third, and what would be the final trial was so weak that the Court had to direct a verdict of acquittal. With defense lawyers Jim Hogle and George Martin (who had also tried the *Rupe* case) still seated at the counsel table the chief prosecutor rose and stated that he wanted short recess because he had an announcement to make. A short while later he told the Court that there was no evidence to support the charges against the remaining defendants and he requested that they all be dismissed. The motion was granted.

The Grand Jury Report itself ultimately went down in flames—literally. A lawsuit was filed in the United States District Court in Cleveland on behalf of the Kent 25, various faculty members, and others who might suffer from the chilling effect of the report. In *Hammond v. Brown*,<sup>4</sup> Judge William K. Thomas ordered that the Report be expunged from the County files and publicly burned although he recognized that the Report had already begun to take its intended effect.

Judge Thomas ordered the Report expunged and destroyed for several reasons. First, he found that it was illegal under State law and that the Grand Jury had no authority whatsoever to issue a report. Second, he found that the Report's continued existence "irreparably injure[d] the right of each of the accused indicted to fair trial, protected by the Due Process clause." Finally, he found that

A report of the Special Grand Jury, an official accusatory body of the community, that criticizes faculty members for "over-emphasis on dissent," thus seeking to impose norms of "behavior and expression," restricts and interferes with the faculty members' exercise of protected expression.<sup>5</sup>

Indeed, after many days of testimony the Court found that the interference and restriction was already happening and found that it was happening because of the Report:

Because of the Report instructors have altered or dropped course materials for fear of classroom controversy. For example, an assistant professor of English, after reading the Report, "scratched three poems" from her outline in her Introduction to Poetry course. The poems are "Politics" by William Butler Yeats, "Prometheus" by Lord Byron, and "Dover Beach" by Matthew Arnold.

In "Politics," Yeats writes "And maybe what they say is true/ of war and war's alarms."

A university professor may add or subtract course content for different reasons. But when a university professor is fearful that "war's alarm," a poet's concern, may produce "inflammatory discussion" in a poetry class, it is evident that the Report's riptide is washing away protected expression on the Kent campus.



Other evidence cumulatively shows that this teacher's reaction was not isolated. The Report is dulling classroom discussion and is upsetting the teaching atmosphere. The effect was described by other faculty witnesses. When thought is controlled, when pedagogues and pupils shrink from free inquiry at a state university because of a report of a resident Grand Jury, then academic freedom of expression is impermissibly impaired.<sup>6</sup>

The combination of the exoneration of those who were responsible for the shooting and killing of students, the charging of innocent students and faculty with criminal acts, and the thinly veiled threats against the University community by the only official body with the power to take action which published a report on the May 4 tragedy, clearly had an enormously chilling effect on a variety of freedoms protected by the First Amendment. There is much evidence that the effect of the "washing away of protected expression" continues today. The "dulling of classroom discussion" and the upsetting of the University atmosphere was, as the Court noted, irreparable.

The Scranton Commission in commenting on the years of unrest immediately proceeding the tragedies at Kent and Jackson State, noted that "It is not so much the unrest of the past half dozen years that is exceptional as it is the quiet of the twenty years which preceded them." Equally exceptional but not as surprising in light of the official response is the twenty years of quiet that followed.

### Notes

- <sup>1</sup> I.F. Stone, *The Killings at Kent State* (New York: New York Review Book) 1971: 15. Emphasis in the original.
- <sup>2</sup> An excellent analysis of the evidence is provided by Peter Davies in his book *The Truth About Kent State A Challenge to the American Conscience* (New York: Farrar Strauss Giroux) 1973.
- <sup>3</sup> David E. Engdall, "The Legal Background and Aftermath of the Kent State Tragedy," *Cleveland Law Review* 3.22 (1973).
- <sup>4</sup> 323 F. Supp 326 (1971)
- <sup>5</sup> *Ibid.*: 349.
- <sup>6</sup> *Ibid.*: 350.