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Tribute

**\*15 TRIBUTE TO JUSTICE ANTONIN SCALIA**

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It's a great honor for me to pay tribute to Justice Scalia because clerking for him was one of the highlights of my life.

But I confess that I have had a hard time choosing what to say, because Justice Scalia has had a profound influence on so many areas of law and jurisprudence. Indeed, he is a towering force in all the subjects I research and teach.

To avoid picking just one substantive area, I originally thought about highlighting what I see as one of the Justice's great, overarching contributions to law, and that is his gift with words. Too often judges forget that someone will actually read their opinions, but Justice Scalia never does. He treats his readers to gems like this one, from a dissent to a case involving application of the Lemon test [FN1] to an Establishment Clause question: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ." [FN2] Or this, from his concurrence in a case involving the regulation of nude dancing:

Perhaps the dissenters believe that "offense to others" ought to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian "you - may - do - what - you - like - so - long - as - it - does - not - injure - someone - else" beau ideal--much less for thinking that it was written into the Constitution. The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. [FN3]

**\*16** And then there's my personal favorite, from Justice Scalia's lone and prescient dissent in *Morrison v. Olson*, the case that upheld the independent counsel law [FN4] against a separation of powers challenge:

Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immedi-

ately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf. [FN5]

I often read many of the Justice's opinions as I prepare for class, and I never cease to admire his skill and style.

But because his talent with a pen truly does speak for itself, I have decided to highlight an area of the Justice's jurisprudence that does not always receive the attention it deserves. And that is his transformation of the criminal law. He has written countless opinions defending a criminal defendant's rights against the power of the state. His contributions to criminal law have been critically important and will have lasting effects. Indeed, they alone would merit the honor that the Annual Survey bestows today. They also demonstrate the Justice's fidelity to constitutional principles of liberty—even when a politically conservative viewpoint would yield a different conclusion.

I don't have the luxury of time to focus on all of his contributions, so I will briefly highlight four.

The first is the Justice's commitment to trial by jury. Since joining the Court, the Justice has been a staunch advocate of the jury guarantee. He has eloquently explained in numerous opinions that a failure to instruct a jury on all material elements [FN6] of the crime charged or to give a proper definition of reasonable doubt [FN7] can never be harmless error. And in the last few years, the Justice's opinions on the relationship between trial by jury and sentencing laws have led to a sea change in modern sentencing practices. Beginning\*17 with his powerful dissent in *Almendarez-Torres*, [FN8] the Justice has argued that modern sentencing laws that require judges to increase a defendant's sentence on the basis of factual findings made by the judge run afoul of our jury system. His views have ultimately won over a majority of the Court in *Apprendi*, [FN9] *Blakely*, [FN10] and *Booker*, [FN11] and sentencing laws throughout the country have changed as a result.

Second, the Justice has also fundamentally changed the Court's Confrontation Clause [FN12] jurisprudence. In 1990, the Justice dissented in *Maryland v. Craig* [FN13] because the Court allowed a child witness to testify via closed circuit television in a sex abuse case. The Justice wrote: "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." [FN14] The Justice dissented because, in his view, the Court was "not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings." [FN15] But that was not the last we would hear from the Justice on the meaning of the Confrontation Clause. His recent opinion for the Court in *Crawford v. Washington* [FN16] establishes unequivocally that out-of-court, testimonial statements by witnesses are barred, under the Confrontation Clause, unless witnesses are unavailable and the defendant had a prior opportunity to cross-examine them. Thus, we now have a bright-line rule protecting defendants that replaces the Court's previous test that often admitted such evidence as long as a judge found it to be reliable. [FN17]

Third, Justice Scalia has also protected the individual rights of defendants through his textualist interpretation of criminal statutes and his adherence to the rule of lenity, the venerable canon of interpretation\*18 that ambiguous statutes should be interpreted in favor of one accused of a crime. The Justice has consistently interpreted substantive criminal statutes carefully and narrowly, [FN18] and the rule of lenity has had no greater supporter on the Supreme Court than Justice Scalia. Whether the crime has been carjacking, [FN19] using guns in connection with drug trafficking, [FN20] evading currency reporting requirements, [FN21] extortion, [FN22] securities violations, [FN23] fraud, [FN24] or juvenile crime, [FN25] the Justice has time and again interpreted criminal statutes in favor of the accused. True to his methods of statutory interpretation, he applies the rule of

lenity by looking solely to the text, so legislative history can never be used to support an interpretation against a criminal defendant. [FN26]

Fourth, and finally, I want to note that the Justice's commitment to constitutional criminal procedures and strict separation of powers has not diminished, even in the face of wartime and the fear of terrorism. Most members of the Court were content to allow the Government to deprive Yaser Esam Hamdi, an American citizen captured during military operations in Afghanistan and alleged to be an enemy combatant, of his procedural guarantees under the Constitution and to give him instead only the barest of procedural protections. Justice Scalia's powerful dissent, in contrast, made \*19 clear that the bright lines of the Constitution must not yield in times of fear. [FN27]

The case of Hamdi, Justice Scalia noted, "brings into conflict the competing demands of national security and our citizens' constitutional right to personal liberty." [FN28] But whereas a majority of the Court significantly curtailed Mr. Hamdi's constitutional rights in the face of executive demands for flexibility, Justice Scalia used his traditional methods of analysis-- originalism and formalism--and concluded that Mr. Hamdi was entitled to all the protections the Constitution establishes in criminal proceedings. In a theme that is evident throughout the Justice's jurisprudence, he criticized the plurality's opinion for reflecting what he called "a Mr. Fix-it Mentality." [FN29] "The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions." [FN30] Justice Scalia, in contrast, did not bend the constitutional rights of an accused to a claimed exigency.

Here is another quote that proudly sits alongside so many other beautifully written passages from the Justice's opinions:

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis . . . . Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent. [FN31]

In all of these areas, and so many others, [FN32] it is evident that the touchstones of the Justice's jurisprudence--a commitment to the \*20 separation of powers, respect for the democratic process, fidelity to the Framers' constitutional design, careful textualism, and bright line rules of decision--have not yielded when those values have come up against someone accused of a crime, no matter how serious or repugnant the alleged conduct. The Justice has held firm, and our criminal law jurisprudence--and constitutional order--is the stronger for his efforts.

[FN1]. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating a test for determining when a statute passes muster under the Establishment Clause that looked to whether the law had a "secular legislative purpose," whether its "principal or primary effect" was one that "neither advance[d] nor inhibit[ed] religion," and whether the statute "foster[ed] an excessive government entanglement with religion") (internal quotation and citation omitted).

[FN2]. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

[FN3]. [Barnes v. Glen Theatre, Inc.](#), 501 U.S. 560, 574-75 (1991) (Scalia, J., concurring in the judgment).

[FN4]. “Title VI of the Ethics in Government Act (Title VI or the Act), 28 U.S.C. §§ 591-599 (1982 ed., Supp. V), allow[ed] for the appointment of an ‘independent counsel’ to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws.” [Morrison v. Olson](#), 487 U.S. 654, 660 (1988).

[FN5]. *Id.* at 699 (Scalia, J., dissenting).

[FN6]. [Neder v. United States](#), 527 U.S. 1, 30-40 (1999) (Scalia, J., concurring in part and dissenting in part); see also [United States v. Gaudin](#), 515 U.S. 506, 522-23 (1995) (stating that the question of materiality must go to the jury because “[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged”).

[FN7]. [Sullivan v. Louisiana](#), 508 U.S. 275, 281-82 (1993).

[FN8]. [Almendarez-Torres v. United States](#), 523 U.S. 224, 248-71 (1998) (Scalia, J., dissenting).

[FN9]. [Apprendi v. New Jersey](#), 530 U.S. 466 (2000).

[FN10]. [Blakely v. Washington](#), 542 U.S. 296 (2004).

[FN11]. [United States v. Booker](#), 125 S. Ct. 738 (2005). Although a majority of the Court agreed with Justice Scalia's analysis and found that the Sixth Amendment as construed in [Blakely](#) applies to the Federal Sentencing Guidelines, his views did not win over a majority of the Court on the remedial question of what to do with the Guidelines in light of that analysis. See *id.* at 771.

[FN12]. U.S. Const. amend. VI.

[FN13]. [Maryland v. Craig](#), 497 U.S. 836, 860-70 (1990) (Scalia, J., dissenting).

[FN14]. *Id.* at 860.

[FN15]. *Id.* at 870. For another case outlining Justice Scalia's views on the Confrontation Clause, see [Coy v. Iowa](#), 487 U.S. 1012 (1988).

[FN16]. [Crawford v. Washington](#), 541 U.S. 36 (2004).

[FN17]. [Ohio v. Roberts](#), 448 U.S. 56, 65-66 (1980).

[FN18]. See, e.g., [Fischer v. United States](#), 529 U.S. 667, 682-93 (2000) (Thomas, J., dissenting, joined by Justice Scalia); [United States v. Sun-Diamond Growers of Cal.](#), 526 U.S. 398 (1999); [United States v. Rodriguez-Moreno](#), 526 U.S. 275, 282-85 (1999) (Scalia, J., dissenting); [Cheek v. United States](#), 498 U.S. 192, 207-09 (1991) (Scalia, J., concurring in the judgment); [Schmuck v. United States](#), 489 U.S. 705, 722-25 (1989) (Scalia, J., dissenting).

[FN19]. [Holloway v. United States](#), 526 U.S. 1, 20 (1999) (Scalia, J., dissenting) (finding the statute unambiguous in favor of the defendant but noting that “if ambiguity existed, however, the rule of lenity would require it to be resolved in the defendant's favor”).

[FN20]. [Smith v. United States](#), 508 U.S. 223, 246-47 (1993) (Scalia, J., dissenting) (finding the statute clear in favor of the defendant but noting that it is at least ambiguous and subject to the rule of lenity); [Muscarello v. United States](#), 524 U.S. 125, 148-49 (1998) (Ginsburg, J., dissenting, joined by Chief Justice Rehnquist and Justices Scalia and Souter).

[FN21]. [Ratzlaf v. United States](#), 510 U.S. 135, 148 (1994).

[FN22]. [Evans v. United States](#), 504 U.S. 255, 289-90 (1992) (Thomas, J., dissenting, joined by Chief Justice Rehnquist and Justice Scalia).

[FN23]. [United States v. O'Hagan](#), 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part).

[FN24]. [Moskal v. United States](#), 498 U.S. 103, 131-32 (1990) (Scalia, J., dissenting).

[FN25]. [United States v. R.L.C.](#), 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment).

[FN26]. *Id.* at 307-11.

[FN27]. [Hamdi v. Rumsfeld](#), 542 U.S. 507, 554-79 (2004) (Scalia, J., dissenting).

[FN28]. *Id.* at 554.

[FN29]. *Id.* at 576.

[FN30]. *Id.* at 576-77.

[FN31]. *Id.* at 579.

[FN32]. Among Justice Scalia's other notable criminal justice opinions are [Kyllo v. United States](#), 533 U.S. 27 (2001) (holding that thermal imaging of a home is a search for purposes of the Fourth Amendment); [Mistretta v. United States](#), 488 U.S. 361, 413-27 (1989) (Scalia, J., dissenting) (finding the Federal Sentencing Guidelines unconstitutional); [County of Riverside v. McLaughlin](#), 500 U.S. 44, 59, 70 (1991) (Scalia, J., dissenting) (concluding that, absent extraordinary circumstances, it is an unreasonable seizure under the Fourth Amendment for the police to make a warrantless arrest and delay probable cause for the arrest "(1) for reasons unrelated to arrangement of the probable-cause determination or completion of the steps incident to arrest, or (2) beyond 24 hours after the arrest").