Justice and American Particularism

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Justice, justice shalt thou follow, that thou mayest live, and inherit the land which the Lord thy God giveth thee.
—Deuteronomy 16:18-20

With the departure of Justice Sandra Day O’Connor from the U.S. Supreme Court, and the likelihood that Chief Justice William Rehnquist will retire within the next year, President Bush is in a position to influence the judicial philosophy of this country for a generation. While specific issues such as freedom of choice are of course important, even more critical will be how a candidate for the Court will conceive of justice itself. The Declaration of Independence proclaims that our nation was founded on the idea “that all men are created equal, that they are endowed by their Creator with certain inalienable rights,” among which are life, liberty, and the pursuit of happiness. This idea, which came to the United States from the European Enlightenment, was internationalist and universalizing in its intent (even though limited in practice to the political and economic rights of propertied, white males). Today, however, neo-conservatives, led by Justice Scalia, have attacked internationalism in law. Isolationist in intent, this neo-conservative theory of justice dangerously separates the United States from international jurisprudence and—ironically—from the founding principle of universal rights to which these neo-conservatives claim to adhere.

The history of the United States has been a constant struggle, often in the face of bitter, violent opposition by entrenched interests, to create a more just world. Over time, rights once extended by the Declaration of Independence and Bill of Rights only to white, propertied males came to be enjoyed by African Americans, women, and laborers. The struggle continues today to clarify the rights of juveniles; of gay, bisexual, and transgendered people; of foreigners; and of other powerless and persecuted minorities. In many of these areas, international law has leap-frogged U.S. law. For example, Spain, Canada, the Netherlands, and Belgium all have passed measures legalizing gay marriage. Nodding to the growing recognition of the universality of human rights in international, and especially European law, a majority of the Supreme Court has referenced such measures in deciding several recent U.S. cases.

Yet Justice Antonin Scalia, usually joined by Chief Justice William Rehnquist and Justice Clarence Thomas, has persistently resisted any recognition of these international standards. Indeed, this contempt for international law is one of the bedrock principles of the Federalist Society, many of whose neoconservative leaders have occupied influential positions in the Bush II Administration. In addition to Justice Scalia, members of the Federalist Society include former Attorney General John Ashcroft, Homeland Security Director Michael Chertoff, Interior Secretary Gale Norton, former Solicitor General Theodore Olson and former Energy Secretary Spencer Abraham. But by virtue of his position as the leading theoretician of the Radical Right on the Supreme Court, Justice Scalia is in a position to lay the theoretical underpinnings for a darkly isolationist view of American justice for years to come, should the President succeed in appointing one or two like-minded justices to the Court.

Several recent cases have illuminated the benefit of drawing upon international standards to evaluate what constitutes justice in U.S. law. In Roper v. Simmons, for example, the United States Supreme Court ruled that capital punishment, as applied to individuals who commit homicide under the age of eighteen, violates the Eighth Amendment to the Constitution. The Court used the fact that juveniles are rarely executed in the United States as the key to its decision that it is cruel and unusual under the Eighth Amendment to subject juveniles to capital punishment. Yet, this ruling was clearly reinforced by international standards, with the majority noting that the United States is the only country in the world that continues to allow juveniles to be sentenced to death. The majority considered the overwhelming weight of international opinion against executing juveniles as confirmation that the death penalty is cruel and unusual punishment for offenders under age eighteen.

In his dissent, Justice Scalia also focused primarily on practice in the United States, asserting that only legislative repeal of most state statutes allowing juveniles to be executed would be proof that it would be unconstitutional for any state to retain the punishment. In his view, the legislative record is too ambiguous to conclude that the Eighth Amendment precludes the states in all cases from executing juveniles. Yet Scalia’s opinion was notable for the intensity with which he savaged the majority for its citation of evolving principles of international law and justice as supporting Sheldon H. Laskin is an attorney and community activist in Baltimore, Maryland, where he is a member of the Baltimore Tikvah Community. He has represented employees in discrimination litigation in the United States Supreme Court and the lower federal courts.
its holding, declaring that “the basic premise that American law should conform to the laws of the rest of the world ought to be rejected out of hand.”

The death penalty case is not the first time that Justice Scalia has attacked a majority of the Court for relying on evolving standards of international law and justice. In Lawrence v. Kansas, Justice Scalia dissented from the majority opinion, which ruled that criminal laws prohibiting consensual sex between adults of the same sex violate the Due Process Clause. He bitterly attacked the majority for noting that the European Court of Justice previously ruled that the right of homosexuals to engage in intimate consensual conduct is a human right that European governments must recognize. As with the juvenile death penalty, Justice Scalia is perfectly comfortable with this country’s taking a far more limited view of the rights of homosexuals than is the case in most developed nations. Leaving aside the devastating effects on gay Americans of Justice Scalia’s views, the Court’s adoption of such views can only contribute to the general sense of American isolation and alienation fostered by the Bush Administration’s arrogant international policies.

Justice Scalia’s narrow view of universal human rights is nowhere better illustrated than in his contrasting views of the rights of American detainees as opposed to the rights of non-citizen detainees in the war on terrorism. In Hamdi v. Rumsfeld, the Court majority ruled that a U.S. citizen may be detained indefinitely as an enemy combatant as long as an adequate judicial review of the grounds for detention is provided. Scalia dissented, arguing that the inalienable right to due process of law guaranteed by the Fifth Amendment requires the government to either charge a detained citizen with treason or release him. Yet, those “inalienable” rights somehow disappear when the person in question is a non-citizen. In Rasul v. Bush, Scalia wrote in dissent that he does not believe a non-citizen detainee has any rights whatsoever that an American court must recognize.

Ultimately, to ground a human right on the ephemeral basis of an individual’s citizenship is to call into question whether or not any universal human rights exist at all. Legal requirements for citizenship change constantly over time, and from country to country. Indeed, citizenship itself is a transient concept as nations come and go; a Soviet citizen born in 1990 found herself a person without a country the following year. A British subject born in Massachusetts in 1775 found himself to be an American the following year. Whatever the narrow legalistic merits of Scalia’s views, the foundation for human rights must be on firmer ground than the ever-shifting historical sands reflected in notions of citizenship. Those rights must be based on the self-evident truths recognized by the Founding Fathers in the Declaration of Independence—that all people are entitled to life, liberty, and the pursuit of happiness. Indeed, the Founders recognized that a momentous event such as the declaration of a free and independent United States could not be explained merely on the parochial basis of national self-interest, but must be publically explained out of “a decent respect to the opinions of mankind.” In honoring those opinions, the Founders acknowledged that the rights to life, liberty, and the pursuit of happiness did not originate on this continent, but rather from the perpetual strivings of peoples everywhere to create a more just world.

Further, Scalia’s America-first ideology is deeply at odds with his own belief that justice derives from the divine. For example, Scalia has argued that the Ten Commandments “are a symbol that government authority comes from God.” Leaving aside the questionable basis of this assertion—a fair reading of the Declaration of Independence and other contemporary documents supports the view that the Founders believed governmental authority derived from the people—how can it be that a universal God would mandate different standards of justice for different nations? The Declaration of Independence clearly proclaims the universality of justice by its acknowledgment that all men are created equal and are equally entitled to the inalienable rights endowed by their Creator.

Nations come and go, but, presumably, the divine endures. A God that modifies her views of justice depending on the flag that flies over a particular piece of real estate is a God that most religions would find difficult to recognize. And Justice Scalia would be hard-pressed to find any theological basis for his supposed belief, shared by the Religious Right, that Americans are God’s chosen people whose purpose is to bring the Word of God to the benighted people of the world. Such a belief is a classic pseudo-theological justification for imperialism and jingoism, but hardly augurs well for creating a more just and peaceful world.

A jurisprudence of meaning should aspire toward a legal system based on deeper and higher levels of social justice, taking its authority from whatever sources move the world in those directions. Sometimes, as in the right of trial by jury of one’s peers, those rights may come out of the American legal system; in other cases, those rights may come from beyond our shores. However, in all cases, recognition of those rights in the American legal system must reaffirm the value of every single human being. Justice is not the province of one nation or one people; it belongs to all humanity.