

343-90

JAN 24 REC'D

Jan 18, 1990

Dear Mr. Lamb:

FEB 15 ANS'D

The attached reprints are from
the book by Tom Goldstein
entitled "The News at any Cost".

I am sending these along to you
because you seem to be enthralled
with the NY Times and its
"integrity."

I can assure you that the Times
is just as fallible, inaccurate,
and biased as any member
of the 4th estate.

Do not be misled by its
mast head.

Yours truly,

Pentagon
the Viet-
ciple the
aterial is

eous and
d privacy
than two
attack in
reporters
ef. In one
ent when
g corporal

to be left
On August
ne Review,
ntenced to
(The con-
er that day,
d by a staff
w. She had
o be drunk,
ed shortly
d just been
h negligent
intoxicants.
the *Spokes*-
d for trying

his decision
en managing
sed: "... it
composition
, better than
A driver zip-
common oc-
police, that
is out to be a
ant trial, the

story gets more compelling. Let it happen on judgment day for her client and it becomes very touching. It was a really rotten day for Julie Twyford. . . . The picture was made in a public place of a public incident. The information in the picture and the cutline was accurate."

It is hard to quarrel that Julie Twyford was a legitimate subject of news—even though the criminal charges were subsequently dropped. The position of Clarence Arrington, another reluctant newsmaker, is more ambiguous. Early on Sunday, December 3, 1978, he received a phone call from a friend who told him his picture was on the cover of *The New York Times Magazine* to illustrate a story on the black middle class. (In the picture, Arrington, a financial analyst in Manhattan, is walking briskly along the street, and he is clearly recognizable, although his name is not used.) Arrington was shocked, because, as he claimed later, he did not even know his picture was being taken. The lead article in the magazine described black middle-class aspirations and the failure of middle-class blacks to continue to press for the needs of lower-class blacks, a thesis that Arrington found repugnant. He sued.

The principles of the law of privacy were not totally settled in this area, and Arrington's case moved up through the state court system. At the New York Court of Appeals, the state's highest court, he was told he could not prevail against the *Times* because his picture appeared in connection with the news-gathering process. But almost as a consolation prize, the court said he was permitted to pursue his suit against the free-lance photographer and the photographer's agent, because they were engaged solely in commerce. The Court of Appeals was clearly troubled by the result and seemed to be saying that while the state law was against Arrington, fairness was on his side. He appealed to the United States Supreme Court, which, in 1983, refused to entertain his appeal against the *Times*, which, because it is wealthy, was clearly a more desirable defendant for Arrington than the photographer or his agent.

Incidentally, the *Times*, which views itself as a guardian of the First Amendment, failed to cover this lawsuit until the Supreme Court reached its decision, and then it devoted only a paragraph to its victory. This is odd, given the seriousness—even near hysteria—with which some publishers viewed this case. At one point, after the ruling of the state Court of Appeals, Cravath, Swaine & Moore, a conservative and pres-

Toni Goldstein "The News at Any Cost"

tigious Wall Street law firm, submitted a highly charged friend-of-the-court brief asking the court to reconsider its decision. The firm, which was representing CBS, *Time*, *Newsweek*, the Gannett chain and others, went so far as to predict that if freelance photographers could be held liable if they failed to obtain the consent of their subjects "some of the publishers who depend on the these photojournalists might have to leave New York, others, severely to curtail their use of illustrative material." That, said the law firm in its brief, would lead to a situation where "the press will not operate freely and the public will not be as informed." Eventually, the state legislature, heavily lobbied by the media, nullified the state court's ruling. That was not covered in the *Times* either.

There is something unpleasant about taking advantage of unwary bystanders like Clarence Arrington. He was wronged, even though there was no legal remedy to correct it. The freelancer who took the photo, Gianfranco Gorgoni, said afterward: "I feel I am for Arrington, in a way, because of the contents of the article." But the photographer said he disapproved of the lawsuit and would have resorted to the concept that lawyers call self-help: "If it had been me, I would have gone and punched the writer." In contrast to Arrington's assertion, the photographer insisted that Arrington saw the photograph being taken, and had he wished, he could have objected and the photographer would have stopped shooting.

All this took place in the open. Many of the most questionable techniques used by journalists in their quest to be eyewitnesses rely on stealth, secrecy and deceit.

A. A. Dietemann was a disabled veteran who claimed to be a doctor. He was later labeled by a judge as a practitioner of "simple quackery." In 1963 two reporters from *Life* magazine visited him in his California home, which he also used as his office. One reporter, who did not disclose her identity, described imaginary symptoms of cancer, saying she had a lump on her breast. The reporter told how Dietemann immediately diagnosed the problem: "He began beating that wand and rubbing me. He finally decided I had butter poisoning because I ate rancid butter exactly eleven years, nine months and seven days ago. That poison settled in my leg, causing the lump in my breast. He gave me some clay pills for it." Unbeknownst to Dietemann, the reporter was wired to transmit the conversation to a car, where another *Life* employee was recording it, along

is legal
between
ters is

record,
nely tell
they do
who may
hat per-
r moves
ney wish
d never
f people
they are
be offers
ry of the

ry that is
ylor, ex-
ees with
s without
Taping a
sts there
the other
horthand
which is
l put an-
ness. His
ocrisy is
sy for the
notes on
in.

There is
ographing
a face-to-
are being
even not
recorded
ectations.
people do
der. Simi-
tion to be

At many newspapers, including *The New York Times*, secret taping used to be common. For most of the time that I was reporter there, I sat near the rear of the block-long newsroom with reporters working on larger projects who had less day-to-day responsibility for stories. Telephone induction coils were attached to several phones. The devices attach to a tape recorder like a microphone. Conversations at the *Times* were recorded secretly in spite of a policy forbidding it.

This policy, however, was hardly well advertised. I do not recall it ever specifically being mentioned in the six years I was there. I only became aware of it several years after I left the newspaper, when, in connection with the survey I conducted for this book, I was sent a memorandum issued by A. M. Rosenthal, the same day the *Times* broke a front-page story on secret taping conducted by Charles Z. Wick. Rosenthal's memorandum read:

"The story about the taping of telephone calls in the paper of December 28th, prompts me to issue a reminder of what has long been a *Times* policy:

"We do not make any tapes of telephone calls without informing the person at the other end of the line."

Then, a month later, Arthur Ochs Sulzberger, the publisher of the *Times*, in a sensible amplification of that memorandum, issued another written statement:

"Recent reports in the press of the surreptitious use of tape recorders leads me to restate and emphasize the policy of The New York Times Company on the use of such machines.

"It is the policy of The New York Times Company not to record either business or news telephone conversations by an electronic device unless we have the clear agreement of the other party prior to the conversation.

"This policy is one of common sense and courtesy. It is not intended to limit the use of tape recorders in face-to-face interviews when the party being interviewed agrees to the recording, or in press conferences where the speaker is 'on record.'

"While taping of conversations without the other party's prior approval is a crime in Florida, it is a discourtesy everywhere. We wish to conduct our business only in a highly ethical way."



What these memoranda do not say is how often secret taping leads to trouble. In June 1983, CBS News suspended George

That decision was met with typical alarm by the press, including the *Times*. Yet after the decision, few, if any, newsrooms were subjected to searches.

In its news stories, the paper adopted the same posture it took in litigation. The *Times* felt that it needed to protect the First Amendment, often to the exclusion of other compelling Constitutional interests. For example, a reader rarely got a clear idea of why a defendant's Sixth Amendment right to a fair trial might arguably be a limitation on the First Amendment freedom of the press. A notable example of this fuzzy coverage were the articles written about *Gannett v. DePasquale*, a 5-to-4 opinion by the Supreme Court holding that the public, including the press, had no right to attend pretrial hearings—hearings that are held to determine if confessions and evidence were properly obtained and therefore are admissible at trial. The court (in an opinion that was far from a model of clarity) held that the rights of an individual defendant were paramount.

No news story began: "In a victory for the presumption of innocence . . ." The emphasis was on the loser—the press. A summary of the *Gannett* decision in a news article in the "News of the Week in Review" section of the *Times* began: "It has to be small consolation to the news gatherers of the land that the United States Supreme Court will rule no more until this fall . . ." Allen Neuharth called the decision "another chilling demonstration that the majority of the Burger court is determined to unmake the Constitution."

Amid this hyperbole, a cautionary note was sounded by Harry Wellington, dean of the Yale Law School: "It seems to me that we ought to be slow about drawing the broadest of conclusions, which seems to be the way it has been interpreted by journalists." In fact, over the next several years, the Supreme Court changed its mind in subsequent court decisions and virtually nullified the *Gannett* ruling.

Cases that have not promoted First Amendment values have sometimes not been covered in the *Times*. For example, the lawsuit brought by Clarence Arrington, whose picture appeared on the front page of the *Times* magazine, was barely mentioned in the paper. More recently, the *Times* failed to cover an arbitration proceeding involving Richard Severo, a difficult but talented staff reporter, who claimed he had been punitively transferred after he chose to have a book that he was writing published by Harper & Row, the highest bidder, rather than by

the book publishing company then owned by the newspaper. The Severo case was more than an internal squabble—*Newsweek* called it “a highly publicized controversy.” It caught the attention of the national media in the summer of 1984 after a lawyer for the *Times* demanded that Severo turn over copies of his notes used in preparation of stories originally appearing in the newspaper which became the basis of the book, *Lisa H.* This offensive demand by a newspaper on one of its own reporters was not mentioned in the *Times*. Indeed, the first mention of the book in the newspaper came on February 6, 1985, when it was reviewed—negatively.

Judges who are antagonistic to First Amendment interests have found themselves ignored, or at risk of being criticized, in both the news and editorial columns of the *Times*. After Myron Farber, the *Times* reporter, was jailed in 1978 for failing to disclose the identity of a source, I was told by one senior editor to “get” judges for what they had done to Farber; after that, I had the unmistakable feeling that stories I wrote critical of judges received better play in the newspaper than they deserved.

Judges friendly to the First Amendment have generally been treated with deference. One First Amendment champion in particular, Irving Kaufman of the federal appeals court based in Manhattan, has received exceptionally favorable coverage. (In a letter to me, Judge Kaufman bristled at the suggestion that the *Times* “has been protective of me or vice versa.” As evidence that this was not so, he referred to a column that I had written in 1979 which he said was “damaging” to him.)



On May 4, 1983, the off-lead of *The New York Times* was an exclusive: President Reagan was going to name a commission to study the impact of organized crime in America, and Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit had agreed to serve as the commission's chairman. (Close readers of the *Times* should not have been terribly surprised by this. Seven months earlier, the paper carried a five-paragraph item on an inside page saying that Kaufman had been “approached by Administration officials” about this job.)

The article examined Kaufman's background in order to supply the reader with his credentials for the position: “In 1957 the