UNIVERSAL RIGHTS AND WRONGS: Roper v. Simmons, Torture and Judge Posner
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The title of a talk should arouse curiosity and even skepticism. The title must give the speaker enough leeway to change the content at will. After all, I chose this title with only a vague idea of what I might actually say. Oh, I knew then and know now the subjects I will discuss. I have studied, written and practiced about them for more than forty years.

I will be candid. William James said, "A great many people think they are thinking when they are merely rearranging their prejudices." That's it. I am going to rearrange some of my prejudices for you. Let me catalog some of them.

I am prejudiced in favor of the idea of universal jurisdiction. I want the world community to recognize that torture, genocide, war crimes, and crimes against humanity have joined piracy and the slave trade as offenses against the entire world. As a consequence, those offenses may generally be prosecuted by any sovereign state in its own tribunals, regardless of where they were committed, and the nationality of victims and offender. I will explain the qualifying word "generally" later. Beyond this, when a nation has custody of an alleged offender, it must obey the maxim aut daedaere aut judicare, which means either render or try.

I am prejudiced in favor of universal rights, the growing sentiment to move beyond the set of prohibitions embodied in, for example, our bill of rights, to a list of affirmative claims of justice that include economic and social rights.

I am prejudiced against killing children, and against killing adults for things they did when they were children. For that matter, I am prejudiced against the death penalty altogether. I think it demonstrably unjust even by the standards of its supporters.

I am prejudiced against torture. I am also prejudiced against the posturing and tergiversation that has lately gone on about torture. The media, even including respectable academic publications, use phrases like "the debate about torture" without a hint of irony. We are seeing memo after memo leaked from the Bush administration, showing that torture of detainees is a standard policy, and that those high-ranking officials who approve of it fall over themselves thinking up defenses to criminal prosecutions for torture and ways to make sure there will never be any judicial review. The norm against torture has become peremptory, jus cogens, and non-derogable. Given my prejudice about universal jurisdiction and its corollaries, you can guess what I think about the prosecutability of many American officials.

I have heard people pose hypotheticals about torture. What if you knew that somebody had planted a bomb, and torture might make them reveal where it was? These days, when we think about "somebody," we usually picture a somebody who is a somewhat different color and a rather different religion that ourselves. My answer is, first, is our "knowing" on the same level as knowing that Saddam Hussein had weapons of mass destruction? Second, let us assume that sometimes the norm against torture will

be violated, and after the fact somebody might want to say that the torturing is excused or justified.

Change the hypothetical slightly. Talk about murder instead of torture. The criminal law has rules about excuse and justification. It is administered with discretion. The trier of fact sometimes makes unauthorized exceptions. Punishment may be mitigated under certain circumstances. Yet all of these considerations could not possibly lead us to say that the norm against murder should not exist or not be enforced. The hypotheticals conjured by apologists for torture tell us absolutely nothing of value.

To return to my prejudices, I have now reached Judge Posner. I am not prejudiced against Judge Posner. I have read his 2005 Foreword in the Harvard Law Review, in which he discusses the Supreme Court's docket and Roper v. Simmons, among other issues. I am not prejudiced against his Harvard article. I only wish he had been candid enough to tell us that he was simply rearranging his own prejudices, of which I will be discussing one or two later in this talk.

So having revealed my prejudices, let me rearrange them, beginning, in inverse order, with Judge Posner.

In the Harvard Foreword, Judge Posner analyzes the judging style and work of federal appeals judges and Supreme Court Justices. His observations about the way these judges work are, in my opinion, accurate and insightful. The way appellate judges manage their dockets, or more accurately have them managed by people who are increasingly distant from the judges' own work, is scandalous. I speak from my own experience, as advocate, author and teacher.

To manage the increasingly crowded docket, judges resort to non-published opinions written by staff attorneys and hardly reviewed at all by article three judges. They deny oral argument. The careless attitude towards docket management seems to leave more free rein for the expression of unvarnished ideological preferences. Put simply, they are not listening. How else, for example, can one explain the Fifth Circuit's systematic trashing of the Penry doctrine in a series of increasingly strained opinions, until Rob Owen and Jordan Steiker – among other stalwarts -- put the matter right. How else to explain indefensibly silly opinion in Hopwood?

So I agree that there is a problem with appellate dockets. However, Judge Posner then goes on to give his game away. He turns to focus on the Supreme Court, its workload, its choice of cases, and then the content of some recent decisions. He decries the Court's willingness to confront and decide some constitutional issues.

Judge Posner critically compares his analysis to that of Harvard professor Henry Hart and Yale professor Alexander Bickel, both of whom wrote in the Harvard Law Review. Professor Bickel is also famous for his book "The Least Dangerous Branch." Professor Hart argued that the Justices were taking too many cases to do a good job. Bickel focused on discretionary procedural devices that Justices ought to use in order not to decide cases, thus leaving decisions about fundamental rights in the hands of states, the Congress, and the executive branch.

As it happens, I claim to know something about the Hart and Bickel theories. In 1970, I wrote an article about justiciability that Charles Alan Wright was nice enough to regard as competent.

Judge Posner insists that his own analysis sharply differs from that of Hart and Bickel. To some extent, he is right. However, much of his criticism of ways appellate

judges do their work is in the same vein as Bickel and Hart. Judge Posner, like those others, uses procedural prescriptions as proxy for disagreement with the content of the Supreme Court's decisions, including the ten commandments cases and Roper v. Simmons – the case that held executing children to be contrary to the 8th amendment.

Judge Posner might disagree with this characterization of his thesis. I know the dividing line between substance and procedure is elusive, but I am confident that my use of the term procedure is allowable. Judge Posner is telling us that the Justices should behave in certain ways for essentially institutional reasons. This is, to me, little different from Professor Bickel's praise of the passive virtues and his endorsing devices by which those virtues should be practiced. I call this sort of structural argument procedural.

There is nothing surprising about using procedure in this way. When one surveys the entire landscape of legal decision-making, one finds so many ways in which the process is loaded against the poor and against those with unpopular claims. Procedural decisions that judges make, about justiciability and even about appeals and appealability, often reflect ideological preferences about the merits. You can see this clearly in the current debates over the death penalty and on the limits of executive power. Those who oppose the death penalty are uniformly in favor of procedures that ensure plenary review of capital cases on direct and collateral review. Those who favor the penalty favor restrictions on review, from whence get procedural horrors like the Anti-Terrorism and Effective Death Penalty Act that the Clinton administration gave us.

Those who want to uphold executive power with respect to detainees make an argument against the justiciability of such questions, and favor limiting the means by which detainees can present their claims. The Supreme Court eloquently rejected the executive branch effort to push article 3 judges out of the way in Hamdi v. Rumsfeld.

As Representative John Dingell famously said at a Congressional hearing, "I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time." You don't have to be a Critical Legal Studies fan to see the truth in that remark.

Judge Posner also says that constitutional decision-making involves value choices – which he calls political judgments – and that such choices are inherently not susceptible to being judged right or wrong. Therefore, he says, the Supreme Court should do less of this kind of value-laden decision-making. His position shows a remarkable insensitivity to the consistent course of human history. As I have argued in other forums, and as thinkers such as Martha Nussbaum have argued at length, one can identify and enforce values based on human goals and needs – human flourishing if you will. Indeed, the entire historically and socially-determined march towards enforceable definitions of international human rights show us the development of verifiable norms. Some of those norms are captured in cases like Lawrence v. Texas, and yes, Roper v. Simmons.

Judge Posner's view of constitutional decision-making fails in two significant ways. First, many of the most important constitutional questions of today involved issues that are firmly rooted in the text of the Constitution and a long history of interpretation. The Executive Branch's astonishing suggestion that habeas corpus, and indeed all review of certain kinds of confinement, can be suspended by Presidential directive and Delphic Congressional utterance, invokes text and decisional law dating to the early 19th Century. The debate about the Warrant Clause traces a similarly long path, as I shall discuss a little later.

Second, I do not accept that decisions about killing children, torture, aggressive war, crimes against humanity, church-state separation -- and many other fundamental issues that the Supreme Court may confront -- involve non-verifiable value choices. I will have a more textured historical analysis later in this talk, but consider these points as a starting place: When in 1946 jurists defined and then enforced norms about aggressive war, crimes against humanity, crimes against peace and genocide, they were expressing historically and socially determined values that recognized contemporary understanding of human flourishing. When the colonial liberation movements changed the world map, the liberators were likewise acting out a consensus of what the essential rights of human beings demand. When Chile, South Africa, and the countries of Eastern Europe emerged from the shadow of repressive governments, their unanimous judgment -- that norms of freedom, fairness and equality must be expressed and enforced -- constitute a validating principle.

Judge Posner's tune may be different, but the song is the same. He joins a chorus of scholars who, beginning in the late 1950s, derided the Supreme Court's decisions in the fields of habeas corpus, equal protection, the first amendment and criminal procedure by focusing on the alleged procedural shortcomings of the Court's work, coupled with the assertion that the Court was masking value choices as legal analysis.

Judge Posner has another essentially procedural way of talking about the Court's decisions, a kind of echo of Alexander Bickel. He says in a closing strophe, speaking of a half-dozen decisions, "the Court should have stayed its hand and allowed the challenged government officials to have their way." Most of the decisions to which he referred involve the Court's structural and historical role as a counter-majoritarian institution. "Staying one's hand" is not institutional neutrality; it is simply another way of deciding the merits. When government violates the norms against torture, genocide, religious persecution, unjust confinement, and invasion of personal privacy – to name only a few – the victims are usually among the despised and disposed, who will not find a remedy from the political branches.

That said, we can pause for a moment to admire the picture of any federal judge, and particularly Judge Posner, preaching the virtues of humility, modesty and restraint.

It is quite disingenuous to suggest that today's Supreme Court Justices have a kind of hubris unique to our own time and therefore both suspect and inconsistent with the expectations of those who wrote the constitution. To begin, all major political figures are likely to say that they are wise, and then to couple that statement with assurances that they are also modest. This is rather like the character in Christopher Fry's play "The Lady's Not for Burning," who exclaims "forgive me for boasting, but once you know my true qualities I can lapse back into a quite delightful humility." More prosaically, I have lived in Texas, famed for self-aggrandizing statements by political figures who have so much to be modest about. This is the home of the self-made man who is inordinately fond of his creator.

The Supreme Court has been, since at least 1801, self-consciously shaping the structure and texture of American society, by the conscious design of all three branches of government. The first Congress knew it when it passed the Judiciary Act with its reference to the "law of nations." The Federalist Congress knew this when it passed the Midnight Judges Act in 1801. Adams knew it when he issued Judge Marbury's commission, but more tellingly when he appointed John Marshall and thereby hijacked

the Court away from Jefferson's intended nominee Spencer Roane of Virginia. One has only to survey the issues that the Court of Marshall, and later of Marshall and Story, then addressed to see what I mean: the Bollman case on military tribunals, Marshall's carefully crafted presiding at Aaron Burr's trial, Jefferson's rebuke of Justice Johnson for the Embargo Act decision, the discussions of slavery in Antelope and Amistad, the discussions of Native American rights in Cherokee Nation and Worcester.

And while the Court was busy with these fundamental questions, powerful figures in the other branches of government were exercising their own power and extolling its inherent virtues.

We do well to consider this history when Judge Posner whispers Cassius-like in our ear that this Supreme Court is bestriding the narrow world in some inappropriate way. Judge Posner also has some words for those he terms "academics," and predictably he argues that most of them are out of touch with the way things really happen. We have heard this sort of criticism before. One of my favorite examples of it appeared in the Texas Law Review in 1999, written by an Oklahoma law professor named Dennis Arrow. Arrow had a name for the law professor liberal dogma that he found rampant. He called it "constitutional modern socialism" and contrasted it with what he called "self-government." He also rebuked Supreme Court Justices for relying on law review articles by these suspect professors.

Who is it, among the Justices and the constitutional scholars, who really believes in "self-government," unless maybe it is "one's own self," which makes it easy to prefer that things be organized so that "one's own self" and other right-thinking people get to decide? Justice Scalia, often held up as a true believer in restraint or self-government, has used his judicial power to invent contractor immunity, to confer standing on anti-regulation ranchers, and to uphold article 3 power as against Congressional efforts to override judicial judgments.

I am not saying that all the talk about institutional roles is cynical or empty. Bertrand de Jouvenel warned us that sometimes in our desire to see a particular decision, we forget our most cherished convictions as to who is competent to make that decision. I have addressed the role of article 3 courts, in academic journals in answer to Professor Bickel, in courts in response to the executive branch in cases about times of war and conflict, and in talks like this. The Supreme Court, and indeed the article 3 branch, is counter-majoritarian by design. It is supposed to uphold rights that wouldn't stand a chance if subjected to "self-government."

I particularly understand the importance in today's climate of confining branches of government to their legitimate roles. We have an executive branch that announces proudly that it conducts searches without a warrant, did so under false colors, and wants to punish those who disclosed this activity. Even on the so-called merits, the product of this snooping has not been proved valuable.

At the level of constitutional discourse, the searches are impeachable offenses. They violate the most fundamental and indisputable allocation of responsibility among branches of government. In 1772, the House of Lords decided two cases, Wilkes v. Wood and Entick v. Carrington, that emphatically rejected the idea of an executive warrant. Those who wrote the 4th Amendment knew those cases. The Supreme Court in Boyd v. United States (overruled on other grounds not relevant here) traced that history. Put this together with James Otis's lawyering against the writs of assistance. John

Adams participated in that work, and later wrote of it "then and there was the child independence born." The warrant clause is one of the basic parts of the constitutional compact, and its rejection of what Madison called "the impious doctrine of the Old World, that people and made for Kings and not Kings for people." When Madison wrote these words, he was speaking of a historical process that validated new norms.

The Framers of the Constitution knew about dangers to the state, and they took care to define the crime of treason. But they made no exception in the Fourth Amendment warrant clause even for cases involving traitors.

Having accepted, as I do, that separation of powers means something, and that one may legitimately question the sources of norms used to decide cases, I turn to the merits. I want to talk about the merits of Roper v. Simmons, about torture, and about what we might permissibly mean when we speak of universal rights and wrongs.

When he discusses Roper, Judge Posner cites his own article about the case. He titled his article, "No Thanks, We Already Have Our Own Laws." He can't mean that. He does not, cannot, believe that the United States and "its own laws" sprung up overnight like a pimple on Tom Jefferson's nose, or more elegantly like Botticelli's Venus on her shell. Those who wrote the Declaration of Independence and the Constitution were better informed than that. At the time of American independence from England, most American jurisdictions received the English common law. We did not have a complete set of "our own laws." Some of our own laws were consciously different from those of England, as designed to protect individual liberty to a greater extent.

But where did these received English laws come from? Let us take a brief tour of the law school curriculum. The law of property of course owed a great debt to the reforms put in place beginning after 1066, the year of the Norman invasion of England. That was, as historians have said, the "Norman century," speaking not only of William the Conqueror but also of his half-brother Roger, who conquered Sicily. Norman French borrowings quickly occupied a great deal of legal ground.

The law and procedure of equity was an import from canon and Roman law. In criminal law, the entire doctrine of conspiracy is a European canonical invention that survived the abolition of the Court of Star Chamber – as I have noted in the Texas Law Review.

In the field of contracts, English law was stuck in a rut until about 1601, when things took off after the decision in Slade's Case. The law of commercial contracts was reformed almost entirely by importing ideas of the law merchant, a mostly continental invention. By 1776 Lord Mansfield had declared the law merchant to be the law of the land.

As for the law of the sea, British writers' ideas, led by Selden, had not fared well in the 17th century debates. No, it was a Dutchman named Grotius whose freedom of the seas theory came to dominate.

I will return to this theme a little later to discuss the law of nations or international law. For now, it is enough to note that "our laws" have historically and consistently borrowed from so-called "foreign" systems. Even after the American revolution, the process continued. Joseph Story, among many others, was an assiduous student of foreign legal systems. So was codifier David Dudley Field, whose work on civil procedure had such great influence and whose substantive law codes had some marked

effect. To take one prosaic example, we get the counterclaim from foreign systems, probably the French but surely from someplace that owed a debt to classical Rome.

Next point: Judge Posner does not claim that legitimate constitutional interpretation must be remorselessly literal or slavishly originalist. He acknowledges that the 8th amendment is, as he puts it, like a "sponge" that may permissibly absorb different content. He accepts that even Justice Scalia would not uphold whipping and the stocks, even though they were accepted forms of punishment in the 18th century.

Of course, I am not sure that Justice Scalia would accept the 8th amendment view that Judge Posner ascribes to him. Nor is this the place to discuss in detail Justice Scalia's rather cranky and inconsistent way of seeing the constitution in general and the 8th amendment in particular. I did read with interest a footnote in his dissent in Morgan v. Illinois, in which he seems to urge that supporting the death penalty can be justified by reference to Immanuel Kant and some language in the book of Exodus. These are, I believe, foreign sources. In any case, Justice Scalia cites Exodus 21:12 on murder, but misses the fact that in Exodus 22:2, his chosen language is modified by reference to mitigation, or perhaps justification. Kant is the guy who says that if a murderer comes to your door and asks if the intended victim is within, you have a moral duty to answer truthfully. I'll let the criminal law scholars sort that one out.

I think Judge Posner would accept the general proposition that a constitution such as ours, short and difficult to amend, must accept interpretive development. The Framers believed that it was a constitution they were adopting and not a set of fetters they were forging. Of course, one may disagree about the nature and extent of interpretation. Therefore, it is historically and textually silly to say that we "already" have our own laws, as though at some point in time, we must stop listening to ideas about human progress towards an idea of justice. Those who wrote the Constitution did not do so in blind worship of the past, but out of well-grounded hopes for the future. In a world such as ours, where the tenor and intensity of demands for justice grow and change, all those responsible for the task of interpretation must have a similar sense of the present moment as history.

Notice, however, that we are still talking about procedure, about the permissible extent of interpretation and about the permissible sources of norms. As for interpretation, that is somebody else's lecture. I want to return to this issue of sources of norms.

A main objection to Roper v. Simmons, voiced by Judge Posner and others, is that the Court's tour of the international horizon was somehow improper. So let me set out four propositions in defense of the Court.

First, United States law includes international law.

Second, all international law is federal law.

Third, international law includes not only treaties, but also customary international law and peremptory norms, known as jus cogens. International law must therefore be determined by looking at state practice and the opinion of respected jurists, foreign and domestic.

Fourth, article 3 courts have a responsibility, in cases that come before them, to see that the United States is a law-abiding and respected member of the international community.

Let us examine these ideas. Of course, international law is federal law. The constitution makes the general government the unique instrument of foreign affairs.

Some of you may remember when in the 1950s some states refused to honor bequests to legatees in socialist countries unless the country concerned would honor a bequest to an American by one of its own citizens. The Supreme Court reaffirmed the "federal-ness" of international relations in a case called Zschernig v. Miller.

But what about the claim that international law can mean something beyond the content of treaties? In a 1900 case, The Paquete Habana, the Supreme Court held that two fishing vessels that the Navy had seized during the Spanish-American war were exempt from seizure under international law and should be returned to their owners. The Court reaffirmed that customary international law was part of the constitution, laws and treaties mentioned in articles 3 and 6 of the constitution. This customary law, the Court said, would be determined by consulting the recognized sources of international law, which as I have said include state practice and the opinion of jurists.

Paquete Habana held nothing new. Let us examine for a moment the text of article 3. If the federal courts are to hear cases involving ambassadors and public ministers, aliens, foreign states and admiralty, where would they get the law to be applied in such cases? From the earliest days, the federal courts shared responsibility with the other branches of government to find and declare principles of the law of nations, or international law as it is sometimes called.

It is easy to test this proposition. Conduct a Westlaw search of Supreme Court decisions from 1800 to 1900. One might use "Vattel" as a search term, for he was the author of leading treatise on the law of nations. Vattel also authored "droit des gens" or "human rights." Yes, you will find at least 13 citations in the 19th century to Vattel's treatise on human rights, and dozens to Vattel's international law treatise in its English and French versions. With those citations, you will see at least 68 approving references to the work of Hugo Grotius, generally to his work De Jure Belli ac Pacis, which translates to Of The Law of War and Peace. The Court generally used the Latin title. After all, as I noted a few moments ago, it was Grotius the Dutchman whose doctrine formed the basis for the law of the sea after about 1700, and not the Englishman Selden. Grotius' monumental work can still be read for its emphasis on human dignity, albeit constrained the social conditions of his own historical period. Can you imagine the muttered jingoistic criticism that must have been leveled at the Supreme Court's citation of that sort of material? I have not looked to see how much, if any, of such criticism the Harvard Law Review was publishing in the 19th century? Maybe there was none to publish.

In short, a careful look at legal and constitutional history makes clear that Judge Posner's criticism is groundless. But there is more.

Even after Erie v. Tompkins, the Supreme Court has understood its role in finding and applying principles of international law to see that the United States is a worthy international citizen. For example, in Banco Nacional v. Sabbatino, the Court upheld a Castro government nationalization decree under the act of state doctrine, despite academic and political criticism. There is a federal common law, and international law is part of it.

Therefore, we did at the time Roper was decided "already" have our own laws and they included norms derived from transnational law.

Of course, the Court's 19th century discussions of international and comparative law did not usually benefit the oppressed. The Court made a complete mess of Native

American rights, and the terrible consequences are with us to this day. Regardless of outcome, however, the mess consisted then, and consists today, not of ignoring international and comparative law, but of getting it wrong.

"Getting it wrong" is a good way to describe most of the Court's examination of the slavery issue. There were those, among them Frederick Douglass, who believed that slavery might be held to violate the constitution. Their hopes did not come true, as finally decided in the Dred Scott decision, which Justice Grier foolishly assured President-elect Buchanan would settle the slavery issue. But the Supreme Court did examine aspects of the slave trade in light of international and comparative law, and their work merits a brief examination.

The constitution of 1787 had expressly recognized the slave-owners' interests. The federal Congress was forbidden by art. 1, sec. 9 from interfering with the slave trade until 1808. Article 4, section 2, in effect obliged each state to deliver fugitive slaves, at least absent federal legislation. And in article 1, sec. 2, slaves and Indians counted three-fifths of a person.

While federal fugitive slave laws persisted until the Civil War, despite efforts by some states to prevent their enforcement, United States law after 1808 forbade American citizens from engaging in the slave trade and even termed such action piracy. The slave trade had also been condemned by a number of other countries. There matters stood in 1825, when the United States Supreme Court decided a case called The Antelope, that being the name of a slave-carrying ship found off the Georgia coast and brought into port by a U.S. naval vessel.

On board were 225 Africans who had been captured for sale as slaves. Some of these men and women had originally been taken from the shores of Africa by Spanish and Portuguese slave traders. The Supreme Court convened to decide who, if anyone, had a property right to these people.

The Spanish and Portuguese consuls argued that their respective countries should receive these slaves. For the slaves, it was argued that the slave trade was an offense to the law of nations and that they should be freed. After all, the United States, while maintaining the institution of slavery, had declared the slave trade as such to be "contrary to the principles of humanity and justice," that is against universal principles of justice. Great Britain had also forbidden slavery and the slave trade, after a public campaign that exposed its horrors.

The Supreme Court was not moved by these arguments. Marshall began by noting that the case present "the sacred rights of liberty and of property . . . in conflict with each other" – the slaves' liberty and the slave-traders' property. Having said that, Marshall – a Virginia slave-owner – cautioned that "the Court must not yield to feelings which might seduce it from the path of duty."

Marshall conceded that "the opinion is extensively, if not universally entertained, that this unnatural traffic ought to be suppressed." In addition, one could turn to ancient texts and find condemnation of slavery save in limited circumstances such as the aftermath of war. Indeed, the institution was itself at war with some fundamental premises of capitalist social relations. Yet Spain and Portugal had continued the trade.

From all of this, Marshall concluded:

> That the course of opinion on the slave trade should be unsettled, ought to excite no surprise. The Christian and civilized nations of the world, which who we have

> most intercourse, have all been engaged in it. However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightly interrupt. It has claimed all the sanction which could be derived from long usage and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each.

Marshall's argument thus rejected the overwhelming public outcry against the slave trade, the developing consensus among sovereign states that it is wrong, and the mounting evidence of its fundamental inhumanity. He even acknowledged that slavery was "contrary to the law of nature." But he looked abroad, outside "our own laws," to the practices of other countries to find what he termed – albeit wrongly – a consensus.

With this analysis in The Antelope, one must compare the famous case of The Amistad, decided in 1841. I am sorry to disappoint you, but the essence of this case cannot be grasped by having watched the motion picture. In the movie, Anthony Hopkins plays John Quincy Adams and has a major role. In the real world, Justice Story ignored the main points of Adams' argument and in fact thought that it was boring – or so he said in a letter.

The decision in Amistad does not, of course, invalidate slavery. However, the Court upholds the Africans' liberty by reference to "eternal principles of justice and international law." By 1841, the antislavery movement had spread. State practice – that is, the practices of foreign nations -- had changed from 1825. Justice Story's opinion weaves together long-standing principles of evidence, equity, commercial law and admiralty with more recent evidence of consistent state practice to achieve a result.

Marshall viewed state practice as a race to the bottom, which would validate a practice that a leading trade partner such as Britain had given up, but was still being done by Spain and Portugal. Story saw things right side up, with a sense of history, and found customary rules in relatively recent events.

I could give many more examples of the Court using comparative and international law, and have done so elsewhere. You may notice that I use the terms comparative law and international law together. I understand that they are two different fields of study. However, I also believe that because state practice is a major ingredient of customary international law, both disciplines are important parts of our inquiry. In brief summary, I contend that the Roper Court's use of so-called "foreign law" is both proper and necessary.

Indeed, Justice Kennedy's Roper opinion uses some of the same kind of analysis that one finds in The Amistad. I am thinking particularly of the way in which Justice Story was not simply engaged in counting isolated ideas that might come from foreign countries. He was expressing a "universal" consensus, from which – although he forebore to mention it – the United States stood at that time apart. So in Roper, Justice Kennedy shows us that the responsible authorities of every government in the world discountenance killing children. That is not, as Judge Posner seems to think, some sort of passing fancy confined to a few states.

Let me turn therefore to the broader argument about how we are to define justice in the present period, beset as we are by assertions that aggressive war is permissible, civilian deaths are lawful, that the legality of torture depends on who is doing it, that conditions of detention are nobody's business, and that all of these things are unreviewable, that is, for one reason or another not the business of article 3 courts.

I begin with some elementary legal history. In the 19th century literature I have mentioned, the Court, following Vattel and Grotius, used the term "law of nations." I like that term, suggesting as it was intended to do, and does, that there are norms that bind even the conduct of sovereigns within their own territories. This is an old idea that has taken on new meaning in the past six decades. But it is an old idea. Piracy has been a crime against the whole world for a long time, as I have noted. The Supreme Court, in The Amistad, put the slave trade into that category as well.

What, then, about this term "international." Let me retell, briefly, a familiar story. In the mid-1770's Jeremy Bentham was a law student at Oxford, attending lectures by William Blackstone. Blackstone, in his Commentaries on the Laws of England, had spoken of the "law of nations" as

> a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.

For Blackstone, the "law of nations" included provisions relating to individual rights, at least with respect to mercantile transactions, and the rights of hostages. Moreover, Blackstone wrote that the law of nations had been incorporated into the law of England, and was therefore part of "the law of the land," to be applied by English courts in deciding cases between individuals. That is, there were certain transcendent norms that a legitimate sovereign was bound to respect.

Young Jeremy Bentham found these ideas somewhat repellent. "We already have our own laws," one can almost hear him saying. And he did say almost that, for he penned a commentary in which he coined the term "international." He acknowledged that a French jurist, D'Aguesseau, had already had a similar thought, and had expressed a preference for the term "droit entre les gens" – law between peoples -- rather than "droit des gens," because legal obligations ran between nation and nation. Bentham made clear that the legitimate reach of this branch of law related only to "mutual transactions between sovereigns as such," which would "be properly and exclusively termed international."

In an essay written between 1774 and 1776, Bentham and his co-author John Lind directly attacked Blackstone's views. The essay concluded that in great measure, the "law of nations" "isn't law at all." In a passage written by Lind, but reviewed and probably approved by Bentham, we find this:

> The fact is, the term, law of nations, however allowable in common conversation, should never find a place in a philosophical discussion of law: and that for this plain reason, that nations have no common superior upon earth, from whom they can receive a law.

By now, hardly anyone believes in so narrow a view of the word "international," nor in Bentham's view that there are no norms that sovereigns are obliged to follow

beyond those of their internal law and those to which they have agreed by treaty. It is also understood that nations are not the sole bearers of rights conferred by international law, or the law of nations. Individuals and groups possess, and have standing to enforce, such rights, in national as well as international tribunals.

The Treaty of London that established the Nuremburg tribunal, and the great changes in human rights law wrought as the former colonies were freed and took their place in the councils of nations, represent familiar history. Today, hardly anybody doubts that a sovereign's actions within its own territory are not the last word on legality. The Nazi leaders were tried for what they did in their own country as well as elsewhere. The world community condemned and isolated the apartheid regime in South Africa because that regime consistently violated fundamental norms of the law of nations. When we stand up against executing children, we are standing with the world community and in favor of one of its peremptory norms.

Nor, one must say, is it necessary that the norms be written down somewhere in a law code in order for some proper authority to come along and enforce them. When the French courts tried Paul Touvier in 1992 for his 1944 crimes against humanity, the prosecution was based on articles of the French penal code that were added in 1964. Touvier, you may recall, was an military officer of the Vichy Government who ordered seven Jews rounded up and killed. Of course, it had to be proved that Touvier was aware that his conduct was wrong. But the norm that forbids the crime against humanity had been generally understood at least since the 1920s, and was – as the French say – by its nature an integral part of the law.

We see the same thing with respect to the International Criminal Tribunals for Yugoslavia and Rwanda, who exist under charters written after the atrocities had been committed.

And, we must be reminded, no official including a President is immune from prosecution in a proper tribunal for violating these norms. That has been the lesson of the Yugoslavia and Rwanda tribunal as well as the momentous decision of the British House of Lords in the Pinochet case, where I was honored to assist the prosecuting counsel in England and Spain.

Indeed, there was an interesting sidelight on the Pinochet case that I want to share with you. After the second House of Lords judgment had affirmed that Pinochet was subject to extradition, the next step was a hearing before the Metropolitan Magistrate in Bow Street. That magistrate's job was at one time held by Henry Fielding's brother John and the square is somewhat as it was in those days. The courtroom is fairly new. The magistrate in the case was Roland Bartle, known to be conservative and indeed an acquaintance of Margaret Thatcher. Dame Thatcher even made a speech sometime before the hearing in a clear effort to get Magistrate Bartle's attention and support Pinochet.

In his opinion upholding extradition, Magistrate Bartle began by deploring efforts to influence him and to predict his judgment. He then spoke of

> the growing trend of the international community to combine together to outlaw crimes which are abhorrent to civilised society whether they be offences of the kind to which I have referred or crimes of cruelty and violence which may be committed by individuals, by terrorist groups seeking to influence or overthrow democratic governments or by undemocratic governments against their own

citizens. This development may be said to presage the day when, for the purposes of extradition, there will be one law for one world.

Thirty years ago, many if not most American legal scholars denied that there could be so-called jus cogens, or peremptory, norms that would bind state actors even when their own sovereign opted out of a particular norm. Today, American legal opinion has caught up with the rest of the world on that score. There are peremptory and non-derogable norms.

Of course, not all norms can be enforced against all violators in all tribunals. The movement towards universal jurisdiction has made great strides, but has its limits. For example, in 2000, a Belgian court opened a criminal proceeding for crimes against humanity against Mr. Abdoulaye Yerodia, who was at that time Foreign Minister of the Congo. The Republic of Congo brought a proceeding against the Kingdom of Belgium in the International Court of Justice at The Hague. The ICJ majority held that the Congo minister was immune from prosecution in a Belgian court for crimes committed in the Congo. The decision was somewhat troubling to those who have an expansive idea of universal jurisdiction, and would allow any national tribunal to try any offender for any human rights violation, no matter where committed and no matter the nationality of the offender or victim. As for me, I agree with the ICJ majority, though perhaps not with all the reasoning of the various opinions. I was particularly struck by the opinion of the Congolese judge, who wrote compellingly and with one might say a raised eyebrow. He was struck by the irony: Belgium is going to give human rights lessons to the Congo? King Leopold called his venture "the work of civilization." Emile van der Velde, the Belgian socialist parliamentarian (who was by the way, one of Max Weber's students) declaimed in parliamentary debate, "the work of civilization, as you call it, is an enormous and continual butchery." And of course, the saga continued right into the 1960s as Belgium sought to undermine democratic rights even as the Congo was obtaining independence.

The basic holding of the ICJ was that the defendant possessed some sort of immunity from prosecution in Belgium for the offense charged. That holding was not a rejection of universal and peremptory norms, nor of a very broad reading of the jurisdiction to prescribe such norms and a jurisdiction to adjudicate their alleged violation. After all, as I have noted, the British House of Lords, and later the Bow Street magistrate, allowed the extradition of former President Pinochet, and the courts of Spain stood ready to try him. In that case, there were Spanish victims.

Henry Kissinger has written an essay attacking the very idea of universal jurisdiction. However, in that essay, he acknowledges that it would be entirely appropriate to try Augusto Pinochet in Chile for tortures, disappearances and murders that violated peremptory norms of the law of nations. Of course, Dr. Kissinger's opinion about the Pinochet litigation is somewhat cynical, not to say hypocritical. Strong evidence shows that then National Security Adviser Kissinger participated in planning, financing, and authorizing the kidnapping and murder of General Rene Schneider, commander in chief of the Chilean armed forces, in 1970. This was done in order to provoke a coup in Chile or at least forestall the democratic election of a socialist President there. When General Schneider's sons found out about Kissinger's role, five years ago when Congress directed a cache of papers to be declassified, they sued for wrongful death. Dr. Kissinger has so far convinced United States courts that his

complicity is nonjusticiable and that he is immune from being sued anywhere, in any tribunal, for his conduct.

In recognition of the Kissinger litigation, and other torture-based cases, I included "torture" in my title. The same international consensus of which I speak should drive article three judging in these cases, supported of course by treaty law and Congressional enactment.

I have tried to describe a transnational movement towards recognition and enforcement of human rights norms. I have tried to show that the United States Supreme Court has cited and discussed transnational legal principles, and has done so in cases involving fundamental social issues. I turn now to focus on constitutional criminal jurisprudence in a transnational setting. Quickly, for the hour grows late, I will come back to a way of seeing the 8th amendment.

When I first heard of all the "foreign law" controversy surrounding Roper v. Simmons, I was puzzled. At first, I saw that the criticism was coming from right-wing legislators touting xenophobic and jingoistic slogans to please some of their constituents. I was surprised to see serious smart people raising concerns.

After all, the American constitution, in addition to being based on foreign ideas, has itself been an example and inspiration in many countries. Supreme Court decisions applying the basic ideas in the constitution are cited by national and transnational tribunals. I recall vividly being at the criminal science institute in Siracusa in 1990. I was co-chair of a session to draft an agreed statement on basic norms of criminal procedure. The participants were representatives from Poland, Czechoslovakia, Rumania, Bulgaria, and Hungary as well as from Western European countries. The other co-chair and I presided and served as translators between French and English – the two official languages of the conference. Our statement, which took only one day to draft, embodied many ideas from United States Supreme Court decisions construing the bill of rights, as well as from European Court of Human Rights decisions. The same regard, and the same kind of borrowing, has taken place elsewhere. Indeed, I have been told that the Latin American concept of judicial review in human rights matters, known as amparo, owes a great deal to Marbury v. Madison.

You see, many jurists recognize that ideas like judicial review of detention, limits on search and seizure, the right to effective assistance of counsel and to private communication with counsel, fair trial, and regulation of police questioning are valid and important no matter where in the world you happen to live. This centuries-old process of defining and enforcing these rights goes on transnationally. I will bet that almost all the critics of Roper would say that of course other countries should follow the United States' example with respect to certain so-called democratic reforms. Are they so arrogant, or so ignorant of how examples work, to believe that the flow of ideas is or should be all one way?

Let's return briefly to the way that Justice Story was able to approach the issue of human freedom in The Amistad. By the time of his decision, Spain had abolished the slave trade and freed the slaves. The international consensus against slavery, that did not exist when The Antelope was decided in 1825, had matured. Justice Story did not hold that this consensus dictated freedom for the Africans aboard The Amistad. Rather, he used it as a crucial guide to interpretation of important language in the treaty with Spain.

Judge Posner, as we have seen, admits that the 8th amendment prohibition on cruel and unusual punishment is a "sponge" that must absorb new content as time goes by. In Roper, the Court was faced with competing interpretations of "cruel and unusual." It is a principle of international law, long observed by our own courts, that when two constructions of a law are possible, the court should choose the one that brings United States practice into harmony with international law including customary and peremptory norms. Given that interpretive canon, and the admitted adaptability of the words "cruel and unusual," the Court was right to choose an interpretation that places the United States within a unanimous transnational practice.

Beyond Roper and its issues, there lie the lessons that courts must help us learn. I mentioned Hamdi v. Rumsfeld. To the Supreme Court, the government argued that one had to detain Hamdi without review of his confinement because he was so dangerous and the national security required it. To this contention, the Court replied,

> We necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. . . .Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

After the Court held that Hamdi was entitled to some judicial review, and there was a real threat that the adversary system would test the truth of the administration's assertions, the government loaded Hamdi on a plane and sent him home.

It is, I think, all of a piece. Cheney and Rumsfeld display this alarming moral obliquity about torture. Gonzales claims to be innocent of even the most basic understanding of the fourth amendment and its warrant clause; whoever said that justice should be blind did not mean that the Department of Justice should be blind. Right-wing commentators deny that norms exist, grow and change in an international community. Bush and his advisers tell us lies and take the country to a war that pours our blood and treasure into the oil-rich sands of Iraq, and so inflames the Islamic world that any rapprochement seems further away than ever.

I find it significant that in an article on March 21, 2003, Richard Perle referred to the United Nations as "the chatterbox on the Hudson" and saluted what he claimed was its demise. I went to New York recently. The UN is still on the East River. But of course for Bush, Cheney, Rumsfeld, Rice, Gonzales and Perle, trying to explain the peremptory norms of human rights is like explaining a sundial to a bat.

As lawyers litigating for human rights, we must have the knowledge, dedication and skill to navigate through the system that calls itself justice. On dark nights, as C.S. Lewis reminded us, we will give more for guidance as to the two or three steps ahead than for a vision of the far horizon. Yet we do carry that vision. It is as natural to us as walking. When first we learned to walk, we had to think through how each muscle would work in sequence to get us on our feet and moving. Now the process is inherent,

automatic, and so should be the sense that we participate in this transnational historical process, this search for justice. We validate our own struggle, we critically examine the process we are in, from a stance that is necessarily, legitimately, outside ourselves and outside the narrow limits that our opponents seek to impose upon us. As I suggested before, we validate our struggle with a theory of history that looks forward as well as back. You are not exercising unguided and unverifiable value choices in your work. You are standing alongside and marching along with the vast legions of humankind whose search to define and apply these human rights norms has been the distinguishing feature of juridical history for decades.

You have invited me today to help you celebrate what Jordan Steiker, Eden Harrington, Rob Owen, Meredith Roundtree and all their comrades are doing about this most important part of the struggle for human rights. Beyond what I have said about Roper, it is clear that all death penalty cases involve us in expressing this universal value about the value of human life and human dignity. You cannot vote to execute another human being unless you are convinced that he or she is "the other," so effectively demonized by the prosecutors as to be outside the protection of civil society and not entitled to its benefits. As defenders, we seek a level of generalization that includes our clients within the mantle of that protection. We do this in many ways. I once did it, in a case you know, by telling the story of Joseph, who was his brothers' intended victim, and who could yet say to them "I am Joseph your brother" in that celebrated passage from Genesis.

So, I hope that you find what I have said to be at least relevant, even if you did not agree with all of it. I am honored that you have asked me to be here.