

THE COST OF FREEDOM

Voicing a Movement after Kent State 1970



Edited by Susan J. Erenrich

Foreword by Kenneth Hammond

The Kent State Shootings after Nearly 50 Years *One Lawyer's Remembrance*

SANFORD JAY ROSEN

Sanford Jay Rosen was the lead attorney for the dead and wounded students of the May 4, 1970, shootings at Kent State. Rosen came to the case in 1977 as lead counsel for the appeal following the victims' loss of their cases in federal district court in Ohio. After he won the appeal, the cases were sent back to the district court for retrial. Rosen continues to practice law in San Francisco and is a founding partner at the San Francisco law firm Rosen, Bien, Galvan & Grunfeld, LLP. This piece was written in 2019.

To understand my involvement in the Kent State cases, we begin with my father's mother long before I was born in December 1937. Aida Grudsky was born in the late 1860s in Kiev, Ukraine. In 1905, she fled to America with her husband and two sons from Czarist Russia's latest oppression of Jews. Neither son survived the journey. Her eldest, born in the United States, also died as a child. Perhaps because of her unspeakable suffering, Aida had an innate sense of injustice, which she passed on to me.

My late wife Catherine was born in January 1940, just three weeks after she was smuggled into the United States in her mother's belly. Pregnant Jewish women were not allowed into the United States on visitors' visas during World War II. The Nazis murdered Cathy's maternal grandmother and that branch of Cathy's family, except my mother-in-law. Cathy, her siblings, and their children and grandchildren are all who remain. Cathy and I were together from when we were teenagers until she died nine years ago. Her story is also of mine, and has informed my passion to confront injustice.

By May 4, 1970, Cathy and I were raising our family in the sure and certain knowledge that, with all of its many faults, America was the best place in the world for us to live. I knew this even though we had suffered the assassinations of John F. Kennedy, Robert Kennedy, Martin Luther King Jr., Malcolm X, and others. I knew this even though I had paid my dues in advancing civil rights, including by representing curfew violators around the clock during the riots in Baltimore, Maryland, following Dr. King's murder in 1968. The courtrooms were guarded by National Guardsmen armed with bayonets affixed to their rifles, and troops were bivouacked less than a mile from my house.

On May 4, 1970, I learned of the shootings at Kent State. My confidence was shaken. What happened there was unique. Soldiers had shot and killed civilians before in America. But this was the first time it had happened on a college campus where white, middle-American citizen-soldiers had shot similarly white, middle-American students. My closest African American friends were as shaken as I was. They feared that since American soldiers were killing white students on college campuses, all hope was lost for them. Horribly, ten days later, on May 14–15, 1970, two black students were killed, and many more blacks were wounded by police during demonstrations at predominantly black Jackson State College. All of the victims were students at Kent State University:

- Jeff Miller was killed. He was 20 years old and a junior. He was shot down approximately 200–220 feet from the line of fire.
- Allison Kraus was killed. She was 19 years old and a sophomore. She was shot down approximately 325 feet from the line of fire.
- Bill Schroeder was killed. He was 19 years old and a sophomore and member of the ROTC. He was shot down approximately 330 feet from the line of fire as he was walking to class.
- Sandy Scheuer was killed. She was 20 years old and a junior. She was shot down approximately 350 feet from the line of fire.
- Joe Lewis was wounded. He was 18 years old and a freshman. He was at least 60 feet from the line of fire. He was shot twice, in the abdomen and in the leg. He later worked in Oregon as a manager in a water plant.
- John Cleary was wounded. He was 19 years old and a freshman. He was at least 60–75 feet from the line of fire. He was shot in the chest. He later became an architect.
- Tom Grace was wounded. He was 20 years old and a sophomore. He was at least 150 feet from the line of fire. He was shot in the left foot. The

bullet took away a large portion of his foot. He later worked for a state government.

- Jim Russell was wounded. He was 23 years old and a postgraduate student. He was at least 160 feet from the line of fire. He was shot in the right thigh and right forehead. He became a city planner.
- Alan Canfora was wounded. He was 21 years old and a junior. He was approximately 175 feet from the line of fire. He was shot in the right wrist. He later became a law librarian.
- Dean Kahler was wounded. He was 20 years old and a freshman. He was approximately 205 feet from the line of fire. He was paralyzed from the waist down and rendered a paraplegic. He later became an elected county government official.
- Doug Wrentmore was wounded. He was 20 years old and a sophomore. He was at least 340 feet from the line of fire. He was wounded in the left knee and leg. He later became an investor.
- Robby Stamps was wounded. He was 19 years old and a sophomore. He was at least 500 feet from the line of fire. He was hit in the right buttock. He later became a social worker.
- Donald MacKenzie was wounded. He was 21 years old and a junior. He was approximately 500 feet from the line of fire. He was hit in the back of the neck. The bullet exited through his cheek, shattering his jaw. He later became a professor.

It was bizarre that three of the four students who were killed and one of the nine wounded were Jews. Horribly, like my in-laws, Sandy Scheuer's father Martin had fled the Nazi Holocaust to find a safe home in the middle of America.

America in the 1970s was not Hitler's Germany. Despite the Vietnam War and the terrible rift in our country at that time, our legal system had not been co-opted by the government. I knew that I could be involved in responding to the shootings. I had a really good cockpit because I was about to spend the spring and summer of 1970 as special counsel in the American Civil Liberties Union's national office. My boss, Mel Wulf, sent me to Ohio to investigate possible lawsuits to respond to the shootings.

Upon my return to New York, I proposed several lawsuits, including damages suits, on behalf of the victims. I did not expect to be involved in prosecuting them because at the end of the summer, I returned to my regular job as a law professor. Yet, at one stage or another, I became involved in several of the lawsuits.

I assisted in the defense of Craig Morgan, Kent State student body president, against charges of inciting to riot. I tried the lawsuit that contested illegal searches of the Kent State students' dorm rooms in the week that followed the shootings. And I argued the appeal to the US Court of Appeals of the suit to get court orders to reform National Guard weaponry, orders, and training for control of civil disorders.

We won Craig Morgan's case and the illegal search case. We lost the suit to reform the National Guard in the Supreme Court, but likely were instrumental in reforming it.

The thirteen damages cases were tried together for fifteen weeks in US District Court in Cleveland during the summer of 1975. I was not involved in it. The trial ended in a nine-to-three jury verdict against the plaintiffs and in favor of the defendants: Ohio governor James Rhodes, the president of Kent State University, the Ohio National Guard adjutant general, the assistant adjutant general, and the National Guard officers and enlisted men who were responsible for the shootings.

Well before the 1975 damages trial, the families of the thirteen victims formed the Kent State Family as a political force that strived for justice. Rev. John Adams, of the United Methodist Church, was largely responsible for bringing them together. The Kent State Family included other close friends and supporters. The Family insisted on appealing the damages cases after losing at trial.

In the fall of 1975, I was about to make a transition from my job as MALDEF's legal director into private practice. I planned to take several months off to write two books that were sponsored by the ACLU. I never wrote them.

Aryeh Neier, the executive director of the ACLU, asked me to take on the Kent State victims' appeal. He told me that I could not expect to win. He said that "it is hopeless, but for the sake of history, the appeal must be taken. It must not be written that the victims did not appeal, therefore they acquiesced." I agreed to take on the appeal, but decided that we could win.

Michael Geltner, then a law professor at Ohio State University and the lead attorney in much of the Kent State litigation, agreed. He added that if I won the appeal, I had to be prepared to be lead counsel at any retrial. I took his advice to heart, having heard of conflicts among counsel for the victims that played out poorly in the first trial.

I assembled a team of lawyers and paralegals to work with me on the appeal. We worked out of my house. My children and friends remember the disruptions.

Preparing the briefs took more than six months. Our opening brief was 159 pages long and included several pertinent photographs and maps of

the Kent State campus. A separate appendix, including a larger number of pertinent photographs, was also provided to the Appellate Court. The defendants responded with briefs totaling more than 159 pages and included several additional photographs and a map.

The victims were in the courtroom at the oral argument in Cincinnati. Dean Kahler sat up front in his wheelchair. Their presence was acknowledged by the three judges.

In 1977, the Court of Appeals unanimously reversed the trial court and sent the case back for retrial. The court's clerk, who was almost as excited as I was, called to tell me the news. Defendants moved unsuccessfully for reconsideration in the Court of Appeals, and equally unsuccessfully petitioned the Supreme Court to review the case.

Now, the clients collectively had to decide which lawyers were going to represent them at the retry. A member of the original trial team attempted to take the case back. However, I was designated as lead counsel.

I assembled a trial team. The late Rees Davis of Mansfield, Ohio, and David Engdahl then of Boulder, Colorado, were my principal trial cocounsel. Our back-up lawyers were Ellen Sue Goldblatt of Berkeley, California, and Robert Baker of Beckley, West Virginia. Our paralegal was Steven Keller, who later became a lawyer. Engdahl and Keller had worked on the first trial, and provided us with some continuity.

We submitted more than twenty pretrial motions designed to improve the chances of winning the case. We also began to prepare another motion, this one to disqualify Judge Don J. Young, who had presided over the first trial. We believed he was prejudiced against the victims. He withdrew before we filed that motion, but he could not resist taking a parting shot at the victims and their legal team. In a press interview when he withdrew, he declared that the victims were foolishly refusing to settle the case and that they could not win regardless of the number of times the case was tried.

William K. Thomas was assigned as the new trial judge. He had presided over and favorably decided the Kent State illegal search case. He also had ordered expunged an unauthorized and illegally unsealed and published Portage County, Ohio, Grand Jury report that excoriated the Kent State students.

We believed Judge Thomas was a no-nonsense and fair judge. He proved us right. During opening statements at the retrial in 1978, for example, he ordered one of the defendants' lawyers to use the real words, rather than substituting the nonsense phrase, "da-da-da-da," when that lawyer repeated the protest chant: "One, two, three, four. We don't want your fucking war." In that instant, Judge Thomas demystified the chant and much of the events leading up to the May 4 shootings.

We were disappointed that Judge Thomas limited our pretrial discovery. However, he granted all but one of our pretrial motions, including one to exclude bricks and rocks from the courtroom. At the first trial the defendants' lawyers brought sacks full of bricks and rocks into the courtroom, where they remained in plain view as a reminder that similar items were thrown at the Guardsmen before the May 4 shootings.

Lt. Gen. Walter Giles Johnson (US Air Force, retired), the former adjutant general of the Mississippi National Guard, was in charge of the Mississippi National Guard troops when blacks were killed and wounded at Jackson State College. None of General Johnson's troops had fired a weapon.

General Johnson agreed to testify as an expert witness. Before his deposition, the defendants' paralegal told Judge Thomas that General Johnson did not want to testify, and that I had been harassing him. The judge got the general, who was at his golf club in Mississippi, on his speakerphone. General Johnson said I had not harassed him and that he was willing to testify. As we left the judge's chambers, I said heatedly, "Your Honor, we should question the defendants' paralegal under oath now." Judge Thomas responded, as if speaking to an unruly nephew, "Sandy, why don't you take a run around the block and cool down."

At General Johnson's deposition, one of the defendants' lawyers made an anti-Semitic comment featuring my mother. "Sandy," the lawyer said, "I have this image of your Mama as a little old Jewish lady making chicken soup and leaning out of her window in Brooklyn." He must not have known that General Johnson had defied his father to get into World War II, had been shot down, and spent more than a year as a German prisoner of war. As tempers flared, General Johnson said, "Mr. Rosen, is it true that Jewish people believe that chicken soup is like penicillin?" "Yes, General," I said, "some do." To which the general responded, "I love chicken soup." The deposition went on and his answers just got better.

Our jury consultants from the National Jury Project told us that most people's initial reactions to an historic or traumatic event usually remain their final reactions. They also told us that the majority of potential jurors in northern Ohio were hostile to the Kent State victims, and many would try to hide their biases so that they could be on the jury to decide against the victims.

We asked for and got a rigorous selection process. After filling out extensive questionnaires, each potential juror was taken into the judge's chambers and questioned at length by the judge and the lawyers.

Several potential jurors tried to get off, but were not excused. We wanted one of them, a paratrooper in the Korean War, on the jury because we be-

lieved that he knew that well-trained and soldiers under good officers would not have opened fire at Kent State.

Many jurors were disqualified for cause. One was a young black mother who was on welfare. Judge Thomas refused to believe her assurances that she had sufficient family help to take care of her child during the trial. I reacted furiously in front of the judge. When we returned to our “war room” in the courthouse, I threw my briefcase across the room. The next day, Judge Thomas apologized for his decision.

Several potential jurors, whom we believed were biased against the victims, tried hard to stay on the jury. We had to strike (excuse) several peremptorily, but could not get rid of all the potentially biased jurors. The defendants struck the brighter and freethinking jurors, including a young woman who had identified herself as a Druid.

We did the best we could in selecting jurors, but we were not happy with some on the panel. This weighed heavily on me.

Early in the pretrial proceedings, Judge Thomas said that he wanted to explore settlement. All parties and their attorneys agreed that he could act as a settlement judge. He interviewed the victims, and examined some of the deformities and scars (both visible and invisible) caused by the shootings. He fully evaluated the case. He proposed a settlement figure of \$675,000, limiting attorneys’ fees and expenses to \$75,000 of that amount, plus an additional sum for court-awarded costs. Rees Davis, my experienced Ohio co-counsel, agreed that this was a reasonable recovery based on his knowledge of damages recoveries in Ohio. He was not happy to settle. He wanted to try the case to judgment and hold the defendants’ feet to the fire.

John Adams met privately with the parents of the students who had been killed. I have wept only three times in public since I have been an adult. One of those occasions was when the parents came out of their private meeting. With tears and pain they had made the difficult decision to accept the settlement and end that part of their fight for justice and accountability.

My clients agreed to settle on the condition that the defendants, and only the defendants, each sign an acknowledgment that the victims had been wronged. The words of the defendants’ statement were hard-fought. Years later, Rees Davis told me he understood the value of getting the statement. Here is what each defendant, including Ohio’s governor, signed:

In retrospect, the tragedy of May 4, 1970 should not have occurred. The students may have believed that they were right in continuing their mass protest in response to the Cambodian invasion, even though this protest followed the posting and reading by the University of an order to ban rallies

and an order to disperse. These orders have since been determined by the Sixth Circuit Court of Appeals to have been lawful.

Some of the Guardsmen on Blanket Hill, fearful and anxious from prior events, may have believed in their own minds that their lives were in danger. Hindsight suggests that another method would have resolved the confrontation. Better ways must be found to deal with such confrontations.

We devoutly wish that a means had been found to avoid the May 4 events culminating in the Guard shootings and the irreversible deaths and injuries. We deeply regret those events and are profoundly saddened by the deaths of four students and wounding of nine others, which resulted. We hope that the agreement to end this litigation will help to assuage the tragic memories regarding that sad day.

The settlement had to be funded by the State of Ohio. Before the state officials agreed to the settlement, the politicians floated it to legislators and in the public press. Time passed and we started the trial on December 19, 1978, my forty-first birthday.

We worked on our opening statement for weeks, and it took less than an hour for me to deliver. It had a Psalm-like cadence and structure, featuring repetition of form and transitional sentences and phrases. Several jurors brushed tears from their eyes, while others sat stone-faced.

We called our first four witnesses, each of whom testified well. Then, suddenly, it was over. The State of Ohio agreed to the settlement.

The next day, I visited with Judge Thomas and told him how much my clients appreciated his fairness. He responded, "Fairness satisfies the appearance of fairness."

More work had to be done. Some of the victims' previous lawyers attempted to collect full contingent fees from the settlement fund. They were spurned by Judge Thomas and then by the Court of Appeals. As one of the appellate judges in Cincinnati, Pierce Lively, said during oral argument, "What do you want us to do? Send these people back to retry the case a third time?"

The Kent State Family has not yet gotten to the bottom of why the shootings occurred. It is still doing that, and the Family's determination in the damages cases itself has had a powerful impact on America. For instance, I believe the Family became the model for future victims' families, such as the relatives and friends of the victims of the Pan Am Flight 103 bombing over Lockerbie, Scotland.

Moreover, the Kent State damages case was the first in US history in which damages were paid to the victims of shootings by soldiers and in

which state government officials acknowledged in writing that a wrong had been done to the victims.

I understand that the Kent State shootings and litigation caused reform of National Guard weaponry, orders, and training to control assemblages and civil disorders. The shootings are taught in National Guard training classes as an example of what not to do in controlling civilian disorders. National Guard troops no longer patrol with their weapons “locked and loaded.” They lock and load their weapons only when ordered by an officer. They also are provided with and trained on the use of nonlethal weapons.

Since the Kent State and Jackson State shootings, I do not believe there has been a single civilian fatality in the United States caused by National Guard troops in the control of an assembly or civil disorder circumstances, possibly excluding siege situations.

I wish I could say that ending the case gave the victims some peace of mind. Certainly, the money helped Dean Kahler to lead a better life, and it assisted the other victims. But did it bring peace of mind? No. No resolution could.

Reentering my real life in January 1979 was difficult. It took a lot of time. My absence and preoccupation had been difficult on my wife and children, and on me. Even now, nearly fifty years after the shootings and more than forty years after the settlement, I become a bit moody as each May 4 approaches. Sometimes I have buyer’s remorse about settling, rather than trying the case to a judgment. Then again, after the settlement, Judge Thomas told me he was concerned that we could have lost the case.

The wailing from the parents of the slain students I heard in our war room in the Federal Court still haunts me. I continue to mourn for the lost lives so full of promise: Allison, Jeff, Sandy, and Bill. I mourn for the wounded students’ disrupted lives and the disrupted lives of their family members, friends, and witnesses. (During jury selection, one potential juror, a man who had been at Kent State on May 4, burst into tears as he remembered arriving on the Commons just after the shootings.)

I mourn for the other victims who have since died—Robbie Stamps, who died in 2007, and Jim Russell, who died in 2008—and for other members of the Kent State Family who have died, such as parents of the victims and for John Adam and Rees Davis.

I think it is likely that the Kent State tragedy would not have happened if Gov. James Rhodes, Vice President Spiro Agnew, and President Richard Nixon had not used incendiary rhetoric to demonize the antiwar demonstrators at Kent State and many other colleges around the country. It



Sanford Jay Rosen at the settlement news conference in Cleveland, Ohio (Source: John Rowe)

is beyond concerning that elected officials and other public persons in the United States are doing that kind of thing again with a vengeance, enabling the haters among us, as evidenced by the senseless killings by white nationalists, racists, and anti-Semites over the past several years.

I have heard many shocked or disbelieving reactions to the Kent State shootings from around the world from people living in countries long used to the slaughter of civilians by soldiers and police. It does not matter that measured on any world scale, few were killed or wounded at Kent State. It should not have happened in America.

One weekend some years ago, in a chance encounter in a store, I talked with a retired Marine. He had mustered out as a gunnery sergeant and was the second most senior noncommissioned Marine officer at the time of his retirement. He had served two full tours in Vietnam, the last one ending with the evacuation of Saigon in 1975. When I told him that I had represented the victims of the shootings at Kent State, he looked mournful and then angry. "They were murdered," he said.

A people's history of the ongoing search for truth, justice, and reconciliation

“Fifty years later, what happened at Kent State on May 4, 1970, still reverberates, inviting reflection on orthodoxy, dissent, and power in the United States. This invaluable collection of primary source material captures the voices of those that have labored for truth and justice in the aftermath of that violent, fateful day.”—**Christopher Strain**, author of *The Long Sixties: America, 1955–1973*

“May 4, 1970. We all remember what happened at Kent State—or do we? Susan Erenrich has collected memories, tributes, reflections, photographs, and testimonials from wounded students in her emotional book. Indeed, *The Cost of Freedom* is a collection of voices that never should be forgotten. This book is a monument to all those who died, were wounded, or, like me, were forever scarred on May 4, 1970.”

—**Terry Anderson**, author of *The Movement and the Sixties* and five editions of *The Sixties*

The Cost of Freedom: Voicing a Movement after Kent State 1970 is a multi-genre collection describing the May 4, 1970, shootings at Kent State University, the aftermath, and the impact on wider calls for peace and justice. Fifty years after the National Guard killed four unarmed students, Susan J. Erenrich has gathered moving stories of violence, peace, and reflection, demonstrating the continued resonance of the events and the need for sustained discussion. This anthology includes personal narratives, photographs, songs, testimonies, and poetry—some written by eyewitnesses to the day of the shootings—as well as speeches from recent commemoration events and items related to the designation of the site on the National Register of Historic Places in 2016.

Erenrich, who came to Kent State in 1975 as a college freshman, became a member of the May 4 Task Force, a student organization that continues to the present as an organizing group for marking the anniversary each year. Her involvement with the task force led her to make the many connections with writers, artists, and memory-keepers who have built this collection of primary source material.

While a number of books and articles over the years have treated the Kent State shootings and aftermath, this collection is unique in its focus on justice issues and its call to the future. The movement to seek justice, as Erenrich notes, is an ongoing one. These voices call us to continue to move forward even as we learn from the past.

Susan (Susie) J. Erenrich is a social movement history documentarian and professor at American University who uses the arts for social change to tell stories about transformational leadership, resilience, and societal shifts as a result of mobilization efforts by ordinary citizens. She has worked for more than four decades in nonprofit/arts administration, civic engagement, community service, and community organizing. She is also the editor of *Freedom Is a Constant Struggle: An Anthology of the Mississippi Civil Rights Movement* and *Grassroots Leadership & the Arts for Social Change*.

A portion of the proceeds from the sale of *The Cost of Freedom* supports the work of the Kent State University May 4 Visitors Center.

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