



JUSTICE SCALIA REMEMBERED:  
THE NOW-HAZY HALCYON DAYS WITH PROFESSOR SCALIA

While poring over the digital versions of mounds of encomiums for Antonin Scalia I was struck by one of my few memories of him as *Professor* Scalia: Judge Six-pack.

With this dim memory in hand I reached out to a few of my University of Chicago classmates for their recollections. No one knew if Scalia created that imaginary jurist but everyone recalled that he often used the humble metaphor. Scalia was trying to get us to start our legal analysis at the quotidian base that makes up our lives: not every judge is a Marshall, Holmes, or Jackson. Judges are usually pretty straightforward people.

My own recollection was that Judge Six-pack was described this way: he would come home from work, kiss his wife and kids, have dinner, and settle in to watch the hockey game and have a few brews. One of my classmates recounted this story about our humble judge:

*Professor Scalia would go through a set of facts and then call on a student: “Ms. Smith, you are Judge Six-pack. How would you rule?”*

I have no doubt that the legal point escaped us as we were all too busy imagining “Ms. Smith” having six beers or even *watching* hockey, for that matter. But our simple judge was an instructive technique for Scalia to use. (Judge Six-pack’s occasional appearance in class did not improve my view of hockey.)

Judge Six-pack was the “everyman,” a model for us to remember that every judge is a human being, and is a model that affects—and should affect—the opinions at the foundation of *stare decisis*. The Judge Six-pack that I remember went a bit further as Scalia’s heuristic tool: law serves every human being, not just the holy order of well-trained lawyers with a pen armed with ready *bons-mots*.

Notwithstanding Scalia’s assertions of an unchanging constitution, he would probably concede that as times changed, so also did his sports-loving beer-guzzling *guy*. Whether or not Scalia would have liked it, Judge Six-pack is now just as likely to be *Judge Everyperson*—someone of any gender pouring a glass of pinot noir or a home-brewed artisanal beer. Six drinks these days would put the judge in a rehab program and who watches hockey, now, anyway? No, probably *Masterpiece Theater*. Maybe *Master Chef*. Or *Judge Judy*. But the purpose of the avatar should still remain. Unchanged.

Another classmate wrote me that Scalia was “was very charming and could be extremely funny—possibly the most entertaining teacher I had at any level.” This, too, I remember—a man approachable in the hallways who always had a smirk or a smile for you and a few good words. He was the kind of person with whom you would be glad to have a beer. But only one. OK, maybe two.

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One classmate emailed me about Scalia’s tendency to sing while walking the halls—opera, if my memory serves. As another classmate (not fond of opera) pointed out, it sounded more like injured house pets. One classmate jokingly asked if the IP lawyers among us could find a copyright infringement in our professor’s love of those arias.

### **Intellectual Property and Justice Scalia**

While Scalia will continue to be lionized or vilified for the more controversial and better known cases, what about intellectual property matters before him in his three decades with the Supremes? (After all, the *Intellectual Property Law Section* publishes *New Matter*.)

The number of opinions and dissents he wrote in this area is small. The cases are not insignificant—*Stanford v. Roche*, *Bilski*, and *ABC v. Aereo*, for example, but divining his “first principles,” as one could do with his other writings, is somewhat more challenging. If commentators are correct, his IP jurisprudence is not so clearly a fortress of what passes today for conservatism. It seems that he recognized the “property” in intellectual property but not in so rigid a manner as to use the principle as a sledgehammer for or against a free market. Professor Laura Larrimore Oullette, one of the authors of the blog, *Written Description*, seems to have gotten it right when she recently posted the following:

*I am not going to claim that Justice Scalia had a coherent theory of IP; each of the opinions described [in this post] could be attributed more to a strong dislike of bad logic than to a first-principles skepticism of IP rights as government interference in the marketplace. But these opinions also suggest that at some level, Justice Scalia did believe that allowing IP rights to be recognized too easily or asserted too broadly could harm competition, consumers, and innovation.*

Scalia conceded that patent cases were not his strong suit. They served, it seems, as a bridge across ideological lines, as he explained that he followed the lead of his personal friend, Ruth Bader Ginsburg.

To sum it all up: from Antonin Scalia’s devotees and critics we know much—perhaps *too* much—of his jurisprudence, his biting rhetorical flourishes, and his *un*-nuanced stand in what should be the dying skirmishes of the culture wars. But I think that my classmates and I will also remember him as a “good guy” with wit, charm, intelligence and humor—and, for me, the guy who lodged in my brain the image of the jurist as the guy next door (and, in spite of judicial rancor, now the *person* next door). I’ll invite that person to drop by. Perhaps for a pinot. Better yet, a petit syrah. We’ll talk about Scalia and his opinions and hoist a few to fine memories of how the law is shaped.

By James C. Roberts III

Written at the request of the editors of *New Matter*