

Anthony Lewis: Pioneer in the Court's Pressroom

*Lyle Denniston**

Americans with a sense of history, and some knowledge of it, like to think of journalists who open new frontiers in their craft as inevitably muckrakers, or fierce and uncompromising agents of radical change. If every pioneering journalist was an Ida Tarbell or Lincoln Steffens or Upton Sinclair, that perception would be right. Those pioneers had the courage to break the mold, to take on the power elites of their day and compel them to bend to the public good. Their journalism had about it the capacity to coerce reform, sometimes by the bludgeon of shock.

H. L. Mencken in his day did his fair share of puncturing inflated public egos, but it is remarkable how little social reform came at his instigation. His wit was deliciously wicked, and his fascination with philology could well be emulated by journalists of all eras. But his work was mainly for parlor amusement, not social improvement.

In modern times, perhaps closest to the muckraker would be Bob Woodward of *The Washington Post*, at least when he was a reporter before becoming a commentator or pundit and got into public spats with the White House. Woodward, together with Carl Bernstein, put an end to the practice of Washington journalists looking the other way when something did not seem right in public affairs, but finding out what actually had gone wrong required a dogged determination, and no weekends off. The list of post-Watergate reforms that their work stimulated is impressive, indeed.

There is another kind of journalistic pioneer, who uses the instrument of daily news coverage to de-fog history or unravel mysteries for ordinary people, to put the seemingly unreachable or inaccessible within the easy grasp of the average citizen. In this genre, one would have to put the war correspondents: Mathew Brady with his camera, Ernie Pyle with his pencil and pad, Bill Mauldin with his cartoonist's sketch pad, David Halberstam with his tape recorder.

A rarer breed of this kind of pioneer would be Joseph Anthony Lewis, who died in March at age eighty-five after a remarkably rich career with *The New York Times*, enlivening the sometimes-arcane world of the law for his readers. A somewhat aristocratic fellow, he had a perhaps surprising passion – and a remarkable gift – for putting the intricacies of law down where any Public Citizen could reach them. (In these days, perhaps the legal translator

* Supreme Court reporter for SCOTUSblog.com, who has covered the Court for more than fifty-five years. The author notes with gratitude the research assistance for this Article by the staff of the Court's Public Information Office and its library. This Article was originally published in the December 2013 issue of the *Journal of Supreme Court History* and is reprinted with permission.

who comes closest to Tony Lewis in making law interesting to those who do not make it their profession is the irrepressible online reporter, Dahlia Lithwick, who does it with a naughty sense of humor that Tony Lewis would never have allowed himself to indulge.)

Journalists, whether they know it or not, and whether or not they would admit it, are profoundly influenced by the eras in which they live and by the ideas which make up their daily news conversation. Tony Lewis was America's witness to "the Warren Court," and it forever made him a believing liberal. (He may have been the only reporter covering the Supreme Court who would have understood why that Court was "liberal" rather than "progressive," which is the more fashionable word for what passes for liberalism today with its strong echoes of early twentieth century progressivism.)

Tony's genius was not objectivity; he genuinely agreed personally with the substance of what the Warren Court was doing to make the civil rights revolution and the criminal law revolution into constitutional realities. His copy showed that he thought the Court was getting it right, almost all of the time. It is too much to suggest that he was an apologist for the Court, but the majority almost certainly thought he was an admirer. That he was a favorite of Justice Felix Frankfurter, the most insufferably arrogant member of that, and perhaps any, Court, and that he counted the Justice as one of his favorites, tells us something a bit uncomfortable about both men.

It detracts from Tony's history, though, to dwell upon where his personal sentiments lie. He made history because he was the first newspaper reporter to want to know how the Marble Palace actually worked, day to day and case to case, and the first to commit to sharing that regularly with a newspaper audience. (Before Tony began on the Court "beat" in the late 1950s, the Court was covered by reporters working in the congressional galleries, who would wander across the street on "decision days," trying to catch up enough to report approximately what the Court was doing, only to walk away until the next time. He made it his preoccupation, and that was a genuine breakthrough.)

There had been, before Tony, other journalists who had paid more than passing attention to the Supreme Court. Arthur Krock, he, too, of *The New York Times*, penetratingly covered the politics surrounding the Hughes Court and the Court-packing controversy, and syndicated columnist Drew Pearson, sort of the Bob Woodward of his day, who provided his readers with the ongoing doings – including some of the internal intrigue – of the Nine Old Men.

But Krock and Pearson were not Supreme Court journalists in the singular way that Tony Lewis would show all of his colleagues how to be. The Court was, in short, Tony's working life, and he covered it with a facile grace and a comprehension that no one had done before – indeed, no one had even tried before. When, for example, the Court ruled in *Baker v. Carr*¹ in 1962 that courts could rule on the constitutionality of "the rotten boroughs"² from

1. 369 U.S. 186 (1962).

2. See *Baker v. Carr*, 369 U.S. 186, 302 (1962) (Frankfurter J., dissenting).

which unrepresentative state legislatures were chosen, Tony wrote this as his second paragraph the next day: “The historic decision was a sharp departure from the court’s traditional reluctance to get into questions of fairness in legislative districting. It could significantly affect the nation-wide struggle of urban, rural and suburban forces for political power.”

Plain and simple, to be sure, but also wise and prophetic.

If there is a fundamental problem in newspaper (and now television and Internet) coverage of America’s courts, including the Supreme Court, it is that reporters – and their editors – are fascinated by the law primarily when it startles or titillates or angers or scandalizes. They cover at most the “really big cases,” and they now do so with less and less space – and, often, with anecdotes instead of legal comprehension. For much of the press, the law now has personality rather than character. The law does not generate popularly exciting stories every day, on every case, and therefore much of the substantive work of the courts finds an audience only with the bench, the bar, the academy – and, these days – the legal blogosphere.

When Tony Lewis came along, he appreciated that almost all of the law had meaning beyond what it said to the practitioners and the professors, a meaning that could start a conversation or an argument across back fences, around the kitchen table, or over a pitcher of beer. If ever there was a journalist who understood what Holmes meant, “the life of the law has not been logic: it has been experience,” it would have been Tony.

His reporting in *The New York Times* combined plain writing with deep understanding of law’s processes, and that is not an easy thing to do, or an easy thing to get past an editor who worships simplicity even if it misses part of the essence. Tony’s legal stories were made of substance, not once-over-lightly trivializations.

Without being subjective, he worked analysis into the story, without needing to rely upon a quotable source to make sense of it. A reader could come away from one of his articles having learned something, not only about what had happened but what it actually meant. To do that in a daily newspaper, without condescension or misinterpretation, is – now as then – a remarkable professional feat. If it did not quite approach brilliance, it certainly was inventive, in the best sense of the word.

When the Court decided *Gideon v. Wainwright* in 1963, giving poor people for the first time a constitutional right to a lawyer to help defend them against criminal charges, Tony’s story added real depth to the public’s understanding by discussing what the Court had left unresolved – a gap that is often left, even by a profoundly important ruling.

He wrote, quite high in the story:

One restriction on the effect of the decision may be the doctrine of waiver – the rule that a man may waive his right to a lawyer by not demanding one. Gideon specifically asked for a lawyer at this trial,

but many prisoners may not have done so. Justice Black's opinion did not settle, either, whether the new rule will apply to the most petty crimes, such as traffic offenses. That will presumably be worked out in later cases.

That was Tony speaking, not a source, and he was clearly qualified to do so.

When he turned from newspapering to the book trade, almost nothing appeared to have been lost in the transition. His 1964 book about the *Gideon* case, *Gideon's Trumpet*, rather slyly tells the reader a great deal more about how the law works than the reader might have expected upon opening it (see, for example, the clever weaving of law and human interest in Chapter 2), but it does so in a way that Clarence Earl Gideon himself surely wanted it to be told: simply and directly, and with an appreciation of what it meant to be abjectly poor and yet have someone actually care about your rights. If the Justices' decision in Clarence Gideon's favor was Abe Fortas' finest moment as an advocate before the Court, it also was Tony's as the laureate of the Court.

It was a sign of Fate's kindness that allowed Tony to live a week beyond the fiftieth anniversary of the Court's decision in *Gideon*. Of all that the Warren Court did to make constitutional law "fair," as Chief Justice Earl Warren so often demanded that it be, the *Gideon* decision was its noblest effort. And history had already judged that this was a story made for Tony Lewis, and a story Tony Lewis made for America. It is not too much to suggest that *Gideon's Trumpet* is the best one-case book ever written about what the Supreme Court does. And that is saying a good deal, given the outpouring of the highly readable, one-case diaries published by the University of Kansas Press.

As the record seems to show, Tony was much more comfortable personally when he moved to *The Times'* London bureau, and even began – his friends noticed – to affect something of an English accent. He wrote with obvious approval of the good life in that tempting city, yet nothing he wrote there could compare with the likes of *Gideon's Trumpet* as a book and *Gideon v. Wainwright* as a topic for a newspaper.

After his reporting years, Tony had a long run as an op-ed columnist but, as so often happens when a working reporter dons the mantle of punditry, there was more of Tony than there was of the human adventure that he had formerly brought so vividly to life in news stories. It was a platform for his liberal preferences, and not a whole lot more. He had bought fully into the dominant mindset of the Cambridge dons. For example, in a 1990 column about a Senate hearing on the nomination of Justice David H. Souter, Tony

wrote angrily of “right-wing . . . extremists outside the American constitutional tradition,” and of “the radical-right legal theorists.”³

Although there is, among those who remember Tony Lewis fondly, an impression that he was a champion of the First Amendment, that he believed in a sturdy freedom of the press, that is somewhat wide of the mark. Tony absolutely believed in the constitutional virtue of *New York Times v. Sullivan*, but that is not the same thing. *Sullivan* did some genuine favors for the American press, but liberate it from the law’s sometimes meddlesome constraints, it did not.

While its author, Justice William J. Brennan, Jr., believed that it was a work of First Amendment absolutism it was nowhere close to that. It was the diluted form of absolutism which *The Times*’ long-time courtroom defender, Floyd Abrams, had always pursued, and that Tony Lewis found most agreeable to his own professional understandings.

Tony’s 1991 book on the *Sullivan* decision (*Make No Law: The Sullivan Case and the First Amendment*) almost certainly exaggerated the historical significance of that ruling when he wrote: “Without *New York Times v. Sullivan*, it is questionable whether the press could have done as much as it has to penetrate the power and secrecy of modern government, or to confront the public with the realities of policy issues.” That is far too much credit to give to a single decision by a court, and far too little credit to the energy, imagination and sheer doggedness of reporters on the scent of a potential abuse of public power.

Still, it must be said that Tony ultimately did recognize the limitations of the *Sullivan* decision as the liberator of the American press. In that same book, he suggested that:

If there is a doubt about the many Supreme Court decisions beginning with *Times v. Sullivan* that gave legal force to the First Amendment, it is a wariness about the amount of law and legalism in American society. The grandeur and the vitality of the First Amendment can be obscured when it is turned over to lawyers, when judges begin drawing lines between permitted and forbidden expression.

That, though, was the very essence of *Times v. Sullivan*, and Tony’s discovery of that seems a bit tardy, and too little examined.

Tony ultimately began to wonder, in the aftermath of 9/11 terrorist attacks and human atrocities in Africa, whether America could afford the truly robust journalism for which he had frequently argued and for which *Times v. Sullivan* stood – for him – as a monument. His book published six years after 9/11, *Freedom for the Thought that We Hate: A Biography of the First Amendment*, is generally an adoring portrait of constitutionally protected free

3. Anthony Lewis, Op-Ed, *Abroad at Home; Respecting the Court*, N.Y. TIMES (Sept. 21, 1990), <http://www.nytimes.com/1990/09/21/opinion/abroad-at-home-respecting-the-court.html>.

expression, and fulsome praise for those who have had the courage to test the restraints on expression.

But there is, near the end, a passage that is jarring – especially considering that it was written by Tony Lewis. It suggested that he had lost some of his faith in the people to deal peaceably and maintain a society while bombarded with thought that could be, and was, translated into terrorist acts. Here is what he wrote:

In an age when words have inspired acts of mass murder and terrorism, it is not as easy for me as it once was to believe that the only remedy for evil counsels, in Brandeis's phrase, should be good ones. The law of the American Constitution allows suppression only when violence or violation of law are intended by speakers and are likely to take place imminently. But perhaps judges, and the rest of us, will be more on guard now for the rare act of expression – not the burning of a flag or the racist slang of an undergraduate – that is genuinely dangerous. 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. That is imminent enough.

In any age, there are enough politicians and pundits who will nurture doubts about truly free expression that it was disheartening to have such a prominent journalistic voice sounding the alarm.

In Tony's later years, after he had mostly laid aside his pen, the Supreme Court changed markedly, and one is left to wonder now what Tony would have written about the "Roberts Court" had he continued on the Court "beat" for *The Times*. At some level, it almost certainly would have disappointed his liberal instincts, one supposes, but would he have been able to chronicle the way the Court now works with the same depth of understanding, the same eagerness to explain results with which he might well disagree strongly?

He surely knew, perhaps more than most of his colleagues on the Court "beat" did, that life in the law is not static, that it very likely takes on some of the belief systems that are newly emergent, that what once was so obvious and accepted is no longer so, and that even the Constitution and the ever-expanding liberties it may seem to express might, in fact, contract, maybe just a little, maybe a lot. With change at the Court, news stories about the law have to come out quite differently, too.

It is well to remember that the Warren Court's liberal heyday ended some three generations ago, and that even the transitional Burger Court concluded its work more than a quarter-century ago. A news chronicler of this day and time must appreciate that the Court's evolution of understanding about the Bill of Rights and the Fourteenth Amendment is now more measured, even hesitant. Different though the results definitely are, the process still needs explaining and understanding.