

Anthony Lewis

*Dahlia Lithwick**

In the obituary he wrote for Anthony Lewis in the *New York Times*, Supreme Court correspondent Adam Liptak explained that Lewis almost single-handedly revolutionized the way the Supreme Court was covered.¹ As Liptak put it,

[b]efore Mr. Lewis started covering the Supreme Court, press reports on its decisions were apt to be pedestrian recitations by journalists without legal training, rarely examining the court's reasoning or grappling with the context and consequences of particular rulings. Mr. Lewis's thorough knowledge of the court's work changed that. His articles were virtual tutorials about currents in legal thinking, written with ease and sweep and an ability to render complex matters accessible.²

In his tribute to Lewis, Professor David Cole made substantially the same observation: Lewis brought with him "a new approach to legal journalism. He combined sophisticated legal analysis with an unparalleled ability to write in plain, lucid English, translating the Court's decisions, explaining their implications, and assessing their significance for a broad readership."³

Tony Lewis changed everything about Supreme Court reporting. He changed everything because he inserted himself directly into the conversation between the Justices of the Supreme Court and the American public. He wasn't writing for the constitutional scholars; he wasn't writing for the history books (although he might have been) and he wasn't writing to impress the justices (although he did). Instead, Lewis was a translator, an ambassador, who in the Warren Court era fashioned himself as the People's Solicitor General; he was the advocate for the little guy before the high court, and an advocate to his readers about what the Court should be doing for the little guy. With sophisticated legal analysis and an eye for jurisprudential trends and shifts, his beat was the Constitution, as much as the Court. And as a consequence, his fingerprints are all over the doctrine he was covering.

* Dahlia Lithwick covers the Supreme Court and the law for Slate.com.

1. Adam Liptak, *Anthony Lewis, Supreme Court Reporter Who Brought Law to Life, Dies at 85*, N.Y. TIMES, Mar. 25, 2013, at A1, available at http://www.nytimes.com/2013/03/26/us/anthony-lewis-pulitzer-prize-winning-columnist-dies-at-85.html?pagewanted=all&_r=0.

2. *Id.*

3. David Cole, *On Anthony Lewis (1927-2013)*, THE N.Y. REV. OF BOOKS, May 9, 2013, available at <http://www.nybooks.com/articles/archives/2013/may/09/anthony-lewis-1927-2013/>.

This is not exactly journalism so much as advocacy, and Lewis deftly played both roles, at a time when such advocacy was sorely needed and editors seemed unconcerned about the dual roles.

It's not just that Lewis's work was cited in Supreme Court opinions, because it was.⁴ It's that his advocacy in certain areas elevated issues to the Court's attention. Richard Tofel, writing in *ProPublica* in March 2013 wrote that, after careful study he determined that Lewis was "the person most responsible" for the "one person one vote" revolution that began in 1962 at the Supreme Court with *Baker v. Carr*.⁵ Tofel references Victor Navasky's book *Kennedy Justice*, to illustrate how Lewis went beyond merely penning a law review article on the subject to help guide the actual litigation: "Lewis actually lobbied Solicitor General Archibald Cox (whom he had gotten to know during his Nieman fellowship) and Attorney General Robert Kennedy (a Harvard classmate of Lewis's), and their aides, to take up a key point in the case on the side of the Tennessee plaintiffs."⁶

Lucas Guttentag, the ACLU lawyer who argued an important immigration case at the high court similarly told David Cole that Anthony Lewis "single-handedly elevated [the issue] to public consciousness through his series of columns on the intolerable consequences of the law and the critical role of the courts. To this day, I think his columns were as important as the briefs we wrote."⁷

And sometimes the double role he played could raise questions. Max Frankel, a former executive editor of *The Times* wrote in his memoir that "Tony Lewis, besides brilliantly covering the Supreme Court, became too conspicuously a member of Robert Kennedy's social circle[.] . . . It was tough to keep your balance when you were expected simultaneously to get the inside scoop and to remain a disinterested witness of events."⁸

In today's Supreme Court press corps there is nobody who can be said to play such a direct role in guiding the course of the doctrine. When Linda Greenhouse was the *New York Times* correspondent, judges, specifically Laurence H. Silberman of the United States Court of Appeals for the District of Columbia Circuit were apt to grumble publicly about the so-called "Greenhouse effect," wherein what he called "lawyer-reporters" hold outsized influence over justices eager to please them.⁹ I have seen little evidence of Justices conforming their opinions to please any one particular journalist in my

4. Liptak, *supra* note 1.

5. Richard Tofel, *Friend of the Court: How Anthony Lewis Influenced the Justices He Covered*, PROPUBLICA (Mar. 27, 2013, 11:18 AM), <http://www.propublica.org/article/friend-of-the-court-how-anthony-lewis-influenced-the-justices-he-covered>.

6. *Id.* (citing VICTOR NAVASKY, *KENNEDY JUSTICE* 302-03 (1971)).

7. Cole, *supra* note 3 (internal quotation marks omitted).

8. Liptak, *supra* note 1 (quoting MAX FRANKEL, *THE TIMES OF MY LIFE AND MY LIFE WITH THE TIMES* 228 (2000)) (internal quotation marks omitted).

9. Martin Tolchin, *Press Is Condemned by a Federal Judge for Court Coverage*, N.Y. TIMES (June 15, 1992), <http://www.nytimes.com/1992/06/15/us/press-is-condemned-by-a-federal-judge-for-court-coverage.html>.

time covering the Court, although I remain open to any attempts. Although I have occasionally tweaked the justices for summoning in members of the press to demand that they write about issues of concern to them.¹⁰ But there is no one on the current Supreme Court press corps who has either the access that Lewis had to the justices, or the influence. And the Court in 2014 is so radically polarized that it's almost impossible to imagine the possibility of any one jurist being swayed by anyone, much less a single reporter.

This raises the core paradox on the question of tone in modern day Supreme Court coverage. Many have noted that the bulk of Supreme Court journalists cover the institution as reverent acolytes: unable to criticize or even opine on anything for fear of upsetting the Justices. Perhaps the most high-profile proponent of this criticism is David Margolick, who once covered legal affairs for the *New York Times* and is a contributing editor at *Vanity Fair* and the author of *Beyond Glory: Joe Louis vs. Max Schmeling, and a World on the Brink*.¹¹ Margolick has written of the modern-day Supreme Court press corps that:

Reporters assigned there rarely venture beyond oral arguments, briefs and decisions. Almost never do they stray from their cubicles. Part of this is perfectly sensible: the court makes most of its news through its opinions, and interpreting them, often heaps of them, at once, on tight deadlines, is damnably (and, maybe, deliberately) difficult. Those who do it well are rare, and they have little time to spare. But it's not the only reason for sticking to the handouts. Going beyond them, getting into the court's internal operations and culture, is nearly impossible. And examining the justices critically, grading the quality and propriety and intellectual honesty of their work, is dangerous: you risk losing whatever tiny chance you have that one of them will talk to you in a pinch or throw you an occasional crumb. So almost no one even tries. No other reporters are as passive as Supreme Court reporters. Details about the drama and passion and pettiness of the place – in other words, about the way it does its work, *our* work – emerge only years after the fact, and only (as with the posthumous papers of Justice Harry Blackmun) when they are made available to the public.¹²

It is a common criticism. Supreme Court reporters are allegedly too deferential, too polite, too uncritical. We are forever writing the same fawning, empty profile in the hopes of someday achieving the holy grail that is access. Access like Tony Lewis had. Access that never really materializes for most of us. Herein lies the central paradox: Nobody writes like Tony

10. See Dahlia Lithwick, *Clerked Around: Is There a Major Girl Crisis in Supreme Court Hiring?*, SLATE (Aug. 30, 2006, 6:46 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/08/clerked_around.html.

11. David Margolick, *Meet the Supremes*, N.Y. TIMES (Sept. 23, 2007), http://www.nytimes.com/2007/09/23/books/review/Margolick-t.html?_r=2&oref=login&.

12. *Id.* (emphasis in original).

Lewis and yet everyone hopes that by not doing so we will have Lewis's close relationships. Unlike Lewis, we all pull our punches. Unlike Lewis it affords us no closer view of the Court.

As Margolick noted in the same article that called out the press corps for laziness, the problem with Supreme Court reporters is also a kind of institutional Patty Hearst Syndrome:

Some are there for decades, becoming almost adjuncts of the court, absorbing its elitism, acting as cheerleaders or apologists or scolds, feeding the cult of personality that surrounds its members. Others become quasi justices themselves, handing down clever opinions on opinions rather than ever picking up a phone and asking a few questions.¹³

I sometimes joke that our arid view of what constitutes Supreme Court reporting means that for the most part, the Supreme Court press corps covers the institution as though the law itself were a living thing and the nine justices were dead. We can become very excitable when it seems that there may be a shift in doctrine after questioning at oral argument. But we sometimes forget to point out that Justices Clarence Thomas and Stephen Breyer were whispering and giggling, or that Chief Justice John Roberts had to interrupt Justice Sonia Sotomayor whose questions were taking too long.

An important article on the beholden press corps appeared in *Brill's Content* in 1999, arguing that the Court needed more reporters like (then) *USA Today* correspondent Tony Mauro, who has always conceived of his beat as encompassing the personal and quirky aspects of the Court and the justices and who has sometimes found himself alone in pointing out that something merits a story.¹⁴ It was Mauro who reported on the lack of minority clerks hired at the Court at that time.¹⁵ Other reporters thought it was an inappropriate subject for consideration. Supreme Court reporters similarly failed to report on then-Chief Justice William H. Rehnquist's strange behavior when he was struggling with an addiction to pain medication.¹⁶ We don't even like to cover topics like the Anita Hill revelations or confirmation hearings; believing that these are political – not legal – affairs that are not really seemly, or befitting our professorial natures.

When I first started covering the Court in a less than completely reverent fashion in 1999, reporters from other publications would catch up with me in the hallways after oral argument and say, "you should write about this," while referencing some zany or strange conduct that had occurred, or some particularly terrible piece of oral advocacy, or some other bit of theatre from the morning that would never make its way into their more serious copy. I

13. *Id.*

14. *May It Please the Court*, BRILL'S CONTENT (Oct. 1999), <http://www.brillscotent.com/court.shtml>.

15. *Id.*

16. *Id.*

recall thinking at the time that while it was a relief that everyone was handing over the Shakespearian observations to me, the Court would be better served if everyone wrote those stories themselves. But more and more frequently, reporters leave the drama and the pettiness and the human frailty at oral argument and write about the daily journey of the law itself. We are academics for the most part, not critics or advocates.

All this seemliness has led in turn to the widespread criticism that most of the modern-day Supreme Court press corps are nothing more than shuffling Court employees. Richard Davis, a professor at Brigham Young University who wrote the 1994 book *Decisions and Images: The Supreme Court and the Press* describes us as, “in essence tools of the Court,” explaining, “The reporters say, our role is not to be a watchdog, our role is to be a linking mechanism between the justices . . . and the public.”¹⁷ This is yet another example of Anthony Lewis’s influence on the profession; we have become so focused on emulating his type of deep-dive analytical legal reporting, that we sometimes forget the actual humans about whom he ultimately cared so very much.

Above everything, Lewis’s was the most consistent voice for justice for the poorest and most marginalized Americans for over half a century. His books, his Supreme Court coverage and his columns for *The New York Times* featured stories of injustice, elitism, and willful blindness. Yet very few of us who cover the Court today feel that there is space for that kind of overt compassion and sympathy in our reporting.

In 2009, when Justice David Souter stepped down from the Supreme Court and President Barack Obama promised to find a replacement for him who embodied the quality of “empathy,”¹⁸ it launched a national rhetorical freak-out that went on to color not only the months-long conversation about the nature of progressive constitutional values, but the entirety of the Sonia Sotomayor confirmation battle.¹⁹ It was a fascinating analogue to the conversation about objective, mechanical balls-and-strikes justices to witness that empathy was also a quality that was frowned upon in writing about the Court. There is no place for compassion and empathy, both in the Court’s internal deliberations and in the coverage of the institution. And it was hard not to contrast this dispassionate, abstract tone with the ways in which Anthony Lewis, over a decades-long career, used story-telling, narrative, granular detail and his own innate sense of right and wrong, to steer the national conversation about injustice in the direction of tolerance, inclusiveness, and equality.

17. *Id.*

18. Mark Sherman, *Obama Wants Replacement for Justice Souter to Have Empathy, Intellect; Groups Seek Fight*, STARTRIBUNE (May 2, 2009, 2:30 AM), <http://www.startribune.com/politics/44125502.html>.

19. John Paul Rollert, *Justice Sotomayor – Not Guilty of ‘Empathy’*, CHRISTIAN SCI. MONITOR (Aug. 19, 2011, 11:36 AM), <http://www.csmonitor.com/Commentary/Opinion/2011/0829/Justice-Sotomayor-not-guilty-of-empathy>.

I cannot imagine what it would be like to cover the Supreme Court without allowing opinion and analysis and values to inform the coverage. I admire my colleagues who do it brilliantly but I am always struck by the fact that the smattering of people who know the Court better than anyone are the people whose opinions I would most like to hear. Nor can I imagine covering the justices as though they were the oracle at Delphi: all-knowing and all-powerful. To my mind, the great gift of the Supreme Court beat is the fact that it careens from majestic to silly to inspiring to self-aggrandizing in almost equal measure. That is the art of this beat for me; admiring the Court and the justices for their frailties as well as their greatness.

Anthony Lewis was never just a journalist. He was a journalist/advocate in ways that would likely terrify modern editors and would raise crippling self-doubt in modern reporters, unsure as we are of our roles and responsibilities in a media world dominated by traffic and tweets. Perhaps more than anything Lewis's journalistic tone was informed by the fact that he *saw* everything – the lofty justices, the broken plaintiffs, and all of us in between. He made us see what he saw and he made us understand why it matters. And he was never embarrassed to say that it mattered to him, as well.