Anthony Lewis and the First Amendment

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It is a great privilege to be with you today to celebrate the life and work of Anthony Lewis who created modern legal journalism. I thought I would try to do three things today to help us think about Tony's legacy. One is to sketch out what made Tony such a giant. A second is to reflect for a minute on the state of the modern Supreme Court press corps, which he essentially founded. And a third is to consider a topic Tony returned to again and again in his articles, columns and books: the role of the press in a democracy and under the rule of law. Tony believed passionately in the First Amendment but was skeptical about a special role for the institutional press in the constitutional structure, and this set him apart from most journalists and all press lawyers. I'd like to make the case that his clear-eyed and iconoclastic views in this area were a triumph of intellectual honesty over self-interest.

I.

Tony arrived at *The Times*'s Washington bureau in 1955, at the age of 28.[1] He had gone to Harvard as an undergraduate and then had an undistinguished four-year run as an editor at *The Times* in New York.[2] He left that job to work on Adlai Stevenson's 1952 presidential campaign and then joined *The Washington Daily News*, a lively afternoon tabloid.[3] He promptly won a Pulitzer Prize there, for a series of articles on Abraham Chasanow, a Navy employee unjustly accused of being a security risk.[4] The Navy eventually cleared and reinstated Mr. Chasanow, who credited Tony's reporting for his vindication.[5]

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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. *Id.*

4. *Id.*

5. *Id.*

The Pulitzer prompted *The Times* to have another look at its former employee. Scotty Reston, the Washington Bureau Chief, hired him to cover the Justice Department and the Supreme Court.[6] Then, in a turning point for *The Times* and for legal journalism, the paper sent Tony off to Harvard Law School on a Nieman Fellowship in 1956 and 1957 to study law for a year.[7] The idea that a little legal training might help in covering the Supreme Court was a novelty at the time. It is no longer.

When Tony returned to Washington and the Court, his coverage so impressed Justice Felix Frankfurter – a man not easy to impress – that he called Reston.[8] "I can't believe what that young man achieved," Justice Frankfurter said, as Reston recalled in his memoir, *Deadline*.[9] "There aren't two justices of the Court who have such a grasp of these cases."[10]

Tony's Supreme Court reporting transformed the genre, and it earned him a second Pulitzer, in 1963.[11] You can divide press coverage of the Supreme Court coverage into two eras: before Tony Lewis, and after. The old articles on the Court's decisions were pedestrian recitations by journalists without legal training that did little more than recite who had won and who had lost, perhaps adding how the justices had voted. These reports rarely examined the Court's reasoning or explored the doctrinal context and practical consequences of particular rulings.

Tony's work changed that. His articles were tutorials about currents in legal thinking, written with ease and sweep and an ability to render complex matters accessible.

The 1963 Pulitzer citation singled out Mr. Lewis's coverage of *Baker v. Carr*,[12] in which the Supreme Court opened legislative districting to oversight by the federal courts.[13] Tony did more than cover the decision; an article on legislative apportionment that he had written for *The Harvard Law Review*[14] was cited in the decision at Footnote 27.[15]

Tony cut a striking figure in Washington. He was, Gay Talese wrote in *The Kingdom and the Power*, his 1969 history of *The Times*, "cool, lean, well-scrubbed-looking, intense and brilliant."[16]

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6. *Id.*
7. *Id.*
8. *Id.*
9. JAMES RESTON, DEADLINE: A MEMOIR 204 (1991).
10. *Id.*
11. Liptak, *supra* note 1.
12. *See National Reporting*, PULITZER PRIZES, http://www.pulitzer.org/bycat/National-Reporting (last visited Nov. 2, 2014).
13. 369 U.S. 186, 204 (1962).
14. Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958).
15. *Baker*, 396 U.S. at 207 n.27.
16. GAY TALESE, THE KINGDOM AND THE POWER: BEHIND THE SCENES AT THE NEW YORK TIMES 349-50 (1969).

"Only those who knew him well," Talese added, "or with whom he was sufficiently impressed and thus responsive, sensed the interesting man beneath – the connoisseur of opera, the serious man married to a tall, blithe student of modern dance, the superb mimic of W. C. Fields, the charming dinner guest."[17]

He moved easily among the powerful and was close – some said too close – to Attorney General Robert F. Kennedy.

Though he left an indelible mark, Tony only covered the Supreme Court as a reporter for eight years.[18] He went on, in 1965, to become *The Times*'s London Bureau Chief, and he never lost his connections to and affection for London.[19]

He was briefly a candidate for a high editing position in New York, but that was scuttled by intrigue and miscommunications. As a consolation prize, he was given a column that would grace the op-ed page and dazzle readers for more than three decades.[20] It was called "Abroad at Home" or "At Home Abroad," depending on where he was writing from.[21]

Tony wrote four books.[22] One of them, *Gideon's Trumpet*, told the story of *Gideon v. Wainwright*, the 1963 decision that guaranteed lawyers to poor defendants charged with serious crimes.[23] It was published in 1964 and has never gone out of print.[24] If you've never read it, you should. If you haven't read it in a long time, you should read it again.

Gideon's Trumpet, remains to my mind, along with Richard Kluger's *Simple Justice*,[25] one of the two best books on a Supreme Court case. Tony wrote it partly because he had time on his hands during a four-month newspaper strike.[26] The book told the story of Clarence Earl Gideon, a Florida drifter accused of breaking into a poolroom who was tried and convicted without a lawyer, and it sought to place the decision his case gave rise to in a larger context.[27]

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17. *Id.* at 350.

18. *See* Nieman Foundation for Journalism at Harvard Univ., *About Us: Anthony Lewis*, NIEMAN WATCHDOG, http://niemanwatchdog.org/index.cfm?fuseact-ion=about.viewcontributors&bioid=21 (last visited Nov. 3, 2014).

19. Liptak, *supra* note 1.

20. *See id.*

21. *Id.*

22. *Anthony Lewis*, MEDIA L. RES. CTR., http://www.medialaw.org/events/185-anthony-lewis (last visited Nov. 4, 2014).

23. ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

24. Liptak, *supra* note 1.

25. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

26. Liptak, *supra* note 1.

27. LEWIS, *supra* note 23.

Three decades later, he wrote a book on another Warren Court landmark, *New York Times v. Sullivan*, called *Make No Law*.[28] *Sullivan* was the 1964 Supreme Court decision that revolutionized American libel law by applying First Amendment principles to state libel law for the first time and ruling that public officials suing critics of their official conduct had to prove that the contested statements were made with "actual malice," meaning with knowledge of their falsity or with serious subjective doubts about their truth.[29]

II.

It has been – can you believe this? – fifty years since Anthony Lewis stopped covering the Supreme Court. Yet there is no one in the current press corps who does not strive to emulate him, in the depth of his knowledge and the clarity of his writing. We all fall short.

But we work within the conception of Supreme Court coverage he created. Perhaps half of the twenty-five or so reporters who now cover the Court more or less full time have legal training, and all of us seek to go beyond the results in given cases to explore the reasoning and how it affects legal doctrines, what it says about the Court and alliances within it and how it is likely to affect the real lives of real people.

Tony worked in a different age, one in which Supreme Court decisions were not instantly available. Most people first learned of what the Supreme Court had done the day before in the next morning's newspaper. *The Times* used to publish long excerpts from decisions because that was the only way readers could see what the Court had actually said. Now, of course, the decisions are available instantly, as are all manner of briefs, lower court rulings and scholarship.

Tony had the field largely to himself. There was no SCOTUSblog or instant commentary from lawyers and law professors. If you disagreed with something Tony wrote and wanted to reach a wide audience, you could send a letter to *The Times*.

Tony once told me that the trick to the job was months of preparation to be ready for intense activity when the big decisions landed in early summer. That hasn't changed.

But two things have. One makes life for Supreme Court reporters these days easier; the other makes it much harder.

Life is easier because the Court does not work as hard. In Tony's years at the Court, it was not unusual to have as many as 130 decisions in argued

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28. ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1991).

29. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

cases in one term.[30] Now that number is close to seventy per term.[31] The end-of-term pile-up can seem daunting these days, but it is nothing like it was back then.

What Tony did not have to do was write for the Internet. Heavy though his workload was, he had all day to read, consult, and reflect before filing his stories in the early evening for the next day's paper. To the likes of me, that sounds like an incredible luxury. When big decisions land, editors and readers demand web articles almost immediately. These can be very short and not very deep and can sometimes seem a return to the kind of journalism Tony tried to do away with.

To be sure, those short accounts are but early versions of articles that will be revised and supplemented through the day. The final product in the next day's paper will still aspire to meet Tony's standards of sophistication and clarity. But the early stories on the web will be read by many more people than the later ones in the paper. That is, there is an inverse relationship between readership and quality.

III.

In preparation for this talk, I went back to read a sample of Tony's articles and columns, along with some passages from his books, to remind myself of his strongly held and idiosyncratic views on the press clause of the First Amendment.

His key point was that the press clause – "Congress shall make no law . . . abridging the freedom . . . of the press" – does not entitle the institutional press to a special legal status.[32] That seems correct to me, and it is in line with historical evidence and most Supreme Court precedent.[33]

But the view has sweeping implications, particularly in the wake of the 2010 decision in *Citizens United v. Federal Election Commission*.[34] That decision said corporations have the right under the First Amendment to pay for speech about politics.[35] Opponents of the decision who say that corporations should not be allowed to speak must confront the problem that most

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30. *Supreme Court of the United States, Petitions for Certiorari, 1926-1969*, FED. JUD. CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_Sup_Ct_petitions_for_certiorari (last visited Nov. 4, 2014).

31. *Supreme Court of the United States, Petitions for Certiorari, 1970-2012*, FED. JUD. CTR., http://www.fjc.gov/history/caseload.nsf/page/caseloads_petitions_for_certiorari_2 (last visited Nov. 4, 2014).

32. *See* MEDIA L. RES. CTR., *supra* note 22.

33. *See, e.g.*, Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012); Adam Liptak, *In Arguments on Corporate Speech, the Press Is a Problem*, N.Y. TIMES, Feb. 8, 2011, at A12, *available at* http://www.nytimes.com/2011/02/08/us/08bar.html?_r=0.

34. 558 U.S. 310 (2010).

35. *Id.* at 342-43.

news organizations are organized as corporations.[36] The New York Times Company is a corporation.

The standard response is that news organizations are entitled to special protection because they are "the press" referred to in the First Amendment. Tony disagreed.

The First Amendment's reference to "the press," he said in a public interview at Harvard in 2006, was merely to the products of printing presses – printed words as opposed to spoken ones.[37] That is, the press clause protects a form of mass communication and not a set of businesses that hold themselves out as "the press."

"[I]t's a great mistake for the press to give itself a preferred position," Tony said.[38]

That is not to say he agreed with *Citizens United* or the cases it built upon, notably *Buckley v. Valeo* in 1976.[39] In a 1976 column, he said the Constitution "does not require us to live in a never-never land where we know nothing about the power of money in politics."[40]

"We know that money talks[,]" he wrote. "[B]ut that is the problem, not the answer."[41]

But that is a separate question from the constitutional status of the institutional press. In a 1978 column, Tony wrote that "[i]t is a fundamental mistake, I think, for the press to argue that it is entitled to different and better treatment under the Constitution. The First Amendment also protects the right of professors and pamphleteers and ordinary citizens to write and speak freely."[42]

As a consequence, he did not seem particularly disturbed by the Supreme Court's endorsement of a search of the newsroom of a college newspaper by police executing a warrant. On this point, Tony was at odds with Justice Potter Stewart, the member of the Court most associated with the view that the First Amendment offers special protections to the institutional press.[43] Tony said "there is no historical basis whatever for thinking that the press is exempt from the Fourth Amendment's warrant procedure" and that

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36. *See* Ashley Lutz, *These 6 Corporations Control 90% of The Media in America*, BUS. INSIDER (June 14, 2012, 9:49 AM), http://www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6.

37. Interview by Ronald Collins with Anthony Lewis, Journalist, N.Y. Times, in Cambridge, Mass. (Sept. 12, 2006).

38. *Id.*

39. 424 U.S. 1 (1976).

40. Anthony Lewis, *Scrambling of Campaign Law Pleases Few*, CEDAR RAPIDS GAZETTE, Feb. 9, 1976, at 6, *available at* http://newspaperarchive.com/us/iowa/cedar-rapids/cedar-rapids-gazette/1976/02-09/page-6.

41. *Id.*

42. Anthony Lewis, *The Court and the Press*, N.Y. TIMES, June 8, 1978, at A27.

43. LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 8 (2004); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

"Justice Stewart's attempt in his *Stanford* dissent to put the press in a special constitutional status was labored and unconvincing."[44]

I was a little surprised, then, to see how approvingly Tony wrote in 1980 of *Richmond Newspapers, Inc. v. Virginia*, which established a First Amendment right of access to criminal trials, converting a constitutional ban on censorship into an affirmative right of access.[45]

But here, too, he fell back on the distinction that was his touchstone. He said it mattered "that the press in this case did not claim a privileged constitutional position for itself: It spoke as the representative of a public interest."[46]

The area in which Tony most frustrated his colleagues and the lawyers who represented them was the reporters' privilege. Consistent with his views on the meaning of the press clause, he wrote in 1981 that it is "constitutional hubris" to indulge "a belief that the First Amendment gives journalism an exalted status."[47] He said he was troubled in particular by the "belief that the Constitution gives us a right to use anonymous sources without being called to account."[48]

He did not believe that the First Amendment allows journalists to resist subpoenas for their confidential sources.[49] The Supreme Court rejected that claim in 1972 in *Branzburg v. Hayes*,[50] and Tony thought that case correctly decided.[51]

Notwithstanding the ruling in *Branzburg*, he wrote, "the press has continued to talk about a 'First Amendment privilege' as [if] it existed. [It] does not, and in my strong opinion it should not."[52]

Reporters should keep their promises, he said, but as a matter of honor and not of constitutional law.[53] "Not many judges will push them to disclose, in the end," he wrote.[54] "But if a few brave journalists go to prison for their promise, it is no disrespect to them to say that the battle is better fought that way in the balance of courtroom interests and public opinion than under the distorting guise of constitutional privilege for journalists."[55]

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44. Lewis, *supra* note 42 (referring to Justice Stewart's dissent in *Zurcher v. Stanford Daily*, 436 U.S. 547, 570-77 (1978) (Stewart, J., dissenting)).

45. 448 U.S. 555, 556-57 (1980).

46. Anthony Lewis, *A Right to Be Informed*, N.Y. TIMES, July 3, 1980, at A19.

47. Anthony Lewis, *First Amendment Hubris*, N.Y. TIMES, Apr. 19, 1981, at E15, *available at* http://www.nytimes.com/1981/04/19/opinion/abroad-at-home-first-amendment-hubris.html.

48. *Id.*

49. *Id.*

50. 408 U.S. 665, 692 (1972).

51. Lewis, *supra* note 47.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id*.

Tony said judges were in a better position than journalists to balance the interests involved, and he wrote approvingly[56] of a concurring opinion by Judge David S. Tatel of the United States Court of Appeals for the District of Columbia Circuit in the decision that sent a *Times* reporter, Judith Miller, to jail for eighty-five days in 2005.[57] Judge Tatel said a special prosecutor's need for information outweighed the public interest in allowing Ms. Miller to protect her source.[58]

Tony was similarly skeptical about what he considered unwarranted press intrusions into privacy. In a 2002 article in *The Nova Law Review*, Tony criticized *The Times* and other news organizations for filing briefs supporting reporting that he considered tawdry.[59]

In his final book, *Freedom for the Thought That We Hate: A Biography of the First Amendment*, published in 2008, Tony wrote that he was inclined to relax some of the most stringent First Amendment protections "[i]n an age when words have inspired acts of mass murder and terrorism."[60] In particular, he said he might reconsider the conventional view that there was only one justification for making incitement a crime: the likelihood of imminent violence.[61]

Tony wrote that there was "genuinely dangerous" speech that did not meet the imminence requirement.[62] "I think we should be able to punish speech that urges terrorist violence to an audience some of whose members are ready to act on the urging," Mr. Lewis wrote.[63] "That is imminence enough."[64]

Much as he loved and admired the press, Tony considered the courts to be the bedrock institution of American freedom. That faith was informed by his years covering the Warren Court, and it did not seem substantially shaken by the more conservative courts that succeeded it. Given the choice between the rule of law and press freedom, Tony generally chose the former. He was in that way, by the standards of most journalists, something of an iconoclast.

But the clarity and rigor of his thought in this area as in so many others demonstrated that the task of legal journalism, as he reinvented it, is to provide readers with authoritative news and analysis even at the expense of the interests of the press itself.

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56. *See* ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 98-100 (2007).

57. *Id.*; *see also In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1163-83 (D.C. Cir. 2005) (Tatel, J., concurring).

58. In re *Grand Jury Subpoena*, 438 F.3d at 1182.

59. Anthony Lewis, *Privacy and Civilization, an Essay*, 27 NOVA L. REV. 225, 238 (2002).

60. LEWIS, *supra* note 56, at 166.

61. *Id.* at 166-67.

62. *Id.* at 167.

63. *Id.*

64. *Id.*