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CHRISTINE JOLLS

The Real Justice Scalia

Ronald Dworkin wrote in his final book, *Justice for Hedgehogs*:

We value great art most fundamentally . . . because it embodies a performance, a rising to artistic challenge. We value human lives well lived not for the completed narrative, as if fiction would do as well, but because they too embody a performance: a rising to the challenge of having a life to lead.¹

Justice Scalia had a life to lead—and he did. For someone of his office and his level of jurisprudential influence, he was remarkably disinterested in the calculated, detached pursuit of an optimal “completed narrative.”² Instead he led with his heart.

He was “REAL.”³

“What is REAL?” asked the Rabbit

“It’s a thing that happens to you”

“Does it hurt?” asked the Rabbit.

“Sometimes.”⁴

AUTHOR. Christine Jolls is the Gordon Bradford Tweedy Professor of Law and Organization, Yale Law School. Professor Jolls served as one of Justice Scalia’s law clerks during October Term 1996.

1. RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* 197 (2011).
2. *Id.*
3. MARGERY WILLIAMS, *THE VELVETEEN RABBIT* 12 (Avon Books 1975) (1922).
4. *Id.* at 12-13. The Rabbit is an especially fitting frame for this tribute because I first encountered him in a reading at the wedding of a fellow member of the Scalia clerk tribe.

For Justice Scalia, neither people nor ideas were means for producing a desired objective or goal; rather they were always ends in themselves. Day in and day out, he actively modeled a form of regard and authenticity that became an organizing personal example for me and many of his other wildly devoted law clerks, even those who, as in my case, rued his substantive views.

Although at times Justice Scalia achieved remarkable jurisprudential success—especially in statutory interpretation⁵—on other occasions, often in constitutional law, I believe his heart confounded his preferred “completed narrative.”⁶ Because he was Real, there was raw, unvarnished hurt when he lost, and he routinely bled from austere constitutional principle⁷ to demonstrated partiality toward policies or institutional structures the Court was invalidating.⁸ (When, instead, he was with the majority on austere constitutional principle—as when he provided the fifth vote for the unconstitutionality under the First Amendment of jailing a protester for pouring kerosene on the American flag and burning it at a national political convention⁹—Justice Scalia proved able to put deep personal feelings aside; although he “hate[d] the result” in the case,¹⁰ he joined the majority because, he said, we “have a First Amendment.”¹¹) Justice Scalia certainly was not always a jurisprudential adherent of “behavioral

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5. See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1764-65 & n.50 (2010).
 6. DWORKIN, *supra* note 1, at 197.
 7. See, e.g., *United States v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting) (decrying the “progressive[] narrow[ing]” of the “sphere of self-government reserved to the people of the Republic” by the majority’s imposing “its own favored social and economic dispositions” through the Equal Protection Clause).
 8. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“Many Americans do not want persons who openly engage in homosexual conduct as partners in their business [or] teachers in their children’s schools They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.”); *United States v. Virginia*, 518 U.S. at 566, 601 (Scalia, J., dissenting) (asserting, in a legal challenge to the all-male Virginia Military Institute (VMI), that “[t]oday’s decision does not leave VMI without honor; no court opinion can do that”); *id.* at 566 (“Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half.”).
 9. *Texas v. Johnson*, 491 U.S. 397, 399 (1989).
 10. Erin Fuchs, *Justice Scalia Says He Would Jail This “Bearded Weirdo” If He Were King*, BUS. INSIDER (Mar. 26, 2014, 3:38 PM), <http://www.businessinsider.com/scalia-talks-texas-v-johnson-at-brooklyn-law-2014-3> [<http://perma.cc/VR5S-NAYK>].
 11. Tal Kopan, *What the Supreme Court Has Said About Flag Burning*, CNN (Nov. 29, 2016, 2:31 PM), <http://www.cnn.com/2016/11/29/politics/flag-burning-constitutional-donald-trump/index.html> [<http://perma.cc/WZH7-3KXT>] (quoting a 2012 CNN interview of Justice Scalia).

law and economics”¹²—but both in his life and in his oeuvre he was “both nicer” and at times “more spiteful than the agents postulated by neoclassical” economics.¹³ That he was far more a “Human” than an “Econ”¹⁴ was at times a source of chagrin to some of his clerks—as well as to his wife.

*[The Rabbit was] dragged . . . out . . . and put . . . into the Boy's arms [The Boy] made nice tunnels for him under the bedclothes that he said were like the burrows the real rabbits lived in. And they had splendid games together And when the Boy dropped off to sleep, the Rabbit would snuggle down close under his little warm chin and dream, with the Boy's hands clasped close round him all night long. . . . [T]he little Rabbit . . . was happy, for [it] was true He was Real.*¹⁵

Of one thing I am sure: one cannot understand Justice Scalia without understanding his 55-year marriage to his wife Maureen, whom he loved with fierce devotion. To have been married so long and to display, still, that heartfelt an empathetic allegiance to her (even if his undissembled commentary on various topics could sometimes dismay her), that passionate a loyalty to her, that much care for and about her, should render a deeply inspiring hope to us all.

In exchanges over the two decades I knew Justice Scalia, the concerns and cares of his wife were always right at the surface for him. “How are you?” across a little table at Pepe’s Pizza in our last face-to-face meeting prompted not comments about the Yale lecture he had just delivered to a standing-room-only crowd at St. Thomas More Chapel¹⁶ but “I’m worrying about Maureen’s 75th birthday celebration.” His frequent laments about his waistline expansion were always coupled with grinning expressions of admiration for his wife’s ability to adhere to a rigorous daily exercise-tape routine (of which his imitation was as

12. See, e.g., *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 495 (1992) (Scalia, J., dissenting) (“[A] rational consumer considering the purchase of Kodak equipment will inevitably factor [in] . . . the expected cost of after-market support. . . . If Kodak set generally supracompetitive prices for either spare parts or repair services without making an offsetting reduction in the price of its machines, rational consumers would simply turn to Kodak’s competitors”); RICHARD H. THALER, *MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS* 4, 257–69 (2015) (discussing the focus of behavioral law and economics on replacing unboundedly rational, calculating “Econs” with “Humans” in law and economics analysis).

13. Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1479 (1998).

14. THALER, *supra* note 12, at 4.

15. WILLIAMS, *supra* note 3, at 17–18, 20.

16. *Event Information: Not to the Wise: The Christian as Cretin—Justice Antonin Scalia*, YALE U. (Apr. 2, 2014), <http://calendar.yale.edu/cal/stm/default/today/default/CAL-2c9cb3cd-4335cbd6-0143-9bce475b-000034ccbedework@yale.edu/> [<http://perma.cc/UFA7-6AWU>].

funny as his equally genial imitations of fellow Justices after Conference were). The fearsome, “top of his mind” devotion that I saw so often in Justice Scalia was integral to being the Real person he was.

“Why, it’s a mass of scarlet fever germs! – Burn it at once. . . .” And so the little Rabbit was put into a sack with the old picture-books and a lot of rubbish, and carried out to the end of the garden behind the fowl-house.¹⁷

On February 20, 2016, grave testimony to the role of his wife in Justice Scalia’s life played across the Basilica of the National Shrine of the Immaculate Conception in the sharp break from calm to broken anguish in his son Paul’s voice upon his reference to his Radcliffe-educated mother in eulogizing his father.¹⁸ “We are gathered here because of one man,” began Father Paul Scalia at the remembrance.¹⁹ “A man known personally to many of us, known only by reputation to even more. A man loved by many, scorned by others.”²⁰ That man, Father Scalia continued, “of course, is Jesus of Nazareth.”²¹ Paul Scalia spoke in the strong, faith-filled voice of confidence in the face of death, intoning that because of Jesus’s “life, death and resurrection,” “we do not mourn as those who have no hope” but instead are grateful “that he died and rose for Dad.”²² Yet seconds later, as he gave thanks for Justice Scalia’s marriage to “the woman he loved, a woman who could match him at every step,”²³ his voice broke unbearably, as I know many hearts in the Basilica at the Real remembrance did at the same time:

And . . . the little Rabbit lay . . . behind the fowl-house, and he felt very lonely. The sack had been left untied, and so by wriggling a bit he was able to get his head through the opening and look out. He was shivering a little Near by he could see the thicket of raspberry canes, growing tall and close like

17. WILLIAMS, *supra* note 3, at 30.

18. *Justice Antonin Scalia Funeral Mass*, C-SPAN, at 1:10:18 (Feb. 20, 2016), <http://www.c-span.org/video/?404962-1/justice-antonin-scalia-funeral-mass> [<http://perma.cc/P6XB-P3S8>].

19. Rev. Paul Scalia, *Transcript: Rev. Paul Scalia’s Eulogy for His Father, Justice Antonin Scalia*, USA TODAY (Feb. 20, 2016, 4:33 PM), <http://www.usatoday.com/story/news/politics/2016/02/20/transcript-rev-paul-scalias-eulogy-his-father-justice-antonin-scalia/80667122/> [<http://perma.cc/2QC6-5UTZ>].

20. *Id.*

21. *Id.*

22. *Justice Antonin Scalia Funeral Mass*, *supra* note 18, at 1:08:01-1:09:56.

23. *Id.* at 1:10:18-1:10:24.

a tropical jungle, in whose shadow he had played with the Boy on bygone mornings. He thought of those long sunlit hours in the garden He seemed to see them all pass before him, each more beautiful than the other And a tear, a real tear, trickled down . . .

And then a strange thing happened. For where the tear had fallen a flower grew out of the ground It was so beautiful that the little Rabbit forgot to cry, and just lay there watching it. And presently the blossom opened, and out of it there stepped a fairy.

. . . .

“Run and play, little Rabbit!” she said.

But the little Rabbit sat quite still For when he saw all the wild rabbits dancing around him . . . he didn’t want them to see that he was made all in one piece. He did not know that . . . [the fairy] had changed him altogether. . . .

And he found that he actually had hind legs! . . . [H]e had brown fur, soft and shiny, his ears twitched by themselves, and his whiskers were so long that they brushed the grass. He gave one leap and the joy of using those hind legs was so great that he went springing about the turf on them, jumping sideways and whirling round as the others did

*He was a Real Rabbit . . . at home with the other rabbits.*²⁴

24. WILLIAMS, *supra* note 3, at 32–37.