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## Kent State and the Failure of First Amendment Law

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## KENT STATE AND THE FAILURE OF FIRST AMENDMENT LAW

Gregory P. Magarian\*

### ABSTRACT

Since the U.S. Supreme Court decided its first free speech case 100 years ago, two very different eras have defined First Amendment law. For a half century, before 1970, the Supreme Court focused on protecting the expressive freedom of political dissidents and social reformers. In 1970, amid protests against the Vietnam War, the Ohio National Guard senselessly gunned down four students at Kent State University. The Kent State massacre exposed the fragility in our country of political protest, free speech, and democracy itself. That atrocity should have inspired First Amendment law to affirm and enhance its protection of dissenters and vulnerable speakers. Instead, in a tragic irony, 1970 marks the moment when the Supreme Court began to unmoor First Amendment law from its formative principles and to prioritize protection of wealthy, powerful speakers. Professor Magarian contends that the Court's shift since 1970 has betrayed the First Amendment's democratic promise and transformative power. He calls for the next century to restore and advance First Amendment law's foundational ideals.

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The past two years brought a noteworthy convergence of anniversaries. 2019 marked the centennial of the United States Supreme Court's earliest decision about First Amendment law. In 2020, on May 4, worldwide reckoning with the novel coronavirus obscured the fiftieth anniversary of the Ohio National Guard's murder of four young women and men at Kent State University in Ohio. The Kent State massacre, a dark watershed in our government's suppression of free speech, almost perfectly bisects the First Amendment century. That seismic shock to our public discourse should have inspired stronger First Amendment protection for political dissidents and social reformers. Instead, Kent State corresponds with the beginning of First Amendment law's fifty-year devolution into a protection for the powerful, a descent that shows no signs of bottoming out.

## I.

The Bill of Rights has been part of our Constitution since 1791. However, the jurisprudence of constitutional rights developed slowly, and the Supreme Court never ruled on a First Amendment claim until 1919.<sup>1</sup> The First Amendment century splits almost perfectly into two contrasting halves. In its first half century, from 1919 until about 1970, First Amendment law focused almost completely on protecting socially marginal, politically radical, underpowered speakers. These ragtag idealists were our early paladins of free speech. Their noisy dissent produced the foundational ideals of First Amendment law.

From 1919 through the 1920s and again in the 1950s, our main free speech paladins were communists and other leftists who opposed the First World War and resisted systemic inequality. The Court in its earliest First Amendment decisions ruled against these political dissidents.<sup>2</sup> However,

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1. See *Schenck v. United States*, 249 U.S. 47 (1919) (affirming convictions of Socialist Party members for distributing leaflets that urged resistance to the military draft).

2. The initial group of these cases arose out of activism against the United States' entry into World War I. See *Abrams v. United States*, 250 U.S. 616 (1919) (affirming convictions of Russian immigrant supporters of the Bolshevik Revolution for distributing leaflets that urged curtailment of U.S. military production); *Schenck*, 249 U.S. 47. A second set of cases arose in the late 1920s, during the first Red Scare, from convictions under state "criminal syndicalism" statutes. See *Whitney v. California*, 274 U.S. 357 (1927) (affirming the conviction of a Communist Labor Party member for belonging to a group that advocated political violence), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *Gitlow v. New York*, 268 U.S. 652 (1925) (affirming the conviction of a Socialist for writing and

Justices Oliver Wendell Holmes and Louis Brandeis wrote dissenting and concurring opinions that formed the bedrock for First Amendment law.<sup>3</sup> In one of those opinions, defending the right of a communist to advocate her political views, Justice Brandeis wrote:

It is the function of speech to free men from the bondage of irrational fears. . . . Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.<sup>4</sup>

The views of Justices Holmes and Brandeis eventually prevailed, establishing the core commitment of First Amendment law to protect even the most aggressive challenges to our political power structure.

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circulating materials that advocated the violent overthrow of the government). Communism returned to the forefront of First Amendment jurisprudence in the 1950s, most notoriously in *Dennis v. United States*, 341 U.S. 494 (1951) (affirming federal convictions of U.S. Communist Party leaders for leading the U.S. Communist Party).

3. See *Whitney*, 274 U.S. at 372 (Brandeis, J., concurring); *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting); *Abrams*, 250 U.S. at 624 (Holmes, J., dissenting).

4. *Whitney*, 274 U.S. at 376-77 (Brandeis, J., concurring).

As First Amendment law matured in the 1940s, Jehovah's Witnesses became the next generation of free speech paladins. Members of this small, outsider sect raised numerous free speech claims against restraints on their religious expression.<sup>5</sup> Their most important victory came during World War II, when Jehovah's Witness parents challenged West Virginia's command that their children salute the flag and recite the pledge of allegiance.<sup>6</sup> Those rituals, for the parents, amounted to worshiping false idols.<sup>7</sup> The government, in contrast, claimed it could mandate patriotic acts as a way of promoting national unity.<sup>8</sup> The Supreme Court sided with the Jehovah's Witnesses. In 1943, at the height of wartime patriotic fervor, Justice Robert Jackson wrote:

[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.<sup>9</sup>

Justice Jackson's opinion made clear that the First Amendment lets social and religious nonconformists challenge our dominant cultural consensus.

The final free speech paladins of First Amendment law's first half century were African-American campaigners for racial justice. Civil rights activists in the 1950s and 1960s repeatedly invoked the First Amendment to protect sit-ins, marches, and other public advocacy.<sup>10</sup> Their most famous legal success came in the case of *New York Times Company v. Sullivan*.<sup>11</sup> Supporters of Dr. Martin Luther King, Jr. had written and published in the

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5. See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946) (striking down on First Amendment grounds the conviction of a Jehovah's Witness for distributing religious literature in a "company town"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942) (rejecting a Jehovah's Witness' First Amendment challenge to a breach-of-the-peace conviction and establishing the "fighting words" exception to First Amendment speech protection).

6. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

7. See *id.* at 629.

8. See *id.* at 625.

9. *Id.* at 642.

10. See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966) (striking down on First Amendment grounds the convictions of Black activists who staged a sit-in at a segregated public library); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (holding that the First Amendment rights of assembly and petition barred convictions of Black students for breaching the peace after they marched on the South Carolina state capitol to protest segregation); *NAACP v. Alabama*, 357 U.S. 449 (1958) (establishing First Amendment protection for expressive association and barring a state government from compelling a civil rights organization to turn over its membership list).

11. 376 U.S. 254 (1964).

*New York Times* an essay, titled “Heed Their Rising Voices,” that recounted brutal police attacks on Dr. King and civil rights demonstrators in Montgomery, Alabama. L.B. Sullivan, the Montgomery police commissioner, sued the essay’s authors and the *New York Times* for libel.<sup>12</sup> The Supreme Court held that the First Amendment barred Sullivan’s claim.<sup>13</sup> Justice William Brennan wrote that our society maintains

a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic . . . attacks on government and public officials.<sup>14</sup>

Justice Brennan’s opinion in *Sullivan* both sheltered the powerless and puts the powerful on notice that free speech poses a constant challenge to their hegemony.

The Communists and radicals of the 1920s declared that our whole system of government was wrong. The Jehovah’s Witnesses of the 1940s insisted that their religion mattered more than our country. The civil rights activists of the 1960s testified that our society was fundamentally unjust. These free speech paladins’ legal victories through First Amendment law’s first half century established an emphatic legal vision. The First Amendment’s central purpose was to protect society’s most vulnerable, marginal, and politically provocative speakers. The Constitution created space for sharp challenges to the status quo. Hierarchies of power, particularly the government, must bear the impact of aggressive political and societal dissent. These are the formative, foundational principles of our First Amendment tradition. Fifty years ago, in 1970, these principles seemed ingrained and secure.

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12. *See id.* at 256.

13. *See id.* at 292.

14. *Id.* at 270.

## II.

That same year of 1970 brought a moment of awful reckoning between free speech and government power: the May 4 military assault on students at Kent State University. That massacre left an ugly scar on our national consciousness. Beyond their political and cultural impact, the Kent State shootings and surrounding events severely tested our developing First Amendment commitments.

On Thursday night, April 30, 1970, President Richard Nixon announced that he had expanded the Vietnam War by invading Cambodia.<sup>15</sup> College and university campuses, already seething with opposition to the war and the military draft, exploded.<sup>16</sup> At Kent State University, students flooded the streets in protest all weekend. A small faction vandalized property and burned down the campus ROTC building.<sup>17</sup> In response, Ohio Governor

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15. See AP: *Press Releases, Kent State Shootings: Digital Archive*, KENT STATE UNIV. LIBRS. SPECIAL COLLECTIONS & ARCHIVES (May 2, 1970), <https://omeka.library.kent.edu/special-collections/items/show/3265> [<https://perma.cc/6GGH-SNKF>]; see also Richard Nixon Foundation, President Nixon's Cambodia Incursion Address, YOUTUBE (July 21, 2010), <https://www.youtube.com/watch?v=3cAAAnoqmks> [<https://perma.cc/R9CW-8HE4>].

My account of the Kent State massacre and surrounding events draws primarily upon sources from the Kent State University Library's Department of Special Collections. Kent State has digitized its May 4 Collection, a rich compilation of documents, audio recordings, and visual records about the 1970 shootings, in a virtual archive. See *Kent State Shootings: Digital Archive*, KENT STATE UNIV. LIBRS. SPECIAL COLLECTIONS & ARCHIVES, <https://omeka.library.kent.edu/special-collections/kent-state-shootings-digital-archive> [<https://perma.cc/H5AA-XK86>] [hereinafter Kent State Digital Archive]. In addition, Kent State has collected oral histories of the shootings and their aftermath. See *Kent State Shootings: Oral Histories*, KENT STATE UNIV. LIBRS. SPECIAL COLLECTIONS & ARCHIVES, <https://omeka.library.kent.edu/special-collections/kent-state-shootings-oral-histories> [<https://perma.cc/5VMW-RWD9>] [hereinafter Kent State Oral Histories].

16. See AP: *Press Releases, supra* note 15 ("The demonstration this morning was protesting Nixon's decision to send U.S. troops into Cambodia.").

17. See *Denny Benedict Oral History*, Kent State Oral Histories (Apr. 8, 2010), <https://omeka.library.kent.edu/special-collections/items/show/1558> [<https://perma.cc/B2AA-5WQU>] ("You could see a glow from across the hill: the ROTC building . . . the kids were throwing rocks at it and chanting . . . some of the ammunition would blow up, and there'd be sparks. It was quite a fire."); *Ellis Berns Oral History*, Kent State Oral Histories (May 4, 2010), <https://omeka.library.kent.edu/special-collections/items/show/1559> [<https://perma.cc/7FUK-VH7R>]:

I remember the ROTC being burned, and standing there in just complete awe. It was just remarkable. I had never seen a building burn, with the heat and the fervor and the intensity. These old ROTC buildings were just completely wooden structures, and they just went up in flames. And this was in response, protesters in response to what was happening with the war.

See also Kent State University News Service, *Burned Out ROTC Building with National Guard Personnel and Others Around Building* (photograph), in KENT STATE DIGITAL ARCHIVE (May 4, 1970),

James Rhodes, term limited and facing a primary for a U.S. Senate seat the following Tuesday,<sup>18</sup> deployed the National Guard to Kent.<sup>19</sup> As anti-war protests rolled on, Guard soldiers indiscriminately gassed, beat, and even bayoneted students.<sup>20</sup> By Sunday, the Guard had occupied the campus, turning Kent State into a virtual police state.<sup>21</sup>

On Monday, May 4, hundreds of students gathered at noon for a rally on the main campus commons.<sup>22</sup> They chanted and yelled at the Guard

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<https://omeka.library.kent.edu/special-collections/items/show/1529> [<https://perma.cc/49XV-W4UN>].

18. See Ken Rudin, *40 Years After Kent State: Remembering Ohio Gov. James Rhodes*, NPR (May 3, 2010, 10:49 AM), <https://www.npr.org/sections/politicaljunkie/2010/05/03/126474013/40-years-after-kent-state-remembering-ohio-gov-james-rhodes> [<https://perma.cc/XW8M-DB32>].

19. See *AP: Press Releases*, *supra* note 15.

20. See *AP: Press Releases*, Kent State Digital Archive (May 3, 1970), <https://omeka.library.kent.edu/special-collections/items/show/3266> [<https://perma.cc/4GG4-MS4G>] (describing how National Guardsmen used tear gas and bayoneted rifles to disperse student demonstrators, make arrests, and force students back onto campus).

21. See *id.* (describing the National Guard's occupation of the Kent State campus); Frank Smith, *National Guard Vehicles, Campus, New Library in Background* (photograph), in KENT STATE DIGITAL ARCHIVE (May 1970), <https://omeka.library.kent.edu/special-collections/items/show/1888> [<https://perma.cc/L66P-QDY6>]; John Cleary *Oral History*, Kent State Oral Histories (May 3, 2010), <https://omeka.library.kent.edu/special-collections/items/show/1825> [<https://perma.cc/VF9C-JA8V>]:

But then things kind of got ugly Sunday night. There was a curfew placed and I think they said that you weren't allowed to have more than three people—groups of three people—at certain times . . . And that night, there were some students that tried to defy the curfew. There was tear gas being shot. There was helicopters overhead with searchlights. It was almost like you were in the middle of a war zone.

22. See *Ellis Berns Oral History*, *supra* note 17 (“You could almost feel the tension as you got closer and closer to the University. . . . We were there to make a stand, and I was there to make a stand.”).



troops.<sup>23</sup> The Guard, with no legal authority, declared the protest illegal.<sup>24</sup> Guardsmen attacked the students with tear gas, and soldiers moved in to disperse the crowd.<sup>25</sup> By 12:20 PM, only about fifty student protesters remained.<sup>26</sup> Some threw rocks or taunted the soldiers from between 80 and 200 feet away.<sup>27</sup> Well behind them, hundreds more students were walking

23. See *Michael Erwin Oral History*, Kent State Oral Histories (Apr. 4, 2000), <https://omeka.library.kent.edu/special-collections/items/show/1629> [<https://perma.cc/THH7-XN8X>]:

[Students] started the chants—the anti-war chants—and the police or the National Guard . . . from the ROTC Building started calling out over bullhorns, “This is an unlawful gathering. It needs to break up. If you don’t, we’re going to use force to break it up.” Not the exact words but the message—nobody could hear them—they couldn’t be heard very well from sitting right by the ROTC Building because everybody started shouting them down again. So they decided they needed to go drive around the Commons and get the message out, so to speak. So they did that and there were a few rocks thrown in their direction . . . .

See also *Naomi Goelman Etzkin Oral History*, Kent State Oral Histories (May 4, 1990), <https://omeka.library.kent.edu/special-collections/items/show/1616> [<https://perma.cc/9M7A-KQNE>]:

We were on the side of the hill that was between what was then the Student Union and the architecture building. And there were speakers at the bell, which was always the focal point of the rallies. And the National Guard was just hanging out at that time. There was a lot of chanting and speaking.

24. See *Ronald Goldstein Oral History*, Kent State Oral Histories (May 2, 2015), <https://omeka.library.kent.edu/special-collections/items/show/6128> [<https://perma.cc/8H34-P89G>] (“[T]he students rallied, they rang the bell, and the Guardsmen are lined up there, a guy comes—I guess one of the officers—comes in his jeep with his bullhorn, ‘This gathering . . .’ whatever he called it . . . ‘is illegal, you have to disperse.’”).

25. See *Michael Erwin Oral History*, *supra* note 23:

It was pretty apparent that the crowd wasn’t going to break up on its own . . . And at that point, [Guard troops] started firing tear gas into the crowd and they were using small grenade launchers—it looked like small shotguns. . . . I know this because I put the gas mask on and I ran out and started picking [the tear gas projectiles] up and throwing them back towards the National Guardsmen. And this went on for a while.

See also *Naomi Goelman Etzkin Oral History*, *supra* note 23 (“And then the National Guard began to throw canisters of tear gas. Students really dispersed somewhat; but also some students picked up the canisters and threw them back at the Guard.”).

26. See *Ronald Goldstein Oral History*, *supra* note 24 (“[M]ight have been maybe fifty hardcore demonstrators that were taunting the Guardsmen and there were students just watching and they were not participating, they were watching what was going on . . .”).

27. See PETER DAVIES, *THE TRUTH ABOUT KENT STATE: A CHALLENGE TO THE AMERICAN CONSCIENCE* 40-41 (1973) (giving accounts that students threw rocks from distances of 80 to 125 feet and taunted Guardsmen from distances of 150 to 200 feet); see also GLENN W. FRANK ET AL., *MAY 4TH AND ITS AFTERMATH* 57, <https://omeka.library.kent.edu/special-collections/items/show/4315> [<https://perma.cc/RJU7-X4DH>] (“Some demonstrators followed as close as twenty yards, but most were between sixty and seventy-five yards behind the Guard.”).

to and from class.<sup>28</sup>

At 12:24 PM, for reasons that no one has ever been able to explain, the Guard unit raised their rifles and opened fire. Four students—Allison Krause, Jeff Miller, Sandy Scheuer, and Bill Schroeder—were killed. Nine other students were maimed.<sup>29</sup> One of them, Dean Kahler, was paralyzed for the rest of his life.<sup>30</sup> No one on that campus posed any threat to the Guardsmen. Most of the dead and wounded stood hundreds of feet away when their government’s bullets tore through their bodies.<sup>31</sup> The closest of the murdered students, Jeff Miller, fell 270 feet from his killers.<sup>32</sup> Some of the victims were protesting; some were watching the protest; some were walking to their next class. The soldiers made no effort to help the fallen students. Instead, they attacked the stunned survivors with more tear gas.<sup>33</sup> A Guard captain even planted a handgun on Jeff Miller’s body to try to justify his murder.<sup>34</sup>

The massacre at Kent State horrified and enraged students across the

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28. See *Larry Shank Oral History*, Kent State Oral Histories (Mar. 14, 2019), <https://omeka.library.kent.edu/special-collections/items/show/7981> [https://perma.cc/PTD5-VY72] (“[T]he weirdest thing was, I think, at the time class, had just gotten out. So, there were—not only were there Guardsmen and kids throwing stuff, there were people coming from their classes, walking right through all of it, too.”).

29. See Jerry M. Lewis & Thomas R. Hensley, *The May 4 Shootings at Kent State University: The Search for Historical Accuracy*, at 13, Kent State Digital Archive (1998), <https://omeka.library.kent.edu/special-collections/items/show/4440> [https://perma.cc/8VCW-55PZ].

30. A Kent State student described his interactions with Dean Kahler years after the shooting:

I drove for Campus Bus Service and I drove the handicap vans for a while. I remember stopping to pick up one of the students who was injured, who had spinal cord, you know, bullet go through his spinal cord and then he couldn’t walk. I remember picking him up, in order to put him in his wheelchair, after I put the wheelchair on the bus. I had that physical contact, for the first time in my life, with somebody who could not walk, who was really disabled. It was very profound to feel his weight, to feel what his legs felt like against my chest, as I picked him up.

*Martin Gallagher Oral History*, Kent State Oral Histories (Jan. 11, 2016), <https://omeka.library.kent.edu/special-collections/items/show/7931> [https://perma.cc/9TYD-TP8C].

31. See Lewis & Hensley, *supra* note 30, at 13-14 (recounting the precise distance each victim stood from the Guard when shot).

32. See *id.* at 13.

33. See Jerry M. Lewis, *May 4, 1970: A First Person Account*, Kent State Digital Archive (Jan. 31, 1990), <https://omeka.library.kent.edu/special-collections/items/show/4311> [https://perma.cc/YA6H-Y5WF] (“The Guard made no attempt to help the wounded.”).

34. See *Kent State Guardsman Testifies He Lied*, N.Y. TIMES (July 1, 1975), <https://www.nytimes.com/1975/07/01/archives/kent-state-guardsman-testifies-he-lied.html> [https://perma.cc/TH76-CS45].

country. Protests erupted on campuses, and a general student strike shut down 450 colleges and universities.<sup>35</sup> The general public, however, saw the events at Kent State very differently. In a Gallup Poll taken the week after the shootings, fifty-eight percent of respondents blamed the Kent State victims for their deaths and injuries, while eleven percent blamed the Ohio National Guard.<sup>36</sup> In Ohio, Governor Rhodes surged from behind to very nearly win his Senate primary.<sup>37</sup> He later won two more terms as governor.<sup>38</sup> Some of the public reaction to the massacre was stoked by government disinformation that the news media reflexively propagated. The national press trumpeted claims by Guardsmen that a student sniper provoked the shooting, that students were armed and threw large rocks, that students had charged toward the Guard unit.<sup>39</sup> All of those claims turned out to be false.

On May 8, several hundred students gathered in New York City to protest the Kent State shootings.<sup>40</sup> Peter Brennan, the leader of the city's construction unions, organized hundreds of pro-war construction workers to attack the nonviolent protesters. In what became known as the Hard Hat Riot, Brennan's goons viciously beat the students with construction helmets, clubs, and steel-toed boots. Hard hats then swarmed onto the nearby campus of Pace University and beat any student they saw. Police stood by and did nothing.<sup>41</sup> In response, President Nixon invited construction union representatives to the White House, where they

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35. See Clara Yoon, *The Kent State Shootings*, PBS (July 10, 2017), <https://www.pbs.org/wgbh/roadshow/stories/articles/2017/7/10/kent-state-shootings> [<https://perma.cc/P45D-QQFK>] ("Students protested throughout the United States, and a student strike of four million students led to the closing of more than 450 campuses."). See generally "Student [S]trikes" Subject Area, Kent State Digital Archive, <https://omeka.library.kent.edu/special-collections/kent-state-shootings-digital-archive/browse-by-subject-area#Student%20strikes> [<https://perma.cc/PX9N-XF3S>].

36. See RICK PERLSTEIN, *NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA* 489 (2008).

37. OHIO SECRETARY OF STATE, *REPUBLICAN PRIMARY: MAY 5, 1970*, <https://www.ohiosos.gov/elections/election-results-and-data/1970-1979-official-election-results/republican-primary-may-5-1970/> [<https://perma.cc/7WPF-KMN8>].

38. See Rudin, *supra* note 18.

39. See, e.g., John Kifner, *4 Kent State Students Killed by Troops*, N.Y. TIMES (May 5, 1970), <https://www.nytimes.com/1970/05/05/archives/4-kent-state-students-killed-by-troops-8-hurt-as-shooting-follows.html> [<https://perma.cc/AUQ9-KESM>].

40. See Homer Bigart, *War Foes Here Attacked by Construction Workers*, N.Y. TIMES (May 9, 1970) <https://www.nytimes.com/1970/05/09/archives/war-foes-here-attacked-by-construction-workers-city-hall-is-stormed.html> [<https://perma.cc/6BL2-QB6H>].

41. See *id.*

presented a grinning Nixon with a hard hat.<sup>42</sup> He later appointed Peter Brennan to be his Secretary of Labor.<sup>43</sup>

No government official or National Guard soldier ever faced any legal consequence for the Kent State murders. Not until 1990 did the State of Ohio even apologize to the victims and their families.<sup>44</sup>

Less than two weeks after Kent State, on May 15, 1970, local police and highway patrol officers in Jackson, Mississippi opened fire on unarmed Black student protesters in front of a dormitory at the historically Black Jackson State College. The thirty-second hail of police bullets killed Jackson State student Phillip Gibbs and local high school student James Green, injuring twelve others.<sup>45</sup> The Jackson State massacre, presumably through a combination of societal racism and the fresh shock waves from Kent State, drew limited attention from the national media and has receded even further than Kent State into the shadows of history. Both events embody an apotheosis of “law and order” hostility against young political protesters, while Jackson State also marks a step on the racist trail of horrors to our era’s cascade of police violence against African Americans.

Kent State and the events in its wake exposed a gaping chasm between our country’s democratic ideals and the reality of our public discourse. The press had failed to interrogate the government and inform the public as our leaders dragged us deeper and deeper into the Vietnam morass.<sup>46</sup> When young people protested against the war, their government responded with a fusillade of bullets. The press failed again by spreading false information about the massacre. Most troubling of all, the public took a toxic attitude toward the murdered students, condemning their protest and praising the government that killed them.

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42. See Robert B. Semple Jr., *Nixon Meets Heads of 2 City Unions; Hails War Support*, N.Y. TIMES (May 27, 1970) <https://www.nytimes.com/1970/05/27/archives/nixon-meets-heads-of-2-city-unions-hails-war-support-nixon-meets.html> [<https://perma.cc/U39M-TWSY>].

43. See James M. Naughton, *Construction Union Chief in New York is Chosen to Succeed Hodgson*, N.Y. TIMES (Nov. 30, 1972) <https://www.nytimes.com/1972/11/30/archives/front-page-1-no-title-construction-union-chief-in-new-york-is.html> [<https://perma.cc/J6Y3-G7TF>].

44. See Phil Trexler, *Celeste Apology Was Highlight of Ceremony*, DAILY KENT STATER (May 8, 1990), <https://dks.library.kent.edu/cgi-bin/kentstate?a=d&d=dks19900508-01.2.5> [<https://perma.cc/FP2P-478N>].

45. See generally NANCY K. BRISTOW, *STEEPED IN THE BLOOD OF RACISM: BLACK POWER, LAW AND ORDER, AND THE 1970 SHOOTINGS AT JACKSON STATE COLLEGE* (2020).

46. See, e.g., MICHAEL X. DELLI CARPINI, *Vietnam and the Press*, in *THE LEGACY: THE VIETNAM WAR IN THE AMERICAN IMAGINATION* 129–32 (D. Michael Shafer ed., 1990) (discussing the dearth of critical press coverage in the years leading up to the Vietnam War).

The anti-war protests at Kent State embodied the First Amendment's noblest ideals. Those student protesters gave life and breath to the Supreme Court's formative free speech principles: Brandeis' reminder that revolutionary change birthed our nation; Jackson's defense of deep challenges to the social order; William Brennan's linkage of vibrant democracy to sharp public criticisms of government. Given the course that First Amendment law had followed up until 1970, we might have expected our legal system and our legal culture to hear the Kent State massacre as a call to action. We might have expected our courts to confront this monstrous government assault on public political dissent with the righteous force of foundational First Amendment principles. We might have expected First Amendment law to heighten its urgency in protecting political activism, encouraging critical journalism, and nurturing movements for social change.

But none of that happened. Instead, in a bitterly ironic turn, Kent State corresponds almost perfectly with the Supreme Court's lurch away from its formative First Amendment ideals and toward a new, utterly different set of priorities that would come to define First Amendment law's second half century.

## III.

Richard Nixon, in the first two and a half years of his presidency, between 1969 and 1971, got to appoint four new Supreme Court Justices.<sup>47</sup> Those appointments began a rightward shift on the Court that has never abated. Implications for First Amendment law became quickly apparent. In the late 1960s, during the last years of Chief Justice Earl Warren, the Supreme Court had advanced First Amendment law's foundational principles by boldly expanding the rights of socially and politically marginal speakers. The Justices had held that the First Amendment gave activists a right to leaflet in privately owned shopping centers,<sup>48</sup> let the government make media companies air dissenting points of view,<sup>49</sup> and strongly protected public employees who criticized the government.<sup>50</sup> Within a few years, though, Nixon's new Supreme Court under Chief Justice Warren Burger reversed the shopping center case<sup>51</sup> and limited the decision about media access.<sup>52</sup> The Court eventually limited the public employee speech decision as well.<sup>53</sup>

The early Burger Court did issue some important speech-protective First Amendment holdings. In the two years following Kent State, the Justices reversed the conviction of a protester who walked into a public courthouse wearing a jacket with the slogan "Fuck the draft."<sup>54</sup> They affirmed the right of newspapers to publish the Pentagon Papers, documents

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47. See generally BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1977).

48. See *Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (invoking the First Amendment to bar a state from using trespass law to enjoin union members' picketing a business in a shopping center).

49. See *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367 (1969) (upholding the right-of-reply provision of the federal Fairness Doctrine).

50. See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (announcing and applying a First Amendment balancing test to strike down a teacher's firing for having criticized the local school board).

51. See *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (purporting to narrow *Logan Valley Plaza* by denying antiwar protesters' claim of a First Amendment right to leaflet in a shopping center); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (announcing, in a case about union members' picketing in a shopping mall, that *Lloyd* had effectively overruled *Logan Valley Plaza*).

52. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a state right-of-reply provision for newspapers).

53. See *Connick v. Myers*, 461 U.S. 138 (1983) (holding that First Amendment protection for public employees extends only to a relatively narrow class of speech about matters of public concern).

54. See *Cohen v. California*, 403 U.S. 15 (1971).

from the State Department that laid bare the folly of the Vietnam War.<sup>55</sup> They ordered a state college to let students form a campus chapter of Students for a Democratic Society.<sup>56</sup> Those decisions, all arising out of the anti-war movement, offered hope that the Court would maintain First Amendment law's emphasis on protecting marginal, vulnerable, and dissenting speakers.

Those decisions, however, proved to be dying breaths of the foundational First Amendment. With each passing year, the Court under Chief Justice Burger and his successor, William Rehnquist, dragged First Amendment law further and further from its formative principles. In the bicentennial year of 1976, the Burger Court announced in two landmark decisions that the First Amendment would, from now on, safeguard the free speech rights of commercial advertisers<sup>57</sup> and wealthy political campaign spenders.<sup>58</sup> Those two decisions definitively refocused First Amendment protection away from marginal, vulnerable, and dissenting speakers and toward mainstream, wealthy, and institutional speakers.

That refocusing has intensified, and sharpened to a laser point, over these past fifteen years of the Supreme Court under Chief Justice John Roberts.<sup>59</sup> The Roberts Court has scorned First Amendment claims from peace activists,<sup>60</sup> LGBTQ rights campaigners,<sup>61</sup> insurgent political

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55. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

56. See *Healy v. James*, 408 U.S. 169 (1972).

57. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (striking down a state ban on price advertising by pharmacies).

58. See *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (striking down several federal limits on spending in election campaigns).

59. See generally GREGORY P. MAGARIAN, *MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT* (2017).

60. See *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010) (rejecting a First Amendment challenge to a federal prohibition of peace activists' efforts to teach government-designated terrorist groups about nonviolent conflict resolution).

61. See *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006) (rejecting a First Amendment challenge to a federal rule that withheld government funds from universities whose law schools had barred military recruiters because the military discriminated against LGBTQ applicants).

candidates,<sup>62</sup> incarcerated people,<sup>63</sup> students,<sup>64</sup> and public employees.<sup>65</sup> This Court's greatest First Amendment obsessions have been shielding conservatives from having to pay union dues;<sup>66</sup> bolstering anti-abortion extremists who deceive and harass pregnant women;<sup>67</sup> and—most of all, in a line of cases that only begins with the infamous *Citizens United* decision<sup>68</sup>—increasing big money's domination of electoral politics.<sup>69</sup> The Court's likely new swing Justice, Brett Kavanaugh,<sup>70</sup> has even declared that the First Amendment should bar the government from adopting net

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62. See *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196 (2008) (rejecting a political candidate's First Amendment challenge to a state election law that empowered political party organizations to choose their nominees through party conventions).

63. See *Beard v. Banks*, 548 U.S. 521 (2006) (rejecting a First Amendment challenge to a state's denial of certain prisoners' access to newspapers, magazines, and photographs).

64. See *Morse v. Frederick*, 551 U.S. 393 (2007) (rejecting a First Amendment challenge to a high school's punishment of a student for publicly displaying a banner with the words "BONG HiTS 4 JESUS").

65. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (rejecting a First Amendment challenge to a District Attorney's disciplining of a prosecutor for challenging a decision by his superiors in the course of his official duties).

66. See *Janus v. Am. Fed. of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (holding that the First Amendment bars public employee unions from collecting "fair share fees" from nonmember workers to cover collective bargaining costs), *overruling* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Harris v. Quinn*, 573 U.S. 616 (2014) (limiting the category of public employees that states may require to pay fair share fees); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012) (limiting the circumstances in which a public employee union may charge a "special assessment" to nonmember workers).

67. See *Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018) (striking down state requirements that anti-abortion "crisis pregnancy centers" must inform patients about the availability of state-financed medical services and that centers not licensed to provide medical services must inform patients of their unlicensed status); *McCullen v. Coakley*, 573 U.S. 464 (2014) (striking down as insufficiently narrowly tailored a fixed state buffer zone around reproductive health facilities).

68. See *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down a long-standing federal ban on corporate expenditures to promote political candidates), *overruling* *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990).

69. See *McCutcheon v. FEC*, 572 U.S. 185 (2014) (striking down the federal cap on aggregate campaign contributions by any donor); *Ariz. Free Enter. Fund's Freedom Pol. Action Comm. v. Bennett*, 564 U.S. 721 (2011) (striking down a state's voluntary public financing scheme that varied amounts of public funding depending on opposing candidates' campaign resources); *Davis v. FEC*, 554 U.S. 724 (2008) (striking down a federal election law that increased contribution limits for candidates whose opponents financed their campaigns with large sums from their personal fortunes); *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion) (striking down as unduly restrictive a state's limit on individual campaign contributions).

70. See Noah Feldman, *Supreme Court's Swing Justice Is Now Kavanaugh*, BLOOMBERG LAW (Oct. 28, 2020), <https://news.bloomberglaw.com/us-law-week/opinion-supreme-courts-swing-justice-is-now-kavanaugh> [<https://perma.cc/A6MH-AL94>].



neutrality regulations.<sup>71</sup> The First Amendment of 2020 is one that Justices Brandeis, Jackson, and Brennan would barely recognize.

The First Amendment animates our public discourse and nurtures its possibilities. First Amendment law assures us that we can speak without fear, informs our sense of speech's social value, and warns the government that it can't silence us. Had First Amendment law in 1970 responded to Kent State by strengthening legal protections for radical, marginal, vulnerable speakers, it might have guided our public discourse toward new heights of creativity and engagement. Instead, despite the vast changes wrought by technology, much in our broken public discourse today looks sadly familiar. Just as the press in the 1960s enabled our government's disastrous escalation of the Vietnam War, the press in the 2000s enabled our government's disastrous invasion and occupation of Iraq.<sup>72</sup> Just as the public in the wake of Kent State blamed students for getting murdered and maimed, much opinion polling from recent years shows broad popular disdain for public political protests.<sup>73</sup> Just as soldiers in 1970 could wantonly shoot protesters against military aggression in the heart of an Ohio campus, police officers in 2017 could savagely beat protesters against police violence on the streets of downtown Saint Louis.<sup>74</sup>

71. See U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 426-35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

72. See generally MICHAEL MASSING, NOW THEY TELL US: THE AMERICAN PRESS AND IRAQ (2004).

73. See, e.g., Paul Herrnson & Kathleen Weldon, *Going Too Far: The American Public's Attitudes Toward Protest Movements*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/going-too-far-the-america\\_b\\_6029998](https://www.huffpost.com/entry/going-too-far-the-america_b_6029998) [<https://perma.cc/CPK3-W8L9>]. Public attitudes shifted sharply in mid-2020 during the uprising sparked by Minneapolis police officers' murder of George Floyd. See Kim Parker et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RSCH. CTR. (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/> [<https://perma.cc/Z26V-7598>]. However, that support quickly receded, especially among white people. See Deja Thomas & Juliana Menasce Horowitz, *Support for Black Lives Matter Has Decreased Since June But Remains Strong Among Black Americans*, PEW RES. CTR. (Sept. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/09/16/support-for-black-lives-matter-has-decreased-since-june-but-remains-strong-among-black-americans/> [<https://perma.cc/5UC8-HTWT>].

74. See Robert Patrick, *14 Federal Lawsuits Filed Over Stockley Protest Kettle Arrests, Police Pepper-Spraying*, ST. LOUIS POST-DISPATCH (Sept. 18, 2018), [https://www.stltoday.com/news/local/crime-and-courts/14-federal-lawsuits-filed-over-stockley-protest-kettle-arrests-police-pepper-spraying/article\\_76d4c433-dbf8-56df-adf5-1ecb71f630aa.html](https://www.stltoday.com/news/local/crime-and-courts/14-federal-lawsuits-filed-over-stockley-protest-kettle-arrests-police-pepper-spraying/article_76d4c433-dbf8-56df-adf5-1ecb71f630aa.html) [<https://perma.cc/82EA-RSQM>]. Police violence against people protesting police violence became a nationwide epidemic in 2020 following George Floyd's murder. See Shawn Huber & Julie Bosman, *A Crisis That Began with an Image of Police Violence Keeps Providing More*, N.Y. TIMES (June 12, 2020),

Most states since 2016 have passed or are considering harsh new measures to suppress or punish public political protests.<sup>75</sup> In August 2020, when a right-wing vigilante murdered three people protesting against police violence in Kenosha, Wisconsin, local law enforcement and conservative pundits blamed the protesters for their own deaths.<sup>76</sup> A county Republican leader in Michigan, enraged by left-wing protest movements, tweeted in 2017: “Time for another Kent State.”<sup>77</sup>

The failings of our public discourse are profound and complicated, with social, cultural, and political dimensions. Those failings also have a pivotal legal dimension. First Amendment law has the power to form a large part of the solution for the pathologies of our public discourse. Instead, in the half century since Kent State, First Amendment law has become a larger and larger part of the problem.

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<https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html> [<https://perma.cc/2WPC-5PHZ>].

75. As of April 2021, 45 states since November 2016 had considered or were considering a total of 219 anti-protest bills, of which 26 had been enacted and 71 remained pending. See *U.S. Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/> [<https://perma.cc/BN3R-JPCN>].

76. See Mark Joseph Stern, *The Conservative Defense of Kyle Rittenhouse Is Dangerous Nonsense*, SLATE (Aug. 27, 2020), <https://slate.com/news-and-politics/2020/08/conservatives-defend-kenosha-shooter-kyle-rittenhouse.html> [<https://perma.cc/Y2RD-FHGD>].

77. Dan Adamini, Secretary of the Marquette County Republican Party, *quoted in* Niraj Warikoo, *GOP Leader Apologizes for Tweeting: “Time for Another Kent State,”* DETROIT FREE PRESS (Feb. 6, 2017), <https://www.freep.com/story/news/politics/2017/02/05/gop-leader-apologizes-tweeting-time-another-kent-state/97525120/> [<https://perma.cc/46U9-T972>]. Adamini’s Tweet continued: “One bullet stops a lot of thuggery.” *Id.* He elaborated in a Facebook post: “I’m thinking that another Kent State might be the only solution . . . [Protesters] do it because they know there are no consequences yet.” *Id.* Faced with widespread condemnation, Adamini insisted that “my goal was to stop the violence by protesters, not commit violence against protesters.” *Id.* George Orwell was not available for comment.

## IV.

A remarkable feature of Kent State University in 1970 was its nexus of the 1960s counterculture and 1970s punk culture. Kent Students who survived May 4 went on to form the new wave bands Devo, The Pretenders, and The Waitresses.<sup>78</sup> The disillusionment of 1970 resonates in words from a notorious avatar of “freak power” and a notorious punk rocker.

The freak was gonzo journalist Hunter S. Thompson. Writing just months after the Kent State massacre, in *Fear and Loathing in Las Vegas*, Thompson delivered an elegy for the '60s counterculture:

San Francisco in the middle sixties was a very special time and place to be a part of. . . . There was a fantastic universal sense that whatever we were doing was right, that we were winning . . . , [a] sense of inevitable victory over the forces of Old and Evil. . . . We had all the momentum; we were riding the crest of a high and beautiful wave. . . . [N]ow . . . you can go up on a steep hill in Las Vegas and look West, and with the right kind of eyes you can almost see the high-water mark—that place where the wave finally broke and rolled back.<sup>79</sup>

The punk was John Lydon of the Sex Pistols. In 1978, playing the original Pistols' final concert in the ruins of Thompson's San Francisco, Lydon seemed to conjure Thompson's Las Vegas when his last words prodded his audience: “Ever get the feeling you've been cheated?”<sup>80</sup>

Both Thompson and Lydon could have been talking about the First Amendment. Fifty years ago, Kent State exposed the fragility in our country of political protest, of expressive freedom, of democracy itself. At that critical moment, when we desperately needed free speech law to surge

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78. See Tim Sommer, *How the Kent State Massacre Helped Give Birth to Punk Rock*, WASH. POST (May 3, 2018), [https://www.washingtonpost.com/outlook/how-the-kent-state-massacre-changed-music/2018/05/03/b45ca462-4cb6-11e8-b725-92c89fe3ca4c\\_story.html](https://www.washingtonpost.com/outlook/how-the-kent-state-massacre-changed-music/2018/05/03/b45ca462-4cb6-11e8-b725-92c89fe3ca4c_story.html) [https://perma.cc/AKA4-V7ES].

79. HUNTER S. THOMPSON, *FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM* at 66-68 (1971). The Kent State shootings had shaken Thompson. See HUNTER S. THOMPSON, *The Kentucky Derby Is Decadent and Depraved*, in *THE GREAT SHARK HUNT: GONZO PAPERS*, VOL. 1 (1979) at 38.

80. Sex Pistols on MV, *The Sex Pistols—No Fun—1/14/1978 Winterland (Official)*, YOUTUBE (Sept. 17, 2014), <https://youtu.be/3K3uAlyNL5o?t=398> [https://perma.cc/3GDZ-2PTK].

forward on a rising tide of justice and inclusion, the First Amendment wave instead broke and rolled back. For the ensuing half century, we have all been cheated. We have been cheated of the First Amendment's essence, its legacy, and its transformative power. We have been cheated of the one force in our constitutional order that holds the greatest potential for change, growth—victory over the forces of Old and Evil.

In this age of Black Lives Matter,<sup>81</sup> the Dakota Access Pipeline protests,<sup>82</sup> and the Women's March,<sup>83</sup> public protest and collective political action matter more than at any other time in the past fifty years. The Supreme Court since 1970 has made numbingly clear that the arc of First Amendment law does not bend inevitably toward justice. But we—students, teachers, lawyers, judges, Americans—can make it bend that way. We can recover the vision of First Amendment law's foundational paladins: the political radicals, the social reformers, the fighters for justice. We can adapt the formative ideals of First Amendment law to meet the challenges and fulfill the possibilities of our time, to foster a society that is creative, inclusive, and just. We can, at long last, honor the lessons and redeem the sacrifices of Kent State. That should be our aspiration for First Amendment law's next hundred years.

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81. See, e.g., Audra D.S. Burch, et al., *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html> [<https://perma.cc/JQK4-9T5U>].

82. See, e.g., Sam Levin, *Dakota Access Pipeline: The Who, What and Why of the Standing Rock Protests*, GUARDIAN (Nov. 3, 2016), <https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer> [<https://perma.cc/S269-AN5G>].

83. See, e.g., Anemona Hartocollis & Yamiche Alcindor, *Women's March Highlights as Huge Crowds Protest Trump: "We're Not Going Away,"* N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/womens-march.html> [<https://perma.cc/NR42-4T2G>].



