

# EXCURSUS I

## Peter L. Berger on The Supreme Court Celebrates the Bicentennial

In 1972 the Supreme Court declared a number of death penalty statutes to be unconstitutional. That decision was based on relatively narrow procedural grounds. In the wake of that decision a number of states passed new statutes designed to meet the procedural objections. Those who challenged these new statutes (foremost among them the Legal Defense and Educational Fund of the NAACP) had hoped the Supreme Court would finally rule that capital punishment as such was cruel and unusual punishment, thus violating the Constitution.

This hope was dashed on July 2, 1976, when the Supreme Court upheld the new death penalty statutes of Florida, Georgia, and Texas. As a result of this decision, an estimated 300 individuals in prisons across the country (in the three states in question and in states with similar statutes) stand under immediate threat of execution. The last execution in the United States took place in 1967; it seems likely the next one will take place by 1977.

The Court might have had the decency to wait for a few days. On the other hand, if this is what they were going to do, perhaps it is just as well they did it on the eve of the great patriotic celebration. The action helps illuminate what this country is, what it is not, and what it may yet become.

Human history is an endless record of cruelty. From time to time, almost invariably under the influence of the great religions, there are impulses of compassion that find this or that institutional expression. There is no progress in history toward greater humanity, and most of the impulses of compassion are eradicated after a while in the habitual savagery of the species. But there are progresses, however fragile, however transitory.

There have been a number of these progresses in the last two centuries of Western history (each one, it can be argued, a late flowering of those impulses of compassion rooted in the Judeo-Christian tradition). Among these progresses are the convictions that slavery is an intrinsically inhuman institution, that men and women are equal in their rights as human beings, that children have special rights, that no racial or ethnic differences constitute a diminishment of common humanity and its entitlements, and that nobody in a decent society may be allowed to fall below a certain level of material comfort.

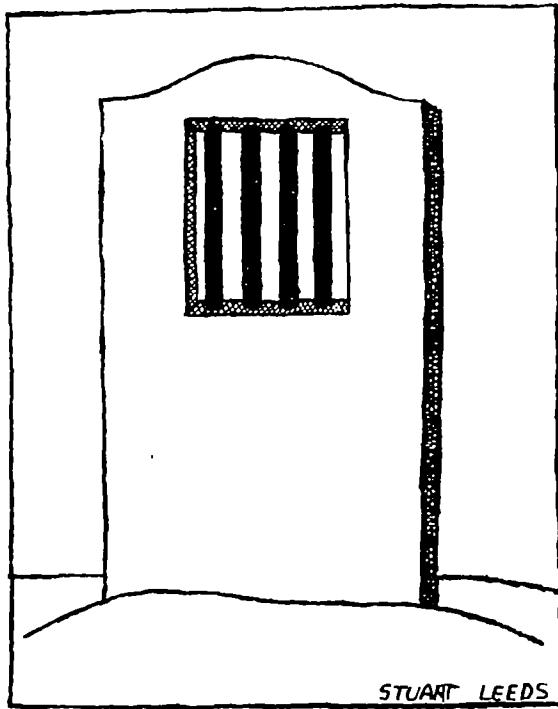
All these convictions, of course, have had far-flung legal implications. But there are two further convictions that more than any other pertain to the law as such—the convictions that torture and capital punishment are inherently dehumanizing, that they must therefore be banned from the legal system of a humanly acceptable society.

This is not the place to review once more the long debate over the death penalty. Much of it, at least in recent years, has been over the statistics concerning its deterrent value (in the opinion of most criminologists this evidence is not as inconclusive as the majority opinion of the Supreme Court maintained). To those who perceive capital punishment as inherently dehumanizing this statistical argument is finally as irrelevant as a debate over, say, the economic productivity of slavery. Their passionate *No!* to the death penalty is based, not on criminological evidence, but on a perception of the quality of being human. This perception has been eloquently described many times, most movingly in this generation by Albert Camus and Arthur Koestler. To those who share this perception, the posture of any society with regard to the death penalty is a crucial moral test. I have shared this perception as far back as I can remember. Thus it is with a sense of profound sorrow that I now perceive the highest legal authority of my country solemnly declaring a crucial moral failure.

Once more, I believe, this country has taken a step back from the high human promise embodied in its foundational documents. To be sure, it is a handful of men who have taken this action. But all of us must participate in the shame, as we will participate in the atrocious scenes that the action portends. Once more, for many of us, it will be more difficult to be an American. As the machinery of death starts up again—electric chairs, gas chambers, gallows—the air we breathe in this country will become more noxious (and not only for those who are aware of this). Every society has something like a moral fabric, and it is not possible to seal off the places where this fabric has been ruptured by acts of horror. The moral pretensions of the institution that has now ratified this particular horror guarantee that the effects will not be minor.

At least today, it seems to me, moral judgments must be made in a comparative and historical context. This does not mean that morality is relativized; it does mean that moral phenomena must be related to other things we know about the world. Comparatively, and there can be no doubt about this, the United States is still one of the few remaining places in the world where there are strong institutions protecting the individual against atrocities undertaken by the state. Virtually all these places have political systems of Western-type liberal democracy. In terms of capital punishment, since World War II there has been either *de jure* or *de facto* abolition in Western Europe (except for Spain) and in Latin America (except for Cuba). Special mention should be made here of Israel, which, despite all the terrorism directed against its citizens, has thus far adhered steadfastly to a legal system without capital punishment: Not a single Arab terrorist has been executed by the Israelis; indeed, the only individual on whom the Jewish state has imposed the death penalty since its independence was Adolf Eichmann.

The death penalty continues to be applied for a variety of offenses (including "economic crimes") in the Soviet orbit, and in most of the countries of Asia and Africa regardless of the ideological character of their regimes. In some countries, indeed, it seems somewhat abstract to speak of capital punishment: What does this term mean in a country where entire populations are subjected to genocide (as in "liberated" Cambodia) or where political dissidents are routinely murdered in their beds by agents of state security (as in a respectable number of other Third World countries)? Odious as this Supreme Court decision is, it does not invalidate the fact that this country is still an oasis of decency in an increasingly tyrannical world; what the decision does do, however, is create more distance between the United States and those few other democracies that should be our allies in decency.



Historically one must ask, quite simply, whether a particular action continues a tradition or whether it reverses tradition, be it for better or for worse. Thus, in making a moral judgment about a country in which the police use torture, it is important to ask whether this has always been so or whether this is a creative innovation of the present government. The historical context of the Supreme Court decision is, in this sense, morally pejorative: The decision reverses what had been a humanizing trend. I, for one, find it difficult to assess the overall impact of the Supreme Court on the quality of being human in America. Some Supreme Court actions have certainly been humanizing, others have not. I suspect that there is no particular pattern to be found here, and that this institution of our system, like the others, is a very mixed bag in moral terms.

Some will undoubtedly relate this decision to the one on abortion that the Supreme Court made in

1973. The comparison leaves me uneasy. I happen to have a position on abortion that differs from that of the "pro-life" forces; on the other hand, I believe the 1973 decision was a very bad one, especially sinister in the Court's utilization of the concept of "meaningful life."

Be this as it may, the two phenomena are morally discrete: On a scale of cruel actions the execution of a middle-aged prisoner is rather far removed from the abortion of, say, a four-week-old fetus. Capital punishment is, always has been, a phenomenon *sui generis*. What perhaps does link the two decisions is a peculiar combination of moral arrogance and intellectual crudity—and a sad combination it is when found in the highest court of the land.

What of the future? There is little ground for optimism. No moral leadership is to be expected on this issue from any of the presently plausible candidates for the Presidency: Jimmy Carter, as Governor of Georgia, signed the very death penalty statute that has just been upheld; President Ford has a record of being in favor of capital punishment for certain crimes; Ronald Reagan has been an unambiguous supporter of capital punishment and also signed a death penalty statute during his governorship of California. The Congress, insofar as it is that part of our political system that is most responsive to popular pressures, is likely to go on reflecting a public opinion that (mainly due to rising crime rates) has been increasingly favorable to capital punishment. And it will be a long time, if ever, until the Supreme Court reverses itself. Thus the issue will be where it was before the recent intermission in the annals of executions in this country—on the conscience of individual prosecutors, jurors, judges, and state governors. The best hope, now as then, is that many of these individual consciences will be in agony.

## EXCURSUS II

*Richard John Neuhaus on  
A Carter Presidency and the Real  
Watershed*

Political pundits who equate cynicism with sophistification are having a hard time trying to look unsurprised. The near-epiphany of Jimmy Carter on the American horizon obviously portends something quite new. Efforts to explain just what it is that is new regularly employ the metaphor of a watershed. A watershed involves a point of parting, a new configuration, a redirection of history into a different course. It is a matter of deep currents rather than surface controversies; it is the phenomenon of which political "issues" are the epiphenomena.

Watersheds are more accurately described in retrospect. Certainly they are more safely declared in retrospect. But retrospect is a luxury not afforded