

The Rigorous Romantic: Anthony Lewis on the Supreme Court Beat

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Tony Lewis called himself “a romantic about the Supreme Court.”¹ If he had not been a romantic when he took up the beat for the *New York Times* in 1957, he surely would have become one as, for the next seven years, he chronicled the Warren Court’s progressive constitutional revolution at the peak of its energy and transformative power. To list just some of the landmark opinions the Court issued during those seven years is to prove the point: *Cooper v. Aaron*,² *Mapp v. Ohio*,³ *Baker v. Carr*,⁴ *Engel v. Vitale*,⁵ *Gideon v. Wainwright*,⁶ *Brady v. Maryland*,⁷ *School District of Abington Township, Pennsylvania v. Schempp*,⁸ *New York Times Co. v. Sullivan*,⁹ *Reynolds v. Sims*,¹⁰ *Heart of Atlanta Motel, Inc. v. United States*.¹¹ “Historic Change in the Supreme Court” was the headline on a *New York Times Magazine* article of Tony’s that ran in the midst of it all, in June 1962, an article to which I shall return, because it reveals as much about its author as it did about its subject.¹²

You may have done a double-take when I said that Tony covered the Court for seven years – only seven years. As one who came to the beat fourteen years after he left it, and who stayed for nearly three decades, I also find that hard to believe, to the extent that I feel the need to keep checking my notes for accuracy every time I mention it. The reason his seven-year tenure sounds so unbelievably short is that its impact was so unbelievably great. He explained what was happening at the Court in muscular and declarative prose that any intelligent reader could understand. But he did so much more than

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1. Anthony Lewis, *Abroad at Home: Reading the Text*, N.Y. TIMES (Aug. 3, 1990), <http://www.nytimes.com/1990/08/03/opinion/abroad-at-home-reading-the-text.html>.

2. 358 U.S. 1 (1958).

3. 367 U.S. 643 (1961).

4. 369 U.S. 186 (1962).

5. 370 U.S. 421 (1962).

6. 372 U.S. 335 (1963).

7. 373 U.S. 83 (1963).

8. 374 U.S. 203 (1963).

9. 376 U.S. 254 (1964).

10. 377 U.S. 533 (1964).

11. 379 U.S. 241 (1964).

12. Anthony Lewis, *Historic Change in the Supreme Court*, N.Y. TIMES MAG., June 17, 1962, at 174.

that. He placed the decisions in the context of contemporary politics and the framework of constitutional history while assessing their significance. He transformed journalism about the Supreme Court from a score-keeping account of winners and losers to a rich narrative of the Court's role in a democracy grappling with profound questions about the meaning of justice for all.

Here, to offer just one example, are the first two paragraphs of his account of the decision in *Reynolds v. Sims*:

The Supreme Court held today that districts in both houses of state legislatures must be "substantially equal" in population.

It was a decision of historic importance. Not since the school segregation cases 10 years ago had the Court interpreted the Constitution to require so fundamental a change in this country's institutions.¹³

And he described *Gideon v. Wainwright*¹⁴ on the day the decision was issued as "one of the most important ever made by the Supreme Court in the criminal law field," a decision that "could have a great impact across the country."¹⁵ Note that *Gideon* was only one of six full opinions that came down on March 18, 1963,¹⁶ filling nearly 200 pages of *United States Reports*.¹⁷ The Warren Court's habeas corpus landmarks, *Townsend v. Sain*¹⁸ and *Fay v. Noia*,¹⁹ were just two of the others. Tony accounted for the array of criminal cases in his story, which led with *Gideon* on page one and took up most of an inside page.²⁰ "This barrage of criminal law decisions, especially the *Gideon* case," he concluded, "should spur state efforts to set up new methods of providing counsel for indigents."²¹

Anthony Lewis and the Warren Court were a perfect match of writer and subject. It's well known that he had a deep personal interest in the reap-

13. Anthony Lewis, *Historic Decision: Both Houses Affected – Ruling Upsets 6 States' Districts*, N.Y. TIMES, June 16, 1964, at 1.

14. 372 U.S. 335 (1963).

15. Anthony Lewis, *Supreme Court Extends Ruling on Free Counsel: Holds States Must Provide Lawyers for All Poor in Serious Criminal Cases*, N.Y. TIMES, Mar. 19, 1963, at 1.

16. See *Opinions from 1963*, JUSTIA, <https://supreme.justia.com/cases/federal/us/year/1963.html> (last visited Nov. 2, 2014).

17. The *Gideon* decision was the first handed down that day and begins on page 335 of the reports. 372 U.S. 335. The *Robinson* decision was the last of the day, and it ends on page 527 of the reports. 372 U.S. 527.

18. 372 U.S. 293 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

19. 372 U.S. 391 (1963), *abrogated by* Coleman v. Thompson, 501 U.S. 722 (1991).

20. See Lewis, *supra* note 15.

21. *Id.*

portionment cases.²² During his year at Harvard as a Nieman Fellow, 1956-57, he wrote an article arguing for the justiciability of the legislative apportionment question.²³ The article appeared in the *Harvard Law Review* in 1958.²⁴ Four years later, Justice Brennan cited it in his opinion for the Court in *Baker v. Carr*.²⁵ Here are Tony's first two paragraphs in his account of the reapportionment decision:

The Supreme Court held today that the distribution of seats in State Legislatures was subject to the constitutional scrutiny of the Federal courts.

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.²⁶

As an aside, Tony's fellowship year at Harvard (from which he had graduated in 1948) was remarkable.²⁷ He spent his time at the law school, with the plan being that he would come back to the New York Times Washington Bureau, where James Reston had hired him in 1955, to cover the Su-

22. See Lincoln Caplan, *Anthony Lewis and the March to Equality*, AM. SCHOLAR (Mar. 25, 2013), <http://theamericanscholar.org/anthony-lewis-and-the-march-to-equality/#.VEME5PnF-Q> (discussing Anthony Lewis's Pulitzer Prize for his reporting on reapportionment cases).

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

24. Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958). The author of a recently published account of the reapportionment cases asserts that Lewis's article "established him as one of the nation's foremost experts on reapportionment and soon attracted the attention of litigants and lawyers frustrated by the continued recalcitrance of lawmakers." J. DOUGLAS SMITH, ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES 44 (2014).

25. 369 U.S. 186, 206 n.27 (1962). In 1963, the Pulitzer Prize committee awarded Tony his second Pulitzer Prize, in the "National Reporting" category, for his coverage of the Court "with particular emphasis on the coverage of the decision in the reapportionment case and its consequences in many of the States of the Union." *National Reporting*, PULITZER PRIZES, <http://www.pulitzer.org/bycat/National-Reporting> (last visited Nov. 2, 2014). His first Pulitzer, also for "National Reporting," had come in 1955, before he joined the *Times*, for a series of articles in the *Washington Daily News* that resulted in clearing the name of a Navy Department employee, Abraham Chasanow, who had been unjustly accused of being a security risk. *Id.*

26. Anthony Lewis, *Decision Is 6 to 2: Many States Likely To Be Affected by Landmark Case*, N.Y. TIMES, Mar. 27, 1962, at 1.

27. See Liptak, *supra* note 23.

preme Court.²⁸ At the end of his year, Justice Felix Frankfurter, who had retained his ties to Harvard Law School after having taught there for twenty-three years, wrote to Arthur Hays Sulzberger, the *Times* publisher, to say that Tony had shown “an astonishing aptitude for understanding even the most technical aspects of the Court’s work.”²⁹

What a ringside seat to history Tony had. The analytical stories he wrote for the weekend were, of course, particularly rich. But his daily accounts of the breaking news from the Court were also steeped in analysis, as well as in the small, telling details that captured the scene for readers. On September 12, 1958, the justices assembled in a special courtroom session to announce their judgment in *Cooper v. Aaron*,³⁰ the Little Rock school case.³¹ Tony’s story explained that the Court decided the case with a brief *per curiam* decision, with a full written opinion to come at some unspecified time in the future – only the third time in recent history that the Court had taken this approach, the story noted.³² Then he gave this description of the scene in the courtroom as Chief Justice Earl Warren announced the judgment: “The Chief Justice was impassive as he began. When he reached the point in the first sentence saying that the court was ‘unanimously of the opinion,’ he paused and looked up as if to emphasize the word ‘unanimously.’”³³

Seventeen days later, when the Court handed down its full opinion ordering the immediate integration of Central High School, an opinion famously now, but unexpectedly then, signed by all nine justices, Tony captured both the significance and atmosphere of the moment:

The Supreme Court said today that neither direct opposition nor “evasive schemes” could nullify its ruling that racial segregation in the public schools was unconstitutional . . .

But today’s opinion went far beyond the issue in the Little Rock case – whether violent local opposition could justify postponement of a plan to admit Negro children to white schools.

The court spelled out in strong language – stronger than the original school decisions – the duty of state and local officials to end school segregation as promptly as possible . . .

28. *Id.*

29. THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 334 (Roger K. Newman ed., 2009).

30. 358 U.S. 1 (1958).

31. See Anthony Lewis, *Court Bars Little Rock Delay; Justices Concur: U.S. Maps Next Move in Legal Contest with Faubus*, N.Y. TIMES, Sept. 13, 1958, at 1.

32. *Id.* The other two were the German saboteurs case, *Ex parte Quirin*, 317 U.S. 1, in 1942, and the Court’s vacating of a stay of execution in the *Rosenberg* case in 1953. Lewis, *supra* note 31.

33. Lewis, *supra* note 31.

The courtroom scene today was one of quiet drama. Suppressed excitement could be sensed among the spectators as it became apparent, at the start of the reading by Chief Justice Earl Warren, that this was more than an ordinary opinion.

The Chief Justice began by saying that all nine members of the court had been joint authors of the opinion.

He looked at each of the justices in turn as he read their names . . .³⁴

Before moving on to some larger points, I can't help mentioning a few more of Tony's day-of-decision stories. His account of *New York Times Co. v. Sullivan*,³⁵ which he called a "constitutional landmark for freedom of the press and speech," was full of analytical detail.³⁶ After meticulously parsing Justice Brennan's opinion and comparing it to the arguments that had been presented to the Court, he noted that the decision "could have an immediate impact on press coverage of race relations in the South," while the Court "did not, of course, limit its discussion to the racial context."³⁷ The Court, he explained, "said that freedom to comment on official conduct, protected by the free-speech and free-press clauses of the First Amendment, would be endangered by unlimited libel awards."³⁸

Later that year, in *Heart of Atlanta Motel, Inc. v. United States*, the Court unanimously upheld the public accommodation provision of the Civil Rights Act of 1964 on Commerce Clause grounds.³⁹ Tony explained the history of the commerce power, going back to *Gibbons v. Ogden*.⁴⁰ He observed that "[t]he opinion bluntly rejected the argument that business-owners would be deprived of property or liberty without due process."⁴¹ He wrote that "politically, the decision was a definitive answer to those in the South and elsewhere who have made an issue of the new law's constitutionality. Most

34. Anthony Lewis, *Supreme Court Forbids Evasion or Force to Balk Integration; 9 Write Opinion: It Goes Far Beyond Little Rock Case – Officials Warned*, N.Y. TIMES, Sept. 30, 1958, at 1.

35. 376 U.S. 254 (1964).

36. Anthony Lewis, *High Court Curbs Public Officials in Libel Actions: It Rules for New York Times and 4 Negro Ministers in Alabama Suit Ad: Decision Is Unanimous: Says Malice Must Be Shown – Opinion Likely to Aid Press Freedom in South*, N.Y. TIMES, Mar. 10, 1964, at 1.

37. *Id.*

38. *Id.* More than a quarter century later, Tony, working from Justice Brennan's papers, wrote a book about the case. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

39. 379 U.S. 241 (1964).

40. Anthony Lewis, *Bench Unanimous: Ruling Clears the Way for Enforcing Law on Full Scale*, N.Y. TIMES, Dec. 15, 1964, at 1.

41. *Id.*

prominent among those is Senator Barry Goldwater, who voted against the law, saying he thought it unconstitutional.”⁴²

Am I wrong to hear a subtle note of triumph in that last sentence? Tony didn't need to remind readers that Barry Goldwater, the Republican presidential candidate, had been overwhelmingly repudiated by the voters just a month earlier.⁴³ This was not the first time Tony had commented on Senator Goldwater's constitutional objection to the Civil Rights Act.⁴⁴ Six months earlier, when the senator announced his opposition to the legislation, Tony produced a story that, while not labeled “news analysis,” shredded Goldwater's position.⁴⁵ The headline on the article read, “The Courts Spurn Goldwater View,” and the article began:

The constitutional argument made by Senator Barry Goldwater today in opposing the civil rights bill is one that stopped winning cases in the courts in the late nineteen-thirties.

It was in 1937 that the Supreme Court rejected for good and all the contention that the Federal Government's power to legislate on interstate commerce was limited to matters “directly” involving commerce. Since then, the courts and the law professors have given the commerce power the broadest interpretation.⁴⁶

The article, which took up only a single column, then guided the reader from the consolidation of national power in early days of the Republic through the regression of the *Lochner* period and up to the New Deal apotheosis, thus depicting the presidential candidate and soon-to-be Republican nominee as one who would return the country to a long-ago era, widely discredited and, probably for most readers, long forgotten.⁴⁷

Tony was, of course, writing at the height of the civil rights revolution, which was unfolding in many places other than the Supreme Court.⁴⁸ When he was not covering Court decisions, Tony wrote widely about civil rights legislation and enforcement.⁴⁹ One article in June 1964, following passage of

42. *Id.*

43. See *Unofficial Presidential Election Results*, N.Y. TIMES MAG., Dec. 13, 1962, at 85.

44. See Anthony Lewis, *The Courts Spurn Goldwater View: Broadest Interpretation Is Given to Commerce Power*, N.Y. TIMES, June 19, 1964, at 18.

45. See *id.*

46. *Id.*

47. See *id.*

48. See generally Virginia Postrel, *The Consequences of the 1960's Race Riots Come into View*, N.Y. TIMES (Dec. 30, 2004), <http://www.nytimes.com/2004/12/30/business/30scene.html>.

49. See Anthony Lewis, *U.S. Powers Are Limited in Dealing With Civil Rights Strife: Government Is Unable To Provide Police Protection Without Large-Scale*

the Civil Rights Act and just a week after three young civil rights workers had been murdered in Mississippi, discussed the challenges and uncertain prospects for federal enforcement.⁵⁰

It is not very helpful to talk about the President's powers in legal terms. He unquestionably has the power, and the duty, to prevent mass bloodshed in this country if local authorities cannot or will not. The question, rather, is one of wise policy – of the point at which one should take so drastic a step . . .

The premise of the Civil Rights Act of 1964 is that law and the courts can resolve racial conflict. The enforcement steps about to begin will show whether that premise is still correct.⁵¹

It's obvious that the struggle for racial justice in America deeply engaged Tony Lewis, just as the South African struggle would do years later. A deep moral stance pervaded his work to a degree that might surprise today's sanctimonious journalism police, for whom all ideas merit equal treatment and the arid he-said, she-said formula provides the only safe armor against the ever-present danger that opinion might creep into a news story. Like his friend Ronald Dworkin, the great legal philosopher whose death preceded Tony's by only a few weeks, Tony believed in a "moral reading" of law that "brings political morality into the heart of constitutional law."⁵² I venture here into presumption. I never had the privilege of having such a conversation with Tony. His decades as a columnist that followed his brief Supreme Court assignment of course made his moral stance explicit, and his critical eye in later years was often trained on the Supreme Court as a growing conservative majority embraced an ever more formal, desiccated and ahistorical notion of equality. But the young Tony Lewis, the daily journalist, only thirty when he took up the Supreme Court beat, did not – to quote Cardozo – "stand aloof on these chill and distant heights."⁵³ He embraced the Court, as he put it in the 1962 magazine article I referred to earlier, "as a moral goad to the political process[.] . . . Slowly but perceptibly, with occasional retreats but with the over-all direction clear, the Court is taking up the role of conscience to the country."⁵⁴

"Perhaps unconsciously, Lewis was assisting in the creation in the cult of the Court that became a staple of modern liberalism," L. A. Powe Jr. ob-

Military Operation: Federal Intervention by a Take-Over of Local Law Enforcement Is Viewed as Too Drastic a Move, N.Y. TIMES, June 28, 1964, at E3.

50. *See id.*

51. *Id.*

52. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996).

53. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

54. Lewis, *supra* note 12.

served in a 2004 essay.⁵⁵ Indeed, the sentiments in Tony's 1962 magazine piece might sound naive, even heart-breakingly so, from the perspective of today, so soon after the Roberts Court dismantled the Voting Rights Act of 1965⁵⁶ and further tightened the constitutional noose around affirmative action in higher education.⁵⁷ Tony didn't live to see those particular decisions, but he saw them coming. He remained a romantic until the end, but he was a realist as well – a rigorous romantic, in the title of this talk. I think it was the fact of having, in his youth, seen how the ideal once came so close to being realized that gave him the power to assess the political, judicial, and human failings that his resonant voice criticized in the decades that followed.

Tony the Supreme Court journalist wasn't perfect. Among the articles of his that I looked for was the one on *Jacobellis v. Ohio*,⁵⁸ the 1964 obscenity ruling. I wanted to see what he had made of Justice Potter Stewart's famous line, "I know it when I see it, and the motion picture involved in this case is not that."⁵⁹ To my surprise, the line wasn't quoted in his story.⁶⁰ How could he have missed it?

Well, it turned out that *Jacobellis* was one of fourteen decisions issued on June 22, 1964 with full signed opinions, along with numerous other unsigned opinions that resolved others of the many obscenity cases then pending.⁶¹ The other decisions that came down that day included such major criminal-law rulings as *Escobedo v. Illinois*⁶² and *Jackson v. Denno*,⁶³ along with major antitrust and national security cases.⁶⁴ Tony had more on his plate that day, in other words, than recording a snappy one-liner from a concurring Justice.

I know a great journalist when I see one, and Anthony Lewis was it.

55. L.A. Powe, Jr., *Writing the First Draft of History: Anthony Lewis as Supreme Court Correspondent*, 29 J. SUP. CT. HIST. 177, 187 (2004).

56. See *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

57. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421-22 (2013).

58. 378 U.S. 184 (1964).

59. *Id.* at 197 (Stewart, J., concurring).

60. See Anthony Lewis, *Court Voids Ban on 'Tropic' Book: Frees Henry Miller Novel – 'The Lovers' Approved*, N.Y. TIMES, June 23, 1964, at 26.

61. See *Opinions from 1964*, JUSTIA, <https://supreme.justia.com/cases/federal/us/year/1964.html> (last visited Nov. 2, 2014).

62. 378 U.S. 478 (1964).

63. 378 U.S. 368 (1964).

64. See *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964); *United States v. Cont'l Can Co.*, 378 U.S. 441 (1964).