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Is it Time to Stop Tinkering with the Machinery of Death?

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ALAN GARFIELD

That was the question Justice Stephen Breyer posed at the end of the Supreme Court's last term. The Court had issued a decision addressing only the narrower question of whether a certain drug could be used to execute inmates. Breyer wanted the Court to address the broad question of whether the death penalty is even constitutional.

Breyer is weary of the Court trying to "patch up the death penalty's legal wounds one at a time." He thinks that the death penalty is beyond repair and that it violates the Eighth Amendment's ban on "cruel and unusual punishments." In 1972, the Supreme Court suspended death sentences because state laws had failed to stop jurors from meting out the sentences arbitrarily. States responded with new guidelines to limit juror discretion.

During the following 40 years, the Supreme Court has issued numerous decisions fixing problems in the death penalty's administration. But it has assumed that the death penalty itself was constitutional. Breyer now believes that position is untenable. Citing studies from the past four decades, he contends that the death penalty is irreparably flawed. The system is "cruel," he says, because its administration is unreliable and arbitrary. And it has become increasingly "unusual" both domestically and internationally.

To demonstrate the system's unreliability, Breyer

notes that 115 death row inmates have been exonerated. Tragically, some were exonerated only after their executions. Breyer finds the system arbitrary because death sentences have less to do with a crime's egregiousness than with the victim's race or the county where the defendant was prosecuted. Indeed, between 2004 and 2009, "just 29 counties" – less than 1 percent of the counties in the country – accounted for almost half of all death sentences.

Finally, Breyer observes that the death penalty has become increasingly rare both here and abroad. Thirty states have "either formally abolished the death penalty or have not conducted an execution in more than eight years." And, in 2013, only eight countries in the world executed more than 10 individuals. The United States was one. The others were not countries we ordinarily try to emulate: China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, and Yemen.

Justices Antonin Scalia and Clarence Thomas countered Breyer's contentions. Scalia complained that it is the convictions that are unreliable, not the punishments. Thomas and Scalia both skewered the studies Breyer cited. They were especially appalled by a study that measured the "egregiousness" of crimes by assigning them varying "depravity points": two for murdering a child but one for murdering a senior. "If only," Scalia mused, "Aristotle, Aquinas and Hume knew that moral philosophy could be so neatly distilled into a pocket-sized . . . 'system of metrics.'"

This term the Supreme Court will again confront

the death penalty. On Wednesday, the Court will consider whether jurors must be "affirmatively instructed" that mitigating circumstances need not be proven beyond a reasonable doubt. The following Tuesday the Court will consider whether jurors and not judges should make the factual findings about aggravating circumstances.

In neither case is the Court likely to take up Breyer's broadside attack on the death penalty. Instead, it will continue to tinker. What will it take to convince us to disable the machinery of death? And who – judges or elected officials – should make that decision?

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