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Kent State — Justice and Morality

*John P. Adams**

IN SEPTEMBER 1970, THE PRESIDENT'S COMMISSION ON CAMPUS UNREST¹ made a strong recommendation that the President of the United States exercise "... his reconciling moral leadership as the first step to prevent violence and create understanding."² Although this recommendation was made in a report by the Commission on Campus Unrest which met the deadline that had been set for it to complete its work before the reopening of the colleges and universities in the fall of 1970, nearly three months passed before the President wrote a "Dear Bill" letter to the Chairman of the Commission, former Governor William W. Scranton, and gave any response to the recommendation.³

In his letter to Governor Scranton, the President refused to accept any responsibility that his office might have had for the campus disturbances which were so prevalent after the "incursion" into Cambodia, and the killing of students at Kent State University in the spring of 1970.⁴

The President's letter seemed to reject the eight recommendations which the Commission made for his role in the reconciliation that needed to take place between the older and younger generations and between the government and the students on the college campuses.⁵ Rather than confirming the high role that the President could assume in the healing process, Mr. Nixon chose rather to say, in his reply to Governor Scranton in December, 1970,

Moral authority in a great and diverse nation such as ours does not reside in the presidency alone. There are thousands upon thousands of individuals — clergy, teachers, public officials, scholars, writers, — to whom segments of the nation look for moral, intellectual, and political leader-

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¹ U.S. PRESIDENT'S COMMISSION ON CAMPUS UNREST, REPORT, Arno Press, 1970) [hereinafter cited as the SCRANTON COMMISSION].

² *Id.* at 8.

³ Letter from President Nixon to former Governor William Scranton, Chairman, Scranton Commission, Dec. 12, 1970. The letter was in response to the Scranton Commission's eight recommendations suggested to be taken by the President to effect reconciliation of differences between the age generations.

⁴ *Id.* at 10.

⁵ Recommendations to be taken by President Nixon: a) exercise moral leadership; b) discard divisive rhetoric; c) take a lead in discovering the underlying reasons for campus unrest; d) emphasize those values common to all Americans; e) renew the national commitment to full social justice; f) lend personal support to the universities to accomplish reform; g) insure that he is continually informed of the views of students, Black and other minorities; h) and call national meetings to foster national understanding. SCRANTON COMMISSION, *supra* note 1, at 8.

ship. Over the decade of disorders just ended some of these leaders of the national community have spoken or acted with forthrightness and courage, on and off campus, unequivocally condemning violence and disruption as instruments of change, and reaffirming the principles upon which continuance of a free society depends.⁶

It was most appropriate for the President to point to other leaders and declare that "moral authority" is shared in this nation by many institutions and individuals, although he could have elevated the office of the Presidency considerably among many young people and others by indicating the steps that he was prepared to take in the crisis of confidence.

Traditionally, it has been assumed that the religious community bears a special responsibility for exercising moral authority in our society. The first category of leaders mentioned in the President's inventory of the others, to whom the nation looks, was that of clergy.

There was a heavy involvement of campus ministers and resident clergymen during those crucial days that followed the killing of Kent State University students — days which included the killing of two more students on the campus of Jackson College on May 14, 1970.

That kind of involvement of priests, rabbis, and ministers is expected, and in a time when it was desperately needed the ministry was performed; the service was given. Yet, in the months that followed the killing at Kent State, it became apparent that there was another ministry which was needed. It was not a matter of exercising the "moral authority" as the President suggested, to condemn "... violence and disruption as instruments of change" Rather, it became apparent that "moral authority" would be needed to assure that accountability would be established for the abuse of governmental authority and the misuse of military firepower against civilian student dissenters. Violence had been used as an instrument to prevent change, and the moral authority of the religious community needed to be exercised in protest of the blatant violation of the civil rights of young citizens.

The early polls indicated that there was nearly a blanket public approval given for the killing of the four students at Kent State University.⁸ James Michener, in his book, *Kent State: What Happened and Why*, notes that a common reaction to the shooting was that more students should have been killed.⁹ The only other regret

⁶ *Supra* note 3.

⁷ *Id.*

⁸ See generally, J. MICHENER, *KENT STATE: WHAT HAPPENED AND WHY*, (1971).

⁹ *Id.* at 310.

that some seemed to have was that the supposedly radical professors were not also killed.¹⁰ In this rather prevalent climate of opinion, it obviously would be difficult to conduct investigations and take legal actions, and it is significant, therefore, that on May 14, 1970 the General Board of the Ohio Council of Churches voted support for investigation¹¹ for which the United States Senator from Ohio, William Saxbe, had appealed on the floor of the Senate on May 5.¹²

This was one of the earliest involvements of the church in the political aspect of the Kent State issue, and it was significant, for it demanded that the investigation also include the use and procedures for use of the National Guard in crisis situations.

Throughout the summer of 1970, the Ohio Council of Churches and the Ohio Board United Ministries in Higher Education studied campus disturbances across the State of Ohio, and in September, 1970, published a report, "Disruption on the Campuses of Ohio Colleges and Universities, Spring 1970." The report did not concentrate disproportionately on the Kent State shooting, for at the same time more substantial investigations were being made concerning the Kent State University disruption by a large number of agencies including the President's Commission on Campus Unrest, the Federal Bureau of Investigation,¹³ the Inspector General's Office of the Ohio National Guard,¹⁴ the Ohio State Highway Patrol,¹⁵ the Special Kent State University Commission on KSU Violence,¹⁶ the American Civil Liberties Union,¹⁷ and others.¹⁸

There was every indication in those early weeks to believe that the Federal Government would conduct a responsible investigation in the event that no serious investigation effort would be pressed to fruition by the State of Ohio. On July 23, 1970, a preliminary summary report of the FBI investigation stated that the shooting deaths were "not proper and in order,"¹⁹ and the statement was made that evidence was being gathered for presentation to a federal grand jury.²⁰ The hearings of the President's Commission on Campus Un-

¹⁰ *Id.* at 323.

¹¹ Memorandum of General Board of the Ohio Council of Churches, May, 1970 (unpublished).

¹² 91ST CONG., 2ND SESS. 14150-55 (1970).

¹³ Justice Department, Civil Rights Division, Summary of the FBI reports on Kent State reprinted in I. F. STONE, *THE KILLINGS AT KENT STATE* 60-101 (1970).

¹⁴ Report of the Inspector General's office of the Ohio National Guard (unpublished).

¹⁵ Report of Ohio State Highway Patrol (unpublished).

¹⁶ See generally, Report of the Special Kent State University Commission on Kent State University Violence (August 1970).

¹⁷ Memoranda of the American Civil Liberties Union compiled subsequent to May, 1970, (unpublished).

¹⁸ See generally, the bibliographic index to the SCRANTON COMMISSION, *supra* at note 1.

¹⁹ *Supra* note 13. See also Akron Beacon Journal, July 23, 24, 1970 at 1.

²⁰ *Id.*

rest demonstrated that the panel of citizens named by President Nixon intended to probe deeply and speak forthrightly about the killing at Kent State.²¹

During this time there was a "quiet waiting for the evidence," not only among those in the legal profession, but also in the offices of religious organizations and other private agencies.²² This type of quietness was surely different from that which already was being displayed by the formerly activists and anti-war youth of the nation. They had been stunned by the repressive act of a state government and by the approval that had been given to that act generally. Tens of thousands of youth were undoubtedly thrown into a more profound despair about the condition of the American Society and their alienation from "the system" was deeply intensified.

The quiet among the youth seemed to be a part of a necessary assimilation of an event that was a real turning point for their part of our society — and one from which there was no turning back. So many of their thoughts turned to the Boston Massacre, and they saw parallels between the killings of 1770 and those at Kent State in 1970. They noted that the American Revolution initially was small, but that finally it changed a whole system of government. As one student said, "Only five people were killed in the Boston Massacre," and another student replied, "And now we've got the Kent Massacre, and that was four."²³

The comparative calm that existed in some of the religious offices, both in the state and nationally, expressed a confidence in and a reliance upon the official investigations as they were taking place and upon the governmental action, in the form of a federal grand jury that was believed would surely follow.

There were serious questions raised in some of the establishment institutions such as the church as the developments of the summer of 1970 unfolded. Many were convinced that the truth of May 4, 1970 would be obfuscated when Ohio Governor James Rhodes, on August 3, reacted to the inculpatory reports of the FBI by directing the Ohio Attorney General to call a special state grand jury to do its own investigating of Kent State.²⁴ Also, the restrictions that were placed upon the hearings that were conducted by the Scranton Commission indicated that its report would have a limited effect when it was finally made.²⁵

²¹ See generally SCRANTON COMMISSION, *supra* note 1 at Preface.

²² National Council of Churches, Washington, D. C.; Washington Interreligious Staff Council, Washington, D. C.; Union of American Hebrew Congregations, Washington, D. C.

²³ See generally, the Daily Kent Stater, Feb. 29, 1972 at 1.

²⁴ There are intimations by Senator Young, James Michener, and other monographers of the Kent State Tragedy to the effect that this Special State Grand Jury would be a white-wash. See generally, *supra* note 1.

²⁵ The tenor of President Nixon's reply to Governor William Scranton indicates a rejection of the Scranton Commission's conclusions. See *supra* note 3.

However, on September 24, Assistant Attorney General Jerris Leonard, then head of the Civil Rights Division of the United States Department of Justice, stated that there would be federal action if the state proceedings were not handled capably,²⁶ and more importantly, on September 26, the President's Commission on Campus Unrest concluded that "the indiscriminate firing of rifles into a crowd of students and the deaths that followed were unnecessary, unwarranted, and inexcusable."²⁷

There was a temporary kind of confidence that emerged with the publication of the Report of the Scranton Commission on September 26, 1970, and it was felt that the appropriate agencies of the government would surely use their significant and considerable resources to respond to the findings of the Commission.

Yet, in the high offices of the federal government only silence followed the issuance of the report.

For the most part, the religious community remained silent during this time. There were no declarations or pronouncements about the distortions that were being made concerning campus unrest or student dissent. There were no cries of outrage or statements of righteous indignation. In retrospect, one is led to believe that either the whole issue was too delicate and difficult to presently question or else a pervasive apathy was beginning to settle over the church community.

On October 16, the Ohio Special Grand Jury indicted 25 students and faculty,²⁸ and in a report that was later expunged by a federal judge,²⁹ declared the Ohio National Guard blameless in the deaths and injuries of students at Kent State. The report held the University administration and faculty responsible for the disturbance and thus, for the circumstances that had created the killing.³⁰ Even in the light of the facts as they were then known, this was intolerable, and reactions started to develop.

On October 23, 1970, in response to the Special Grand Jury Report, the Kent (Ohio) Ministerial Association and the Kent State Campus Ministries stated in a joint press release: "We, as religious leaders of the Kent Community would be seriously negligent if we did not fulfill our duty of leadership in reconciliation by speaking

²⁶ Letter from Jerris Leonard, chief of the Civil Rights Division of the Department of Justice, now Chief of Law Enforcement Assistance Agency (LEAA), to Arthur Krause, father of one of the slain Kent State students, September 24, 1970.

²⁷ SCRANTON COMMISSION, *supra* note 1, at 289.

²⁸ Report of the Portage County Grand Jury, Oct. 16, 1970, reprinted in the Akron Beacon Journal, Oct. 17, 1970 at 1, and I. F. STONE, THE KILLINGS AT KENT STATE: HOW MURDER WENT UNPUNISHED 145-158 (1970).

²⁹ Judge William K. Thomas expunged the report on Jan. 28, 1971.

³⁰ *Supra* note 28.

out at this time." The two groups of clergymen proceeded to state the inadequacies in the Special Grand Jury Report, and then to ask for a fuller explanation of the events of May 4, 1970, through a federal grand jury investigation. They joined the other voices that were demanding a further federal investigation of the killing.

Two weeks later, substantial excerpts from the *Summary of the FBI Report on the Kent State University Disorder* were published in the New York Times,³¹ and facts became public: The assembly of students which the Guard attempted to disperse was peaceful and quiet until the Guard advanced. The Guard had not been surrounded. There was no sniper. There was reason to believe that the claim by the Guard that their lives were endangered by the students was fabricated subsequent to the event.³²

The events of the month of October rather typified the process that had been working since the shooting. Efforts were made to justify the abuse of governmental power. The justifications were simply the result of further abuses of the same governmental power. However, there was enough leaking of the truth and sharing of the facts that the official moves became conspicuous.

As the months went by, every investigative report seemed to be counterbalanced by another report, one which would contradict the conclusions of the previous one.³³ Increasingly, the hope for a responsible, objective, and conclusive investigation seemed to depend upon a decision to convene a federal grand jury by the United States Department of Justice. Especially after a federal judge ordered the investigative report of the Ohio Special Grand Jury destroyed, it was expected that the Justice Department would take the initiative and fulfill the promise that was made by Assistant Attorney General Jerris Leonard to take action if the state proceedings were not conducted "properly."³⁴

Many more weeks passed, and on March 19, 1971, Mr. Leonard wrote a memorandum to Robert Finch, Counselor to the President at the White House,³⁵ in which he noted that the state grand jury had indicted students, but took no action against the Guardsmen for alleged use of excessive force against the students who were killed and injured.³⁶ He then stated:

³¹ *Supra* note 19 at 1, col. 3.

³² *Id.* at 1, col. 5.

³³ The summary of the FBI report unqualifiedly criticizes the handling of the incident by the Ohio National Guard as well as command and procedure defects within the Ohio National Guard. The expunged Portage County Grand Jury Report completely exculpates the Ohio National Guard and inculpates Kent State students and faculty. See *supra* notes 19 and 28.

³⁴ *Supra* note 26.

³⁵ A two page memorandum from Jerris Leonard to Robert Finch, March 19, 1971.

³⁶ *Id.* at 1.

Since that time (October 16, 1970) intensive analysis of the Federal Bureau of Investigation's evidence, in light of the state grand jury's action, has been conducted by this Division (Civil Rights) and at this time, I am personally conducting such analysis and expect a decision with respect to the question of convening a federal grand jury in the Northern District of Ohio to be made within the next few weeks. Such decision has not at this juncture been made.³⁷

As I have stated, up until this time, the national offices of the religious denominations and the headquarters of the various religious faith had merely monitored this succession of investigations and the issuance of the multiple and often contradictory reports regarding the shooting and killing of students at Kent State University. When, however, on Sunday, March 21, 1972, the first public trial balloon on a negative decision by the United States Department of Justice to act in the Kent State case, was floated in the *Washington Post*,³⁸ it was unquestionably a time to act.

In the *Washington Post* article by Ken W. Clawson, now Deputy Director of Communications for the White House, the announcement was made that,

The government has virtually decided against convening a federal grand jury to investigate the killing of four Kent State University students by Ohio National Guardsmen last May. Only final approval by Attorney General John N. Mitchell is needed to ratify a decision, reached reluctantly by the Justice Department's Civil Rights Division that the government should not enter the case.³⁹

The decision which the March 19th memorandum to the White House stated had not been made, was made, according to the March 21st article, on the basis that the government could not establish the "intent" of the Guardsmen to violate the civil rights of the demonstrators, that the Ohio National Guard had corrected many of its procedures in the ten months intervening, and that to seek indictments against the individual Guardsmen who fired would be to "scapegoat" them.⁴⁰ Also, it was determined that the convening

³⁷ *Id.* at 2.

³⁸ Clawson, *The Washington Post*, March 21, 1971.

³⁹ *Id.*

⁴⁰ The Ohio National Guardsmen who did fire, approximately forty-five men, are involved in various litigations with parents of the slain students and injured students, and to date the individual guardsmen have incurred approximately \$77,000 in legal fees. The State of Ohio has recently agreed to underwrite these fees after the guardsmen's attorneys agreed to a forty per cent reduction in total fees.

of a federal grand jury might create another crisis at the very time that there seemed to be a cooling of temperatures on the campuses of the colleges and universities.⁴¹

Those who had been monitoring the developments in the Kent State case over the preceding months were astounded at the decision, the trial announcement of which was being floated in the press. It was obvious that the conflicting reports of the various investigations had so confused the event and so clouded the facts about what had happened that the convening of a federal grand jury for the purpose of conducting an investigation had become an absolute necessity. Yet, the United States Department of Justice was saying that it could not take such an initiative. The decision, as announced, with quotations from one of those unnamed high officials in the Department of Justice, was unsatisfactory, for the Justice Department did not need to be restricted in its investigation because of any premature inability to establish the "intent" of the Guardsmen to violate the civil rights of the demonstrators, and whether or not there were indictments against individual Guardsmen would be a decision that would be made by the prosecution, which in this case would be the United States Department of Justice itself. Finally, to say that the Ohio National Guard had corrected many of its procedures and to use this as a reason for not calling a federal grand jury was invalid, for the adherence of any National Guard to federal guidelines is fully voluntary and has no binding effect under law.⁴²

The tentative decision of the Justice Department could not go unchallenged. On Monday, March 22, a call was issued for the members of the Civil Liberties Task Force of the Washington Inter-religious Staff Council, which is composed of the representatives of the offices of the various denominations and faiths, to meet on March 23 to consider possible courses of action relative to the announced tentative decision of the Department of Justice. Prior to that meeting, representatives of the Task Force began checking closely with lawyers whose knowledge and competence in federal civil rights laws are widely respected. Their counsel indicated that there was sufficient reason in law and fact to demand that the United States Department of Justice revise its tentative decision not to act, and that a federal grand jury be requested to complete the various unfinished investigations, each of which had been terminated short of a final and conclusive report.⁴³

⁴¹ *Supra* note 37.

⁴² See generally, SCRANTON COMMISSION, *supra* note 1, at 178-83.

⁴³ Both the summary of the FBI report and the Scranton Commission furnish some evidence of a pre-shooting conspiracy. The evidence is unequivocal that following the shooting there was conspiracy to fabricate reasons for the shooting. See *supra* notes 1, 9, 14.

An appointment was arranged for the next day, March 24, with Assistant Attorney General Jerris Leonard, and for nearly an hour and a half, eight representatives of national religious legislative affairs offices⁴⁴ raised detailed questions about the decision that had been reported in the newspaper three days previously.⁴⁵ Mr. Leonard stated that the newspaper report was essentially correct, but that a final decision had not been reached by his Division and that no recommendation had been made, as of that time, to the Attorney General.

The final decision by the Attorney General not to convene a federal grand jury was not announced until Friday, August 13, nearly five months later.⁴⁶ In the interim, the national religious community became directly and heavily involved in the Kent State issue. It was a late date—ten months after the killing of four students by the Ohio National Guard—but in many ways it was a strategic time for the national religious offices to become involved.

Clearly, the morale of the parents and the families of the students who were killed and wounded had reached the lowest point. After the early days of shock and grief, they had at the very least looked to the federal government to help establish the truth about the shooting and to assist them in ferreting out the facts concerning the event which had brought death and injuries to their children. Now, with the announcement of a tentative decision by the Justice Department, that hope was fading, and at the same time support was given to those distortions of the event which had not only seemed to justify the shooting of their sons and daughters, but which had made the families themselves the daily targets of hate mail and nuisance telephone calls.

Beginning in March 1971, several of the national religious offices began to play a role. Part of that role was a pastoral role to the families of the victims of the Kent shooting. The long telephone calls and the extensive correspondence were surely the means by which some of the grief was worked through, for the grief of the families needed to be expressed not only to those who had sympathy, but to those who had a concern for the significance of the event and who had a knowledge of what took place on May 4, 1970.

Since the Board of Christian Social Concerns of the United Methodist Church is the only denominational agency that has assigned a person full-time to administration of justice issues, I began to take a lead position in this relationship and to take initiatives on behalf and with the approval of the parents of the students. An-

⁴⁴ *Supra* note 22.

⁴⁵ *Supra* note 38.

⁴⁶ New York Times, Aug. 14, 1971, at 1, col. 5.

other role that needed to be played was that of being a liaison for the families in Washington, D. C. with the several federal agencies. Since the state government had convened a special grand jury that only indicted students and faculty and had fully justified the indiscriminate use of combat rifles against unarmed student dissenters,⁴⁷ it was only the federal government to which they could look, and the families needed a representative in Washington, D. C. itself. I informally assumed this position at that time and at their request.

In a short time, I established contact with all the parents, and I discovered that, for the most part, they were not in contact with one another, and that each of them, with their attorneys, was set on a separate pursuit of justice. The office of the Department of Law, Justice and Community Relations of the Board of Christian Social Concerns of the United Methodist Church became a type of "good office" through which the parents could begin to communicate with one another, and eventually it became the mechanism for bringing the attorneys together and finally in the joining of several of the civil cases.

We all began sharing information, and there were volumes of it. Every family had something to contribute, and we began building a file of reports and documents which has proven to be useful in conferences with governmental officials, in legal research, and in contacts with the communications media.

We developed a type of telephone network between the families, and from what I have been told, this helped them not only to feel the sense of support which they could give to each other and which could be partially furnished by those who represented the several faith and denominations, but it also gave an encouragement to convert their sorrow and grief into an energy that could be used to activate the agencies of the government that had refused to move. It provided for new channels of communication between the families and the attorneys who were representing them, and it allowed for a sharing of legal and other kinds of materials that were needed by all who were trying to participate in the pursuit of justice.

It has been said that the United States Department of Justice had to postpone for five months its intended decision not to convene a grand jury as a result of the newly active involvement of the families in the politics in the Kent State issue.⁴⁸ In that five months, the Kent State issue was caused to live in a way that few thought was really possible after ten months of veiling and cloaking by

⁴⁷ *Supra* note 28.

⁴⁸ The official Department of Justice rationale for the five month delay was the unfamiliarity with the Kent State case of the successor to Jerris Leonard in the Civil Rights Division. Leonard had, during the interim, moved over to LEAA.

many different agencies of the government. It had been assumed that the issue was dead, like the students who were killed, and that it was just a matter of having a burial ceremony conducted by all of the governmental agencies which had refused to sustain it. By the time the decision was finally announced, on August 13, 1971, the American public knew more of the facts, and the Attorney General had to make his decision and announce it in the full light of day.

In that five months, the representatives of nearly ten national religious offices worked on a daily basis to research the issue and to bring every appropriate influence to bear upon those who were in the strategic positions of authority in the federal and state governments. This entailed a series of appointments with officials in the Department of Justice⁴⁹ and with staff members of Congressional committees as well as a whole succession of meetings with persons who were knowledgeable about the Kent State event.⁵⁰

An immediate objective was simply one of "keeping the issue alive," which meant not a use of publicity gimmicks, but more the regular asking of the questions which had not been answered, the presenting again of the facts that seemed constantly to get confused, and the insisting that our system of justice had the capacity to deal with the Kent State issue thoroughly and impartially.

Of course, there were those who felt that the involvement of the religious community in this issue was grossly inappropriate. It was assumed that any interest in discovering the truth about Kent was surely rooted in an effort to be vindictive toward members of the Ohio National Guard. It was said that the religious community ought to have as much concern about the Guard as it had about the students and their families. As a matter of fact, there was such a concern for the members of the Guard, and I have been in correspondence with some of the men who were on assignment at Kent State University. However, even those Guardsmen who were interested in having the truth about May 4, 1970, known were not permitted to reveal what they knew. As James Michener said in his book, *Kent State: What Happened and Why*, "In the years that lie ahead, someone will talk and a flood of testimony will be released."⁵¹ We felt that those Guardsmen who wanted to tell what they knew about the event should have the opportunity to do so with the protection that could be furnished by the federal government through a grand jury.

⁴⁹ Meetings were had by the religious-lay community with the Deputy Attorney General, now Attorney General R. Kleindienst, then chief of the Department of Justice, Civil Rights Division, Jerris Leonard, and D. Norman, Chief of Civil Rights — Criminal Division of the Department of Justice.

⁵⁰ S. A. Sindell, Cleveland, Ohio, attorney representing Arthur Krause; I. F. Stone, author; J. Michener, author; P. Davis, author of unpublished monograph, "Appeal for Justice"; J. Adams.

⁵¹ *Supra* note 9 at 540.

However, the power of the government was being used to protect the image of the Ohio National Guard and not the Guardsmen themselves. The families, on the other hand, had no one to whom to turn. The expense and the burden of any possible allowable litigation through which the facts could be known and the truth could be discovered were not to be shared by any agency of the federal government.⁵² So if justice were to be done in this classic instance of a government using its military power to kill and its legal power to protect itself from the consequences of an illegal act, someone — and in this instance the religious community — had to begin furnishing some support.

There are many instances, frequent ones no doubt, when the power of government is misused and where the authority of a government is abused, but the Kent State event presented one that was so graphically clear and so classically important that it could not be permitted to pass into the musty files of the archives of the government without there having been a final clear look and a full determination that any such repressive act of the government in the future would be ultimately rejected by a society that rests upon the unalienable rights of its citizens.

Actually, this involvement of the religious community in the Kent State issue demonstrated a real faith in the system of justice which has been established in the United States — a faith incidentally greater than the one which was frequently expressed by those who had the responsibility for its functioning. It was really believed that our government could use its authority to objectively complete an investigation and to impartially determine the facts about an event that had bloodily blotted our democratic system and which had caused thousands upon thousands of the young to distrust their government and to disown their country. It was inconceivable that the Attorney General of the United States would not utilize the invaluable tools available to him through federal law to test, through witnesses before a federal grand jury, the validity of his own department's allegations regarding the conduct of the Ohio National Guard.

The issue had to be kept alive long enough for the young people to believe that the killing of students by the armed troops of the government was not a simple matter-of-fact event — that there were establishment institutions which found it equally abhorrent and which would resist forever any ready acceptance of a malevolent misuse of the power of the government.

A great psychic vacuum needed to be filled, and any extensive eroding of a confidence in our democratic system needed to be stopped.

⁵² But see, *supra* note 40.

One of the students at Kent State on the day of the shooting wrote to the little team of family representatives and religious agency staff persons and said:

I am frustrated. You must share this frustration. You've claimed to be working "in the system" toward some goal. What do you feel? Do you feel that you're chipping bits and pieces away from an immense block? Do you feel you're continually pushing up against an immobile wall? Frustration? Yes. Don't you get runarounds in your inquiries? Don't you sometimes feel like dropping the entire thing? You have more patience than I and will probably continue hacking away to unveil the truth longer than I ever could. But with time you will be exposed to more lies, more red tape, more injustice. For this reason and this reason only, I hope this thing takes a God-awfully long time. Not to kill your efforts, but to help you understand why kids today are beginning to live differently, why they are refusing to cooperate with people (governments) that lie, cheat, kill, distort truths to their own ends, and why some are resorting to violence . . . No, I don't agree with what they're doing. but I fully *understand* why."⁵³

It is significant that not many months later the writer of that letter dropped me a note saying, "If there is anything you need, anything you want done, please let me know. Anything. I'd like to help if at all possible."⁵⁴

Joseph Rhodes, a member of the President's Commission on Campus Unrest, wrote, "A great danger facing America today is that we will become accustomed to inequities and injustices and lose our capacity for indignation to our passion for confirmation."⁵⁵ The involvement of the religious community in the Kent State issue was simply a small expression of some residue of that passion for justice, that passion for justice which needs to flourish again and for a while a trust needs once more to be developed. The student who wrote the letter was knowledgeable, for frustration did develop, and at many points there was the deep desire to forget the whole thing. However, what could be forgotten at the end of one day was vividly reimpressed upon our minds the next day. In spite of the unanswered telephone calls and the letters to which there came no reply, the pursuit had to be continued. As one official passed us off to another official, and as we were referred from one office to

⁵³ Letter from Barry Levine, a student at Kent State, to Arthur Krause, May 12, 1971.

⁵⁴ Letter from Barry Levine to author, Nov. 22, 1971.

⁵⁵ Letter from Joseph Rhodes, member of the Scranton Commission, to author, 1971.

another, the frustration deepened. Even then we could not let go. It only became apparent that the research had to go deeper and the political moves had to become more calculated.

In May, 1971, the office for which I have responsibility turned to a New York insurance broker, Peter Davies, who also had been petitioning the Attorney General and the Congress for a complete investigation almost from the day of the killings. With him, we began to extend the research. Even though we did not have access to the full investigative report of the FBI, and had to rely only upon the excerpts which were published, we began combing through the hundreds of photographs and the volumes of materials which were available to us in order to establish the basis for the reversing of the decision that was in the process of being made by the Department of Justice.⁵⁶

I had first met Peter through Arthur Krause, one of the parents whose daughter had been killed at Kent State and who had given leadership to all of the other families in the frustrating battle for justice. I decided to aid Peter's research, for it seemed to uniquely substantiate, through careful analysis of all the materials, the many appeals that were being made for a federal grand jury.

Ironically, the decision to aid Peter's effort was prompted by then Deputy Attorney General Richard Kleindeinst. On May 17, accompanied by Cleveland Attorney Steven A. Sindell, I met with the Deputy Attorney General on behalf of the families, and during the course of our discussions, Sindell raised with Mr. Kleindeinst the question of a possible violation of Section 241 of the U.S. Code, Title 18.⁵⁷ This, of course, is the very difficult conspiracy law which provides penalties if two or more persons conspire to injure, or oppress, threaten or intimate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States"

The question came up primarily because author James Michener in his exhaustive study, *Kent State: What Happened and Why*, implied that it was likely that some Guardsmen had indeed conspired together a few minutes before the shooting and had decided among themselves to punish the students.⁵⁸ Toward the end of his book, Michener says that the Reader's Digest investigative team was able

⁵⁶ The decision of the Department of Justice not to convene a federal grand jury in northern Ohio was made some time in March, 1971, but was not announced due to a variety of reasons, political and otherwise, until August, 1971.

⁵⁷ Conspiracy Against the Rights of Citizens, 18 U.S.C. §241 (1970) reads in pertinent part: If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . they shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

⁵⁸ *Supra* note 42.

to discover just about everything that happened on May 4, 1970, ". . . save the crucial matter of whether there was, at the practice field, any kind of order or agreement which triggered the firing a few moments later."⁵⁹

Surprisingly, the Deputy Attorney General did not dismiss the suggestion and conceded that the Civil Rights Division had not explored this possibility at all. When I urged that any decision about a federal grand jury be delayed long enough for us to submit material concerning Michener's veiled hints of the more serious wrongdoing than deprivation of civil rights without due process of law, Kleindienst readily agreed. He suggested that the material be submitted in a "substantive" format to David Norman, then Acting Head of the Civil Rights Division at the United States Department of Justice.

Davies was the only person I knew who had for months accumulated research material and who would apply himself to the task despite the limited time available and the fact that there would be no remuneration beyond the expenses for obtaining photographs.

By early June, Davies had completed this "Appeal for Justice" — a 226 page analysis of the Ohio National Guard's movements and actions on May 4, 1970.⁶⁰ The text was secondary to the 70 odd photographs used to illustrate and emphasize the principal proposals of the appeal that the shooting was executed with such precision and coordination that it could not have resulted from individual Guardsmen acting independently and that the Justice Department's Summary of the FBI report impliedly substantiated rather than discredited, Michener's intimation that a decision or agreement to fire preceded the fusilage of gunfire. Both the text and the photographs, in arguing for a federal investigation, were keyed to the mysterious role played by the Guardsman who appears in the famous *Life* photograph of the shooting with a .45 automatic pistol in his left hand,⁶¹ arm fully extended, pointing in the direction in which some of the other Guardsmen are aiming and firing their M.1 rifles.⁶²

The Department of Law, Justice and Community Relations of the Board of Christian Social Concerns of the United Methodist Church distributed the Davies study to officials of the Justice Department, the Attorney General of Ohio, and the Portage County Prosecutor on June 21, 1971. This was done in the conviction that the

⁵⁹ *Supra* note 9 at 543.

⁶⁰ Copies are available from Rev. John P. Adams, Board of Christian Social Concerns of the United Methodist Church, Washington, D.C.

⁶¹ *LIFE*, May 15, 1970, at 29.

⁶² Although the FBI reports believe that Pryor did not fire his weapon, but merely leveled it at the students as an admonitory gesture, the evidence indicates that this action may have triggered a similar *real* response by the men under his command. See generally, *supra* note 14 at 101.

serious questions raised in the report would be accorded equally serious consideration on the part of the Justice Department officials to whom we now looked for answers.

After a month, during which there was neither an acknowledgement nor a response, we released the study to the news media on July 23, 1971, believing that it would keep the issue alive and that it would compel the Department of Justice to publicly respond to the Appeal. In so doing, there was revealed to the public the degree to which a part of the religious community had committed itself in fulfilling the role of moral leadership that President Nixon had charged to the clergy in his letter to Governor Scranton.

Exercising such "moral authority" evokes mixed reactions. Praise and condemnation reflected the approval and dismay with which the revelation of the involvement of the religious community was received. Inevitably, inaccurate reporting or misunderstanding resulted in some instances of bitter rebuke for our meddling in a matter which supposedly was of no concern to the church. In lengthy correspondence we attempted to explain the reasons for our action and the role we believed it was essential for the Board of Christian Social Concerns to play.

Criticism of our part in issuing a document of this nature raised again the issue of how far the church should go in matters that are presumed to be the province only of law and justice. To many laymen we had overstepped the bounds of religious propriety and exposed the church to political attack for our wanton disregard for the traditional separation of church and state affairs. More than one correspondent admonished me to stick to praying and keep my nose out of other people's business. We replied by saying that there is a separation of church and state, but that there dare not be a separation of religion and justice. We explained that the Department of Law, Justice and Community Relations had frequently been related to Justice Department crisis response teams working in cities across the country, but that in the Kent issue it was our clear responsibility to be a part of those efforts to challenge the Department of Justice to carry out *its* responsibility. We believed that through our support of the Davies study we could best fulfill that responsibility.

On Friday, August 13, at 4 p.m., then Attorney General Mitchell responded to our "Appeal for Justice."⁶³ Although it was quite apparent to anyone who had studied the Justice Department's Summary of the FBI Investigation that the civil rights of the victims had been violated, Mitchell keyed his response solely to the question of a conspiracy and Section 241 of the U.S. Code.⁶⁴ Deprivation of

⁶³ New York Times, Aug. 14, 1971, at 15, col. 5.

⁶⁴ *Id.*

civil rights, a crime under Section 242 of the same code was disregarded in his announcement.⁶⁵ The Attorney General concentrated on answering the appeals of the families and in giving a reply to the work of the families and the religious community of the previous five months.

Mitchell conceded that the "facts available" to him "support the conclusion reached by the President's Commission that the rifle fire was, in the words of the Commission, 'unnecessary, unwarranted, and inexcusable.'" The families considered this a concession that was forced out of the Department of Justice after a five month delay in its decision not to convene a federal grand jury. The Attorney General went on to say in his release, however, that our review persuades me that there is not credible evidence of a conspiracy between National Guardsmen to shoot students on the campus and that there is no likelihood of successful prosecutions of individual Guardsmen.⁶⁶

Perhaps the two most incredible portions of Mitchell's statement came in the concluding paragraphs. He said:

in view of the massive federal investigative resources already committed, and the intensive examinations of the results of the investigations, it appears clear that further investigation by a federal grand jury could not reasonably be expected to produce any new evidence which would contribute further to making a prosecutive judgment.⁶⁷

And, finally the sentence: "I am satisfied that the Department has taken every possible action to serve justice."⁶⁸

It seemed to us that the intensive examination of the FBI investigation had produced a thirty-five page summary which contained sufficient evidence to warrant the convening of a federal grand jury, and yet Mr. Mitchell would have us believe that this was not enough. The summary again alleged that two, and possibly more, Guardsmen had lied to FBI agents when they denied having fired their weapons. The summary stated that the Department had "some reason to believe" that the Guardsmen had gotten together and "fabricated" the story that their lives were endangered by the stu-

⁶⁵ Deprivation of Rights Under Color of Law, 18 U.S.C. §242 (1970) reads:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

⁶⁶ *Supra* note 63 at 15, col. 6.

⁶⁷ *Id.*

⁶⁸ *Id.*

dents. The summary said there was no explanation for the shooting "aside entirely from any questions of specific intent on the part of the Guardsmen or a predisposition to use their weapons."

In our response to Mitchell's statement⁷⁰ we said:

It is difficult to reconcile the fact that the shootings were inexcusable — meaning that there are no excuses that can be made for them — and the denial that the National Guard, whether individual Guardsmen or command officers, can be held responsible for them. There is an inconsistency in this statement of the Attorney General that is of considerable dimension.⁷¹

Mitchell had restated his sympathy to the parents of the students killed at Kent State "with the full knowledge that nothing can be said to mitigate their remorse and sorrow."⁷² In our response we noted that of course

nothing that the Department of Justice *says* will soften the sorrow or relieve the remorse. But what the Department of Justice could have *done*, through the courses of action open to it, was to obtain facts in the case, and that clarity would have removed the clouds of confusion and the shadows of doubt that have darkened the days of the parents ever since their children were killed.⁷³

We went on to point out that it is not the function of the Justice Department to offer sympathy but to furnish justice.

The religious community can and has offered words of comfort and hope. It should not be necessary for the religious community to also endeavor to activate the system of justice for which the government has responsibility.⁷⁴

Mitchell's decision, however, left the religious community with no choice but to shoulder that responsibility.

If this blow were not enough the following month Davies and the Board of Christian Social Concerns became defendants in a \$3 million libel and slander suit filed by a sergeant in the Ohio National Guard, the man the Akron Beacon Journal (May 24, 1970) had identified as Myron C. Pryor.⁷⁵ This was the guardsman with the .45

⁶⁸ See *supra* note 13.

⁷⁰ Eight page press release issued Aug. 14, 1971, in response to the Aug. 13, 1971 decision by Attorney General John Mitchell not to convene a federal grand jury.

⁷¹ *Id.* at 2.

⁷² *Supra* note 63 at 15, col. 5.

⁷³ *Supra* note 70 at 3.

⁷⁴ *Id.* at 4.

⁷⁵ Myron Pryor v. P. Davies, Board of Christian Social Concerns et al, case number 71-4052, (S.D. N.Y. 1971).

pistol in his left hand who denied firing his weapon and claimed it contained "an empty magazine."⁷⁶ Not unexpectedly this action sparked a new round of correspondence from members of the church understandably concerned at this highly unusual development in the history of the United Methodist Church.

Injustice, social concern and moral leadership had guided the Board in its deliberations regarding their role in the Kent State case. Conviction in the correctness of that role and a deep desire for the truth guided the Board's response to the suit for libel: legal resistance to the action and, if necessary, defense of that role in the judicial forum where the truth may at long last be revealed.

During the course of our deepening involvement we became as much concerned about the laws involved in the Kent State case as we were about the moral issue at stake. For example, a *Washington Post* editorial,⁷⁷ in two parts, aroused our deep concern at its pitiful misinterpretation of the federal law. A joint letter from Dr. Dean Kelley of the National Council of Churches, Rabbi Richard Hirsch of the Union of American Hebrew Congregations, Mr. Bob Jones of the Washington Interreligious Council, and myself, was sent to the *Washington Post* in response to the second part of their editorial on Mitchell's decision not to convene a federal grand jury. The grave error on the part of the editorial writer occurred in his implication that Section 242 of the U.S. Code, Title 18, could only apply at Kent State if the victims had been blacks or aliens! "The editorial," we wrote, "inaccurately sets forth the law and incorrectly interprets it."⁷⁸ Section 242 very clearly states that whoever

under color of any law, statute, ordinance, regulation, or custom willfully subjects any inhabitant of any state . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of color, or race, than are prescribed for the punishment of citizens, shall be fined . . . etc.⁷⁹

For an editorial writer of such a prestigious newspaper to so carelessly misinterpret the conjunction "or" preceding "to different punishments, pains, etc." is not only appalling but quite unforgivable when the civil rights of four slain young citizens have been violated without due process of law. Not only did we have to try and overcome the intransigence of Attorney General Mitchell but we

⁷⁶ *Supra* note 13 at 101.

⁷⁷ *Washington Post*, Aug. 18, 1971 and Aug. 26, 1971 (two part series).

⁷⁸ *Id.*

⁷⁹ The complete text of 18 U.S.C. §242 (1970) appears *supra* note 65.

also had to cope with inadequate editorial journalism that simply encouraged the administration to persevere in its deliberate circumvention of the law. The *New York Times* editorially expressed its willingness to accept the decision by Ohio's Attorney General to drop prosecution of twenty of the twenty-five students and others indicted by the discredited Portage County Grand Jury as a fair trade for the Justice Department's decision to do nothing in respect to the dead and the wounded.⁸⁰ To the religious community this was nothing short of a horrendous proposition. Because the State of Ohio had been unable to produce enough evidence against the indicted to prosecute them we were called upon by the *New York Times*, in particular, to accept this as a final and just settlement of our argument with the Justice Department. The administration had refused to even explore the possibility of a crime on the part of some Guardsmen who had killed four human beings and we were expected to abandon our demands that the Justice Department do so because the State of Ohio lacked the evidence necessary for successful prosecution of students they were very determined to prosecute for crimes far less serious than taking human life. Such editorials were unacceptable to those who had long studied the issue and the facts related to it.

In the months that have followed the announcement of the decision of the Attorney General to not convene a federal grand jury, the religious community has continued to be fully involved in the Kent State issue. Support has been given to the thousands of students who signed the petition that was sent to the White House and which asked the President of the United States to reconsider the decision of the Attorney General and to use his authority in the convening of a federal grand jury in the Northern District of Ohio. Amicus Curiae Briefs were filed in the civil cases by which the families were endeavoring to seek out the facts. A due process of law fund was established by the National Council of Churches, and contributions were solicited for it in order that the burden of the costs of the civil litigation, carried by the families, could be at least partially alleviated. A motion picture is being produced which will give the facts related to the Kent State issue,⁸¹ and a book soon will be published which will tell about the long struggle for justice in which the families have been engaged.⁸² The involvements of the religious community, we trust, will not stop until there has been a full reconsideration of the Kent State issue.

⁸⁰ *New York Times*, Aug. 14, 1971 at 32.

⁸¹ KENT STATE, 1970, released Sept. 15, 1972.

⁸² P. DAVIES, *THE MURDERS AT KENT STATE: A CHALLENGE TO THE AMERICAN CONSCIENCE*, (to be published Jan. 1973 by Farrar, Straus, and Giroux).

We are now approaching the third anniversary of the killings at Kent State University but the fundamental issue involved is as much alive today as it was at the instant those four young men and women fell dead and dying scores of yards away from the Guardsmen who shot them. It is not an issue of an eye for an eye. We have been keenly aware of the fact these Guardsmen were indeed tired, hungry, tense, and angry. They had been involved in a bitter truckers' strike in which they became the object of much more violence than they ever experienced at Kent State.⁶³ Yet, at the moment that strike was settled and they thought themselves about to return to their families, they were hustled off into a campus situation where animosity and resentment are quickly fuelled by violence when the participants are students rather than truckers. In their four day confrontation with strikers, the Guardsmen had even been subjected to sniper fire. At Kent State it took much, much less to trigger them into shooting, something they had refrained from doing during their efforts to maintain order in the strike. No, the issue here is not one of crime and punishment, but law and justice. Our involvement, our concern, and our commitment centers on the government's deep cynicism concerning our system of justice. We cannot ignore the alacrity with which the Justice Department has convened federal grand juries to investigate Leslie Bacon, Daniel Ellsberg, the Berigan brothers, the Vietnam Veterans Against the War, and others without questioning their adamant refusal to do likewise in a case which involves the killing of human beings under circumstances which the Justice Department has already condemned in its summary of the FBI investigation.

Although it may now seem that the religious community stuck its neck out for the victims at Kent State and promptly lost its head, and with it, perhaps, its religious credibility among some of our citizens, it will eventually become clear that the church, the law and social justice are interrelated if only because they exist by the actions and inactions of human beings. Direct involvement in the politics of social reform may seem revolutionary for the church, but it is, perhaps, no more than a reflection of man's deepening concern about his environment, about respect for human dignity, about the sanctity of life, and, above all, about our tendency to accept political expediency in lieu of honesty, truth and integrity.

There is no substitute for justice in a democracy like ours and if the religious community remains silent when government seeks to substitute inaction then it fails not only its members, but God. We chose not to remain silent and thereby have we fulfilled both

⁶³ Wildcat teamster strike in Cleveland-Akron area involving the same troops without respite for four days, April 29, 1970 to May 2, 1970, immediately before being deployed to Kent State University on May 2, 1970.

our spiritual and secular obligations in this rapidly changing society which demands of its religious community positive positions rather than neutral disinterest. After all, the world's major faiths were not founded by men and women afraid to question, challenge and fight for what they believed was right, even if their faith brought them into conflict with the secular domain of kings, emperors, dictators, and, for what matter, presidents.