NOTE

THE UNREALIZED PROMISE OF SECTION 1983 METHOD-OF-EXECUTION CHALLENGES

Liam J. Montgomery[*]

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INTRODUCTION

ANGEL Diaz was sentenced to death by the State of Florida and his time appeared to have run out. He had exhausted all opportunities for federal post-conviction review, including both direct review and federal habeas corpus. When potentially significant new flaws in Florida's lethal injection protocol came to light,[1] however, Diaz had one additional avenue for relief that the Supreme Court had recently confirmed was available in *Hill v. McDonough*,[2] a suit challenging Florida's lethal injection protocol under 42 U.S.C. Section 1983, the central cause of action in federal civil rights litigation.

Nonetheless, applying an unjustifiably strict timeliness rule, the Florida Supreme Court refused to hear Diaz's new challenge.[3] The federal courts similarly declined to intervene, likewise finding Diaz's challenge untimely in spite of the substantial new evidence he advanced.[4] Angel Diaz was executed by lethal injection soon thereafter in a horrifically botched execution that clearly caused him suffering: over a thirty-four minute period,[5] Diaz "continued to move, squint, grimace, and attempt to speak."[6] Not only did the

[1] Diaz presented the Florida courts with a prominent new medical journal article, the findings of a federal district court in California (invalidating that state's lethal injection protocol), a letter from an expert, and an ABA report criticizing the Florida death penalty system, all of which came to light after his previous challenges. See infra notes 97–98.

[2] 547 U.S. 573, 583–85 (2006).

[3] Diaz v. State, 945 So. 2d 1136, 1144–45 (Fla. 2006).

[4] Diaz v. McDonough, 472 F.3d 849, 851 (11th Cir. 2006).

[5] See Lightbourne v. McCollum, 969 So. 2d 326, 329 (Fla. 2007) (noting that the Diaz execution took thirty-four minutes, which was "substantially longer than in any previous lethal injection execution in Florida" (quoting The Governor's Comm'n on Admin. of Lethal Injection, Final Report with Findings and Recommendations 8 (March 1, 2008))).

[6] Seema Shah, How Lethal Injection Reform Constitutes Impermissible Research on Prisoners, 45 Am. Crim. L. Rev. 1101, 1107 (2008).

execution team incorrectly place the intravenous lines, but they also failed to administer the three-drug "cocktail"[7] in the correct order, with the "likely result . . . that Mr. Diaz felt the excruciating effects of potassium chloride, which causes death by cardiac arrest, before the anesthesia could take effect to block the pain."[8] In fact, his execution was so mishandled that it prompted Governor Jeb Bush to halt all executions and to order a comprehensive review of Florida's lethal injection protocol.[9]

Prior to *Hill*, habeas corpus, one of the two significant avenues for a federal constitutional challenge relating to imprisonment (along with Section 1983), was nearly the sole means by which federal courts regulated state capital punishment schemes in the post-conviction setting. More specifically, it was also largely the only means by which to challenge a state's method of execution in federal court. This was due to Supreme Court decisions that delineated the boundary between habeas corpus and Section 1983. These rulings mandate that "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus, [whereas] requests for relief turning on circumstances of confinement may be presented in a Section 1983 action."[10] Because courts largely viewed method-of-execution challenges as fal-

[7] See infra note 61.

[8] Shah, supra note 6, at 1107–08. Such "botched" executions have occurred elsewhere, and thus challenges to lethal injection protocols are by no means an academic exercise. See Deborah W. Denno, When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us, 63 Ohio St. L.J. 63, 139–42 (2002) (cataloguing thirty-one "botched" lethal injection executions between 1982 and 2001); Ellen Kreitzberg & David Richter, But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions, 47 Santa Clara L. Rev. 445, 490 (2007); Shah, supra note 6, at 1106 ("Problems with the administration of lethal injection have . . . been demonstrated on numerous occasions."). For instance, in Ohio in 2006, Joseph Clark actually sat up during his execution and told the executioners that it was not working. His autopsy revealed nineteen puncture marks and signs that prison officials had improperly administered the anesthetic necessary to prevent suffering during the execution, making it more likely that he suffered severe pain. His execution lasted ninety minutes. Id. at 1107. Even this is not the longest execution on record: A 1998 execution in Texas lasted over two hours due to difficulties in inserting the necessary intravenous lines. Id. at 1106–07.

[9] Adam Liptak & Terry Aguayo, After Problem Execution, Governor Bush Suspends the Death Penalty in Florida, N.Y. Times, Dec. 16, 2006, at A11.

[10] Muhammad v. Close, 540 U.S. 749, 750 (2004) (citations omitted).

ling under the former category,[11] Section 1983 played little role in capital post-conviction litigation.

At the same time, the Supreme Court and Congress developed labyrinthine rules and limitations to channel capital habeas corpus litigation, rules that have made such litigation difficult, and in some cases—such as with the rules against successive petitions—nearly impossible.[12] When combined with the lack of a Section 1983 option, these restrictions have placed death-sentenced inmates in a progressively tighter vise, rendering them unable to make legitimate method-of-execution challenges after their first habeas corpus petition has concluded, even where such challenges are based on later-revealed factual predicates.

Hill and one other recent Supreme Court decision—*Nelson v. Campbell*[13]—ought to have upset this framework: method-of-execution claims are no longer the exclusive province of habeas corpus and may now be brought as Section 1983 actions, within limits.[14] While some of the rules governing Section 1983 are analo-

[11] See Fugate v. Dep't of Corr., 301 F.3d 1287, 1288 (11th Cir. 2002); Williams v. Hopkins, 130 F.3d 333, 336–37 (8th Cir. 1997); In re Sapp, 118 F.3d 460, 462–63 (6th Cir. 1997); Reid v. Johnson, 333 F. Supp. 2d 543, 550 n.12 (E.D. Va. 2004) (citing *In Re Sapp*, 118 F.3d at 462).

[12] See infra Part II.

[13] 541 U.S. 637 (2004).

[14] The most recent and most significant method-of-execution claim is found in *Baze v. Rees*, decided on April 16, 2008. 128 S. Ct. 1520 (2008). *Baze* found Kentucky's lethal injection protocol constitutional, and, for the first time in the Court's history, attempted to establish a standard for evaluating method-of-execution claims under the Eighth Amendment. The Court held that a method of execution would only be found unconstitutional where it posed a "substantial risk of serious harm" or an "objectively intolerable risk of harm." Id. at 1531 (quoting Farmer v. Brennan, 511 U.S. 825, 842, 846 (1994)).

The immediate effect of *Baze* appears to be somewhat limited. One court applying *Baze* commented that it provided "more guidance on what concerns are relevant for discovery in a challenge to a State's procedures regarding lethal injection." Moeller v. Weber, No. Civ. 04-4200, 2008 WL 1957842, at *3 (D.S.D. May 2, 2008). Another posited that *Baze* offered general guidance on the qualifications necessary for the execution team. Clemons v. Crawford, No. 07-4129-CV-C-FJG, 2008 WL 2783233, at *1 (W.D. Mo. July 15, 2008). The only apparent consensus at this point is that because the Court found Kentucky's protocol constitutional, that protocol acts as something of a guidepost for challenges in other states. See Emmett v. Johnson, 532 F.3d 291, 300 (4th Cir. 2008) (holding that Virginia's protocol is constitutional because it is "substantially similar" to Kentucky's); *Moeller*, 2008 WL 1957842, at *4 (ordering further discovery in order to allow South Dakota's protocol to be compared with Kentucky's); Ex parte Alba, 256 S.W.3d 682, 693 (Tex. Crim. App. 2008) (Price, J., dis-

gous to those restricting the use of habeas, there are important distinctions between them.[15] These distinctions should, in turn, actually make a difference for a death-sentenced inmate by allowing him to avoid many of the habeas corpus limitations that he once faced. Thus, this seemingly routine clarification of the boundary between habeas and Section 1983 is potentially a major doctrinal shift, one with significance for both habeas corpus and civil rights jurisprudence, as well as for death penalty litigation as a whole.

As is often the case, though, theory and practice can diverge. This Note will show that lower courts seeking to procedurally limit

senting) (disagreeing with the majority's dismissal of the case because it prevented the court from determining whether Texas's protocol is "substantially similar" to Kentucky's). But cf. Walker v. Epps, No. 08-70028, 2008 WL 2796878, at *5 (5th Cir. July 21, 2008) (King, J., dissenting) (dissenting from grant of summary judgment on the issue of substantial similarity with Kentucky because that issue had not been addressed by the district court); *Emmett*, 532 F.3d at 311 (Gregory, J., dissenting) (cautioning that *Baze* cannot be read "to condone any [three-drug] combination" and dissenting from a grant of summary judgment on an issue the district court never considered, namely "whether material differences exist between Kentucky's and Virginia's protocols").

In the end, *Baze* will not spell the end of method-of-execution challenges. To the contrary, as one commentator has noted, "[t]he Court's splintered decision does not make the task facing lower courts much easier, and litigation on these issues is certain to continue." Shah, supra note 6, at 1141. For example, Justice Stevens's opinion noted that the use of the chemical pancuronium bromide, a paralytic agent, see infra note 61, would continue to be a focal point of litigation. *Baze*, 128 S. Ct. at 1546 (Stevens, J., concurring in the judgment). Likewise, the varying methods states use to verify inmate unconsciousness prior to delivery of the lethal chemicals will continue to be an issue. Id. at 1546 n.9; see also id. at 1569–71 (Ginsburg, J., dissenting) (disputing the adequacy of Kentucky's safeguards on this issue and pointing out that other states use additional safeguards that Kentucky does not).

And most important for the purposes of this Note, *Baze* is a state declaratory judgment action on direct review to the Supreme Court. *Baze*, 128 S. Ct. at 1526. Thus, it involves none of the important Section 1983 issues implicated by *Hill* and *Nelson*.

[15] Section 1983 in the prisoner-litigation context is significantly different than in all other Section 1983 litigation because it includes an exhaustion requirement. Where the plaintiff is incarcerated, the Prison Litigation Reform Act (PLRA) of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66–1321-77 (codified principally at 42 U.S.C. § 1997e(a) (2000)), adds what is in effect an administrative exhaustion requirement. In short, the PLRA requires (with no discretion left to the district court) that a prisoner exhaust all "available" remedies within the state prison system, "even where the relief sought . . . cannot be granted by the administrative process." Woodford v. Ngo, 548 U.S. 81, 85 (2006); see also Booth v. Churner, 532 U.S. 731, 741 (2001). For more on this important aspect of prisoner litigation and its effect on *Hill* challenges, see infra Section II.E.

the litigation resulting from *Hill*[16] often fall back on previously applicable habeas corpus doctrine, reflexively importing aspects of it into these Section 1983 suits. But given the very different policies and rules that underlie each of these doctrines, this importation frustrates the promise of *Hill*'s Section 1983 vehicle for method-of-execution challenges. And even where courts do not engage in such importation, they frustrate *Hill*'s promise in other ways not required by applicable Section 1983 doctrine, such as by formulating unduly harsh timing rules (like the one applied in Diaz's case) or by overlooking the applicable standard of review.[17] In short, *Hill*'s Section 1983 vehicle has done little to loosen the method-of-execution challenge vise.

Examples of how theory and practice have diverged abound. For instance, exemplifying the propensity to fall back on habeas doctrine, the U.S. Court of Appeals for the Sixth Circuit in *Cooey v. Strickland* explicitly imported into the Section 1983 claim at issue

[16] See Douglas A. Berman, Finding Bickel Gold In a *Hill* of Beans, 2006 Cato Sup. Ct. Rev. 311, 323 ("[T]he Supreme Court's approach to *Hill* and other lethal injection litigation has displayed a kind of recklessness concerning how lower courts would have to decipher and respond to the Court's opaque work."); John Gibeaut, More Inmates Likely to Contest Lethal Injection, 5 No. 24 A.B.A. J. E-Report 3 (June 16, 2006) ("[T]he justices [in *Hill*] . . . left the lower courts with precious little guidance. . . .").

[17] Most articles and notes on this topic focus on the Eighth Amendment issue of whether lethal injection is cruel and unusual, rather than focusing on the implications of the procedural vehicle allowed by *Hill* and *Nelson*. See, e.g., Deborah W. Denno, The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty, 76 Fordham L. Rev. 49, 50–51 (2007); Denno, supra note 8, at 63–65; Megan Greer, Recent Development, Legal Injection: The Supreme Court Enters the Lethal Injection Debate: *Hill v. McDonough*, 126 S. Ct. 2096 (2006), 30 Harv. J.L. & Pub. Pol'y 767, 768 (2007); Kreitzberg & Richter, supra note 8 at 449–50; Shah, supra note 6, at 1101; Casey Lynne Ewart, Note, Use of the Drug Pavulon in Lethal Injections: Cruel and Unusual?, 14 Wm. & Mary Bill Rts. J. 1159, 1159 (2006); Kristopher A. Haines, Comment, Lethally Injected: Devolving Standards of Decency in American Society, 34 Cap. U. L. Rev. 459, 459 (2005); Amy L. Mottor, Note, *Morales* and *Taylor*: The Future of Lethal Injection, 6 Appalachian J.L. 287, 295–96 (2007); James R. Wong, Comment, Lethal Injection Protocols: The Failure of Litigation to Stop Suffering and the Case for Legislative Reform, 25 Temp. J. Sci. Tech. & Envtl. L. 263, 264 (2006). Similarly, a recent note in the *Harvard Law Review* proposed a new legal test for whether a method of execution is unconstitutional. Note, A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections, 120 Harv. L. Rev. 1301, 1301 (2007). Professor Douglas Berman did analyze the *Hill* decision, but his analysis focused on what he views as *Hill*'s potentially laudatory effect of prompting legislative reform. Berman, supra note 16, at 326–28.

both specific habeas corpus rules (similar to the habeas statute of limitations) and the underlying policies of habeas corpus.[18] According to the dissent, this "misapprehend[ed] the distinction between the two causes of action" by ignoring the fact that habeas doctrine is aimed at "promot[ing] finality in state-court judgments," a concern not implicated by Section 1983.[19] And in *Workman v. Bredesen*, the court took the extraordinary step of, "[f]or the first time in a death-penalty case . . . , vacat[ing] a temporary restraining order."[20] Given that a temporary restraining order is the least intrusive injunctive relief, intended merely to give the district court a short, ten-day period in which to consider further possible action, *Workman* is a paradigm example of the second tendency noted above: an unduly strict ruling unrelated to habeas rules and not supported by either normal Section 1983 rules or civil procedure rules generally.

Contrast these cases with the district court decision in *Harbison v. Little*, a decision that came soon after *Workman*.[21] In *Harbison*, the district judge conducted a three-day bench trial concerning the exact same lethal injection protocol at issue in *Workman*, finding serious infirmities that amounted to "not a mere 'risk of negligence' but a guarantee of accident, written directly into the protocol itself."[22] The court's full consideration of the important issues at stake through wide-ranging discovery and examination of witnesses illustrates one of Section 1983's key procedural differences from habeas corpus: the ability to conduct a full evidentiary hearing after the inmate has exhausted his first federal habeas challenge.

Cases like *Workman* and *Cooey* ignore the implications of the new Section 1983 procedural vehicle that *Hill* and *Nelson* made available, resulting in a "dysfunctional patchwork of stays and executions."[23] This piecemeal litigation that is pending nationwide cre-

[18] Cooey v. Strickland, 479 F.3d 412, 420–23 (6th Cir. 2007).

[19] Id. at 425 (Gilman, J., dissenting); see also Lee Kovarsky, AEDPA's Wrecks: Comity, Finality, and Federalism, 82 Tul. L. Rev. 443, 487 n.281 (2007).

[20] 486 F.3d 896, 921 (6th Cir. 2007) (Cole, J., dissenting).

[21] 511 F. Supp. 2d 872 (M.D. Tenn. 2007).

[22] Id. at 891.

[23] Alley v. Little, 447 F.3d 976, 977 (6th Cir. 2006) (Martin, Jr., J., dissenting from denial of rehearing en banc).

ates tremendous uncertainty.[24] The success or failure of a particular inmate's challenge will turn more on which circuit, or even district court, hears the challenge, rather than the actual merits of the challenge itself: the State of Tennessee executed Philip Workman under the very same protocol found unconstitutional in *Harbison*.[25] Lower court application of *Hill* thus reintroduces to death penalty litigation the freakish and wanton randomness[26] that the Supreme Court found so objectionable in *Furman v. Georgia*.[27]

To be sure, courts can and do impose equitable limitations on Section 1983 litigation. For instance, the Supreme Court has developed complicated rules governing the doctrines of absolute[28] and qualified immunity,[29] which place important limits on Section 1983 suits against government officials. Likewise, the Court has placed significant restraints on Section 1983 suits against municipalities.[30] But besides the standard refrain that "death is different,"[31] importing habeas corpus limitations into a Section 1983 claim is not

[24] See Cooey v. Strickland, No. 2:04-cv-1156, 2008 WL 471536, at *15 (S.D. Ohio Feb 15, 2008) ("It remains the hope of this Court that the United States Supreme Court will grant the *certiorari* petition arising from this litigation in order to introduce much-needed nationwide uniformity and as much certainty as possible into an area of litigation that has often been plagued by needlessly convoluted and inconsistent reasoning.").

[25] Theo Emery, Tennessee Carries Out First Execution Since Lethal Injection Review, N.Y. Times, May 9, 2007, available at http://www.nytimes.com/2007/05/09/us/09cnd-death.html?pagewanted=print.

[26] See Kreitzberg & Richter, supra note 8, at 467 ("Although many states' procedures are almost identical and the challenges cited comparable evidence, declarations, and exhibits, courts reached different conclusions in disposing these cases.").

[27] 408 U.S. 238, 310 (1972) (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

[28] See, e.g., Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998) (legislative immunity); Stump v. Sparkman, 435 U.S. 349, 356–57 (1978) (judicial immunity); Imbler v. Pachtman, 424 U.S. 409, 423–24 (1976) (prosecutorial immunity).

[29] See, e.g., Hope v. Pelzer, 536 U.S. 730, 739–41 (2002); Saucier v. Katz, 533 U.S. 194, 200–07 (2001); Anderson v. Creighton, 483 U.S. 635, 646 (1987); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

[30] See, e.g., City of Canton v. Harris, 489 U.S. 378, 380 (1989); Pembaur v. City of Cincinnati, 475 U.S. 469, 480–81 (1986); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–95 (1978) (refusing to apply the doctrine of respondeat superior to Section 1983 claims against municipalities).

[31] See, e.g., Gregg v. Georgia, 428 U.S. 153, 188 (1976) (Stewart, Powell & Stevens, JJ., joint opinion) ("[D]eath is different in kind from any other punishment imposed under our system of criminal justice.").

merely the routine exercise of equitable powers given the Court's relatively clear delineation of the boundary between habeas corpus and Section 1983[32] and its recent pronouncement that habeas exhaustion doctrine has no place within Section 1983.[33] Similarly, this Note will show that courts that have imposed other, non-habeas limitations to Section 1983 method-of-execution claims have likewise exceeded the mandate granted in both *Hill* and *Nelson*. Indeed, if not to free litigants from the difficult restrictions that apply to habeas, it is difficult to conceive of why the Court ruled as it did in both *Hill* and *Nelson*.

Part I of this Note will examine the boundary between habeas and Section 1983, and will show how *Hill* and *Nelson* altered that boundary. Part II will explore Section 1983's advantages over habeas corpus in the method-of-execution context, and show specific examples where courts have unjustifiably frustrated the realization of these advantages by importing habeas doctrines. Finally, Part III will conclude by analyzing court-imposed limitations unrelated to habeas corpus, such as unduly harsh timing rules and the detailed examination of a lethal injection protocol on review of a district court's preliminary injunctive relief decision. This final Part will propose solutions that seek to preserve the advantages inherent in Section 1983 while remaining faithful to *Hill*'s admonition that "federal courts can and should protect States from dilatory or speculative suits."[34] In particular, this Note will propose that aggregation of *Hill* suits within states can effectively balance the interests of both inmates and states, while allowing courts to properly adhere to applicable Section 1983 doctrine.

I. *HILL* AND *NELSON* AND THEIR EFFECT ON THE HABEAS CORPUS-SECTION 1983 "BOUNDARY"

A. The Habeas Corpus-Section 1983 "Boundary"

Before *Nelson v. Campbell* was decided in 2004, it was generally accepted that federal method-of-execution claims were cognizable

[32] See infra Part I.
[33] Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 924 (2007); see infra Section II.E.
[34] Hill v. McDonough, 547 U.S. 573, 585 (2006).

only through a habeas corpus petition.[35] Courts hewed to this belief based not only on Supreme Court precedent that had hinted at this conclusion,[36] but also based on cases that marked the dividing line between habeas and Section 1983. This Section will provide a broad overview of the boundary the Supreme Court has developed between these two types of federal constitutional litigation, and will briefly discuss the one previous Supreme Court case that dealt with a Section 1983 method-of-execution challenge.

Prisoners have two primary options for challenging the actions of state officials in a federal forum: a federal habeas corpus challenge or a Section 1983 suit in federal court.[37] Since 1867, state prisoners have been able—to varying degrees—to use the writ of habeas corpus to collaterally attack their state criminal convictions.[38] Habeas corpus thus provides the broader of the two remedies, allowing a federal court to order a sentence reduction[39] or even the outright release of a prisoner in state custody.[40] That being the case, in order to protect against undue interference with state criminal justice systems, the Supreme Court[41] and Congress developed complicated rules to channel federal habeas corpus litigation,

[35] See, e.g., Fugate v. Dep't of Corr., 301 F.3d 1287, 1288 (11th Cir. 2002); Williams v. Hopkins, 130 F.3d 333, 336–37 (8th Cir. 1997); In re Sapp, 118 F.3d 460, 462–63 (6th Cir. 1997); Reid v. Johnson, 333 F. Supp. 2d 543, 550 n.12 (E.D. Va. 2004).

[36] Gomez v. U.S. Dist. Court, 503 U.S. 653, 653–54 (1992) (per curiam).

[37] Heck v. Humphrey, 512 U.S. 477, 480 (1994) ("Both [habeas and Section 1983] provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials, but they differ in their scope and operation."). While state and federal courts have concurrent jurisdiction over § 1983 suits, Felder v. Casey, 487 U.S. 131, 147 (1988) (citing Patsy v. Bd. of Regents, 457 U.S. 496, 506–07 (1982)), this Note will focus on § 1983 suits in federal courts.

[38] Felker v. Turpin, 518 U.S. 651, 659–60 (1996); Schneckloth v. Bustamonte, 412 U.S. 218, 255–56 (1973) (Powell, J., concurring).

[39] Preiser v. Rodriguez, 411 U.S. 475, 487–88 (1973).

[40] Id. at 484 ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.").

[41] See, e.g., Teague v. Lane, 489 U.S. 288, 311–16 (1989) (establishing harsh rules for when a habeas applicant could benefit from a "new" rule of law); Wainwright v. Sykes, 433 U.S. 72, 86–88 (1977) (significantly restricting the ability to raise a procedurally defaulted claim in a habeas petition); Stone v. Powell, 428 U.S. 465, 492–94 (1976) (foreclosing habeas challenges regarding alleged Fourth Amendment violations).

culminating with the passage of the federal Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[42]

In contrast, Section 1983 is narrower, limited to situations where the prisoner seeks damages or injunctive relief that do not implicate the validity or duration of the inmate's sentence.[43] Thus, a key difference between the two doctrines is that a habeas corpus petition inherently requires a federal court to review and perhaps even overturn the final judgment of a state criminal court, raising particularly acute issues of federalism and comity.[44] But Section 1983 does not as sharply implicate these issues because the finality of a state-court judgment is rarely at issue. Where it is, comity and federalism are preserved by applying state preclusion law to the later federal Section 1983 civil suit.[45]

Recognizing that litigants could use Section 1983 to make an end-run around the more restrictive habeas doctrines, the Supreme Court established a boundary between the two, starting with *Preiser v. Rodriguez* in 1972. There the Court explicitly rejected the plaintiff's argument that Section 1983 should permit him immediate access to federal court and allow him to avoid habeas cor-

[42] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of the U.S.C.). The AEDPA was aimed at curbing the "seemingly endless proceedings that have characterized capital litigation." Baze v. Rees, 128 S. Ct. 1520, 1542 (2008) (Alito, J., concurring); see also Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases and 'to further the principles of comity, finality, and federalism.'" (citation omitted) (quoting Williams v. Taylor, 529 U.S. 420, 436 (2000))).

[43] Heck, 512 U.S. at 486–87. Where such a damages action does implicate the validity of the prisoner's sentence, though, the so-called *Heck* rule requires that the inmate show a favorable termination of his conviction or sentence in order to proceed in a § 1983 action. Id.

[44] See Boumediene v. Bush, 128 S. Ct. 2229, 2268 (2008) ("[W]here [habeas] relief is sought from a sentence that resulted from the judgment of a court of record . . . considerable deference is owed to the court that ordered confinement."). Other habeas rules have developed in a similar fashion, such as limits on federal habeas evidentiary hearings and a strict statute of limitations. See infra Part II.

[45] See Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85–87 (1984) (finding that claim preclusion applies to federal Section 1983 actions based on previously litigated state court claims, provided that a state court would be claim precluded as a matter of state preclusion law); Allen v. McCurry, 449 U.S. 90, 105 (1980) (holding that state court decisions have issue preclusive effect on later Section 1983 actions in federal court, again provided that a state court would be precluded by that decision as a matter of state preclusion law).

pus's exhaustion requirement.[46] Instead, the Court held, habeas and its exhaustion requirement applied even where only a reduction in sentence was sought, in order "to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors."[47] Over a series of cases following *Preiser*, the Court evolved, at least in theory, a relatively clear dividing line: a suit that implicates the fact or duration of a prisoner's sentence must be brought as a habeas action, whereas a suit that challenges conditions of confinement can be brought as a Section 1983 action.[48]

Prior to *Hill* and *Nelson*, lower federal courts viewed method-of-execution challenges as falling on the habeas side of this boundary, characterizing them as affecting the "sentence itself."[49] They based this conclusion not only on cases like *Preiser* and *Heck v. Humphrey*, but also on an earlier Supreme Court case addressing a Section 1983 method-of-execution challenge. In 1992, the Ninth Circuit permitted an inmate to use Section 1983 to challenge California's use of the gas chamber. The Supreme Court dismissed the suit as untimely, avoiding the question of whether Section 1983 was an appropriate vehicle for the suit. But the Court strongly indicated that the suit was the functional equivalent of a successive habeas petition, finding that the prisoner had shown no "cause" for failing to raise the issue in one of his four previous federal habeas petitions.[50]

B. The Hill *and* Nelson *Decisions*

It was against this backdrop that the Court decided *Hill* and *Nelson*. By allowing Section 1983 method-of-execution challenges,

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[46] Preiser v. Rodriguez, 411 U.S. 475, 490 (1973); see infra Section II.E.

[47] *Preiser*, 411 U.S. at 490.

[48] See, e.g., Muhammad v. Close, 540 U.S. 749, 750–51 (2004); Edwards v. Balisok, 520 U.S. 641, 645–46 (1997); Heck v. Humphrey, 512 U.S. 477, 481–83 (1994); *Preiser*, 411 U.S. at 487–90.

[49] See, e.g., Fugate v. Dep't of Corr., 301 F.3d 1287, 1288 (11th Cir. 2002); Williams v. Hopkins, 130 F.3d 333, 336–37 (8th Cir. 1997); In re Sapp, 118 F.3d 460, 462–63 (6th Cir. 1997); Reid v. Johnson, 333 F. Supp. 2d 543, 550, 550 n.12 (E.D. Va. 2004).

[50] Gomez v. U.S. Dist. Court, 503 U.S. 653, 653 (1992) (per curiam).

these two cases permitted the precise end-run around habeas that once was understood to be barred. Inmates could now make an immediate Section 1983 challenge to a state's lethal injection protocol, even where they had already litigated their first federal habeas petition.

In *Nelson v. Campbell*, an inmate alleged that Georgia's planned use of a "cut-down" procedure to access his veins (compromised by a lifetime of intravenous drug use) violated the Eighth Amendment ban on cruel and unusual punishment.[51] Filed just three days before his scheduled execution, the U.S. District Court and the U.S. Court of Appeals for the Eleventh Circuit both dismissed the claim as constituting an impermissible second or successive habeas petition, barred by the AEDPA.[52]

The Supreme Court disagreed, holding that Section 1983 was an appropriate vehicle for this challenge. Noting that this challenge to the cut-down procedure was similar to an ordinary Section 1983 claim of deliberate indifference to medical needs, the Court held that "[m]erely labeling something as part of an execution procedure is insufficient to insulate it from a § 1983 attack."[53]

But, refusing to allow a broader Section 1983 challenge to lethal injection, the Court set a number of limits on such challenges. If the particular procedure in question was statutorily required or if, as a factual matter, the inmate was unwilling or unable to concede acceptable alternatives, then there would be a "stronger argument" that habeas must be used, in that such a challenge would implicate the viability of the death sentence itself, rather than a step in effectuating it.[54] Thus, lower courts were to focus on whether the plaintiff's challenge to the cut-down "*necessarily* prevent[s] [the State] from carrying out its execution."[55] In addition, lower courts were not to allow such suits if they constituted delaying tactics, and were to consider among the equitable balancing factors the State's

[51] A "cut-down" procedure is the method by which prison personnel in *Nelson* proposed to gain access to the inmate's veins —compromised by years of intravenous drug use—through a two-inch incision in the inmate's arm or leg. In *Nelson*, the state provided "no assurance that a physician would perform or even be present for the procedure." Nelson v. Campbell, 541 U.S. 637, 640–41 (2004).

[52] Id at 642.

[53] Id. at 644–45.

[54] Id. at 645.

[55] Id. at 647.

"strong interest in proceeding with its judgment."[56] Finally, the Court also noted that because these suits are to be considered conditions of confinement cases under Section 1983, the Prison Litigation Reform Act of 1995 ("PLRA")[57] remains an independent limitation on them.[58]

Where *Nelson* cracked open the door to Section 1983 method-of-execution claims, *Hill v. McDonough* pushed it wide open. Again filed virtually on the eve of the sentence being carried out,[59] *Hill* involved a far broader Section 1983 challenge to lethal injection, this time concerning the three-drug cocktail used by Florida. The lower courts in the Eleventh Circuit found *Nelson* inapplicable and dismissed the case as being the "functional equivalent" of a successive habeas petition.[60]

Finding *Nelson* controlling, the Supreme Court disagreed, allowing the Section 1983 challenge to the three-drug cocktail,[61] largely because the state could proceed with the execution through other

[56] Id. at 649–50 (quoting Gomez v. U.S. Dist. Court, 503 U.S. 653, 654 (1992) (per curiam)).

[57] See infra Part II.E.

[58] *Nelson*, 541 U.S. at 650.

[59] Hill v. McDonough, 574 U.S. 573, 578 (2006) (noting that Hill brought his § 1983 claim four days before his date of execution). In fact, Hill's challenge was so last minute that he was actually strapped to a gurney awaiting execution when the Supreme Court granted certiorari and issued a stay. Gibeaut, supra note 16.

[60] *Hill*, 574 U.S. at 578. For a full explanation of the habeas successive petition limitations, see infra Part II.B.

[61] The "three-drug cocktail" refers to the standard three-drug sequence used by thirty of the thirty-six states that sanction lethal injection, as well as the federal government. Baze v. Rees, 128 S. Ct. 1520, 1527 (2008). The first drug, sodium thiopental, is intended to induce "a deep, comalike unconsciousness when given in the amounts used for lethal injection." Id. The second drug, pancuronium bromide, is a neuromuscular blocking agent that induces paralysis. Kreitzberg & Richter, supra note 8, at 454. The third and final drug, potassium chloride, causes cardiac arrest. Id. In *Baze*, the inmates conceded that if administered properly, this sequence will result in a "humane and constitutional" death. *Baze*, 128 S. Ct. at 1530. Problems arise when the execution is "botched" for various reasons. See supra note 8. For example, potassium chloride "activates the nerves in the inmate's veins before it causes the heart to stop," which is "excruciatingly painful." Kreitzberg & Richter, supra note 8, at 491. And the second drug, pancuronium bromide, totally paralyzes the inmate. Id. at 493. Thus, "[a]n inmate who is not properly anaesthetized by the sedative remains conscious, but the paralysis caused by the pancuronium bromide prohibits any verbal or physical communication while the inmate slowly suffocates to death." Id.; see also Shah, supra note 6, at 1105–06.

methods or alternative chemical combinations.[62] Thus "[u]nder these circumstances a grant of injunctive relief could not be seen as barring the execution of Hill's sentence."[63] The Court concluded by emphasizing again that lower courts must guard against dilatory filings meant only to delay executions, primarily by strictly applying the normal equitable relief factors.[64]

Allowing Section 1983 method-of-execution challenges has profound doctrinal implications for death penalty litigation, presenting litigants with both advantages and limitations. On the one hand, where a state court adjudicates a method-of-execution claim on direct review, a later federal Section 1983 suit will potentially be precluded,[65] an effect largely absent under habeas corpus (provided statutory and judge-made habeas restrictions are surmounted). Limited only to method-of-execution challenges in the capital post-conviction setting, Section 1983 holds out no hope for overturning the inmate's conviction, unlike habeas corpus.

At the same time, though, Section 1983 avoids many of the restrictions imposed under habeas corpus.[66] For example, in virtually every case since *Hill*, the inmate has already exhausted all of his direct and collateral appeals, including one or more federal habeas corpus petitions. The Supreme Court and Congress (through the AEDPA) have made subsequent habeas petitions extremely difficult, even if there is a new factual or legal predicate for the challenge. By making Section 1983 available, *Hill* reopens the door to the federal courts for inmates to assert new factual or legal claims, a door largely closed by habeas corpus rules.

II. THE UNREALIZED ADVANTAGES OF SECTION 1983

Part II of this Note will examine the clear procedural advantages of Section 1983 that *Hill* ought to have made available over five important habeas doctrines: (1) the rules regarding retroactivity

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[62] *Hill*, 574 U.S. at 581.

[63] Id. Importantly, the Court also soundly rejected the state's contention that an inmate must propose a satisfactory alternative, characterizing such a requirement as an unacceptable heightened pleading requirement. Id. at 582.

[64] Id. at 584–85.

[65] Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85 (1984); Allen v. McCurry, 449 U.S. 90, 105 (1980).

[66] Berman, supra note 16, at 326.

and procedural default; (2) the rule against successive petitions; (3) the barriers to obtaining a full evidentiary hearing; (4) the strict habeas timing restrictions; and (5) the habeas corpus "total exhaustion" rule. This Part will also show that, with the exception of a few key rulings such as *Harbison v. Little*,[67] *Morales v. Tilton*,[68] and *Taylor v. Crawford*,[69] to date, *Hill* has had little real impact. This is in part because decisions like *Cooey v. Strickland*[70]—whose approach has been followed by courts in the Fifth, Eighth, Tenth, and Eleventh Circuits—depart from applicable Section 1983 principles, instead treating the challenges as if bound by previously applicable habeas doctrine.

A. Hill *and Habeas Corpus Rules Regarding Retroactivity and Procedural Default*

Unlike in habeas corpus claims, the typical Section 1983 action is filed with no prior state court action related to the claim or issue at stake and thus has no impact on the finality of a state court judgment. In cases where a final state court judgment is at issue (in the *Hill* context, a conviction and sentence), Section 1983 doctrine protects the finality of that judgment in two ways. First, if the state court adjudicated the method-of-execution issue, and applicable state preclusion law would bar a later state court suit, a federal court is similarly precluded by virtue of the Full Faith and Credit

[67] 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007); see also McNair v. Allen, Nos. 2:06-cv-00695-WKW, 2:06-cv-00919-WKW, 2007 WL 4106483, at *2 (M.D. Ala. Nov. 16, 2007) (noting that a trial date was set and discovery was complete, but putting the case on hold pending both the resolution of *Baze* and a 45-day reprieve ordered by the Alabama governor to evaluate that state's protocol).

[68] 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006). This case effectively halted the use of lethal injection in California and prompted Governor Schwarzenegger to convene a review of the state's procedures and policies. Greer, supra note 17, at 776 (asserting that *Hill* prompted an "unprecedented four-day hearing on the constitutionality of California's lethal injection protocol"); Kreitzberg & Richter, supra note 8, at 479–99 (analyzing the *Morales* decision in detail); Mottor, supra note 17, at 290–96 (analyzing the *Morales* decision).

[69] No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006), vacated, 487 F.3d 1072, 1085 (8th Cir. 2007); see also Mottor, supra note 17, at 296–99 (describing the *Taylor* district court decision).

[70] 479 F.3d 412 (6th Cir. 2007); see supra notes 19–20 and accompanying text.

Act.[71] Second, even where the state criminal system has not yet addressed the method-of-execution issue, the finality of the judgment is still protected by the *Preiser* and *Heck* rules.[72] *Hill*, for instance, conditioned its allowance of the Section 1983 action against Florida's three-drug cocktail on the fact that it "could not be seen as barring the execution of Hill's sentence" given that Florida did not statutorily mandate its lethal injection protocol. Florida could execute him by another method or by an alternate chemical combination.[73]

Habeas corpus is different. Because habeas petitioners are required to exhaust the full state direct review process, habeas corpus inherently involves a federal court reviewing and potentially even overturning a state-court judgment, which in turn sharply implicates federalism and comity concerns. These concerns have prompted the development of a variety of rules aimed at preserving the finality of state court judgments and preventing federal courts from unduly interfering with state criminal justice systems.[74]

This Section will examine two of these habeas corpus rules and will show that courts unjustifiably continue to apply them to *Hill* challenges. Such application fails to recognize that these civil rights actions inherently do not implicate the finality of state court judgments: "[The inmate's] challenge, even if successful, does not foreclose his execution. He will be put to death for his crime."[75] Rather, a Section 1983 method-of-execution challenge will at most delay the execution while the state revises its lethal injection protocol.

[71] 28 U.S.C. § 1738; see Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 80–81 (1984); Allen v. McCurry, 449 U.S. 90, 97–98 (1980).

[72] See supra Part I.A.

[73] Hill v. McDonough, 547 U.S. 573, 580–81 (2006); see also Denno, supra note 8, at 145 tbl.10 & n.12 (cataloguing states that allow a "fallback" method of execution that can be employed if the primary method is struck down); Justin B. Shane, Note, Nelson v. Campbell, 124 S. Ct. 2117 (2004), 17 Cap. Def. J. 107, 112–13 (2004) (comparing Virginia, where there is no codified procedure for whether a doctor must be present, with Alabama, which statutorily mandates who must be present at an execution).

[74] McClesky v. Zant, 499 U.S. 467, 491 (1991) ("Finality has special importance in the context of a federal attack on a state conviction. Reexamination of state convictions on federal habeas 'frustrate[s] . . . 'both the States'' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" (quoting Murray v. Carrier, 477 U.S. 478 , 487 (1986)) (internal citations omitted)).

[75] Rutherford v. McDonough, 466 F.3d 970, 981 (11th Cir. 2006) (Wilson, J., dissenting).

1. The Habeas Rule Against Retroactivity

Under the landmark habeas corpus case, *Teague v. Lane*, habeas petitioners may not avail themselves of a "new" rule of law—defined as a rule that was not dictated by precedent at the time their conviction was final—unless they meet one of two exceptions.[76] This rule preserves finality by preventing a federal court from overturning the decision of a state judge who reasonably relied on then-existing law.[77]

The two exceptions to this rule are extremely narrow. An inmate must either show that the rule placed certain types of conduct beyond the power of state courts to regulate,[78] or he must show that the new rule altered a watershed rule of criminal procedure that fundamentally affects the accuracy of decisionmaking.[79]

Section 1983 incorporates no analogous rule. Quite the contrary: Section 1983 qualified immunity doctrine is expressly premised on allowing later litigants to benefit from new constitutional rules forged by those who have gone before them.[80] In other words, whereas habeas doctrine insulates state court judgments from later Supreme Court constitutional rulings, Section 1983 doctrine allows later litigants to immediately take advantage of such developments in constitutional law. Perhaps on this basis, many inmates have ar-

[76] 489 U.S. 288, 305–10 (1989); see also Caspari v. Bohlen, 510 U.S. 383, 389 (1994); Butler v. McKellar, 494 U.S. 407, 412 (1990).

[77] Consistent with its effect on many habeas doctrines, the AEDPA further narrowed the scope of habeas review. See 28 U.S.C. § 2254(d)(1) (2000) (preventing grant of habeas review unless the state adjudication of the prisoner's claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). But this provision applies only where the state court actually decided the constitutional issue. Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 1335 (5th ed. 2003).

[78] *Teague*, 489 U.S. at 311. This exception has been found applicable in subsequent cases. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304, 314–16 (2002).

[79] *Teague*, 489 U.S. at 311–12. This exception has never been found to apply. See, e.g., Whorton v. Bockting, 127 S. Ct. 1173, 1184 (2007) (holding that Crawford v. Washington, 541 U.S. 36, 68 (2004), and its progeny (which dramatically altered the court's Confrontation Clause jurisprudence) did not fall under this exception).

[80] See, e.g., Saucier v. Katz, 533 U.S. 194, 201 (2001) (requiring that a court deciding the issue of qualified immunity first decide whether the officer's actions constituted a constitutional violation, a process that allows the law to become "clearly established," thus barring a later claim of qualified immunity on the same basis).

gued that a late-filed *Hill* cause of action should not be considered untimely if it was filed soon after the Court decided *Hill* since, prior to that case, circuit precedent expressly barred this type of suit.

A number of courts, particularly those in the Fifth, Sixth, and Eleventh Circuits, have repeatedly rejected this argument, effectively importing the *Teague* non-retroactivity rule into *Hill* civil rights actions. In numerous cases, these circuits have held that, "[s]o long as there remains the possibility of en banc reconsideration and Supreme Court review, circuit law does not completely foreclose all avenues for relief."[81] Thus, the argument goes, despite circuit precedent clearly barring such a "legally futile" action,[82] the inmate should have filed a Section 1983 method-of-execution challenge even before *Hill*. Because he did not, the court will not excuse his untimely action.[83]

Note how closely this mirrors the *Teague* rule: Supreme Court precedent did not "dictate" that a *Hill* challenge could not be brought. Applicants facing imminent execution therefore cannot later bring a *Hill* challenge, even where they file soon after the establishment of this new avenue of relief. This stricture imports the habeas corpus "new rule" restrictions into Section 1983.

Unfortunately, this approach fails to recognize that "[l]itigants benefit from the efforts of prior litigants who shape the law every day. . . . Hill forged new precedent"[84] and "breathed life into these claims."[85] While an inmate theoretically could have filed a Section

[81] Harris v. Johnson, 376 F.3d 414, 418–19 (5th Cir. 2004).

[82] Workman v. Bredesen, 486 F.3d 896, 929 (6th Cir. 2007) (Cole, J., dissenting).

[83] See, e.g., Rutherford v. Crosby, 438 F.3d 1087, 1092–93 (11th Cir. 2006) (applying this rule even while *Hill* was still pending); see also Williams v. Allen, 496 F.3d 1210, 1213 (11th Cir. 2007); Grayson v. Allen, 491 F.3d 1318, 1322 (11th Cir. 2007); Cooey v. Strickland, 479 F.3d 412, 422 (6th Cir. 2007); Harris v. Johnson, 376 F.3d 414, 418–19 (5th Cir. 2004); Hallford v. Allen, Civil Action No. 07-0401-WS-C, 2007 WL 2683672, at *5 (S.D. Ala. Sept. 6, 2007); Arthur v. Allen, Civil Action No. 07-0342-WS-C, 2007 WL 2320069, at *3 (S.D. Ala. Aug. 10, 2007).

[84] Rutherford v. McDonough, 466 F.3d 970, 980 (11th Cir. 2006) (Wilson, J., dissenting).

[85] Workman, 486 F.3d at 927 (Cole, J., dissenting); see also Harris v. Dretke, No. 04-70020, 2004 WL 1427042, at *1 (5th Cir. June 23, 2004) (stating that the Fifth Circuit read *Gomez* as "standing for the proposition that a death row inmate may not use § 1983 to challenge the manner in which the State intends to carry out a sentence of death"); Moore v. Rees, Civil Action No. 06-CV-22-KKC, 2007 WL 1035013, at *8 (E.D. Ky. Mar. 30, 2007) ("Prior to the Supreme Court's decision in *Nelson*, the Sixth

1983 method-of-execution challenge before *Hill*, there is "no justification for holding that he was required to do so."[86] As one dissenting opinion noted, *Hill* itself was highly speculative, clearly dilatory (filed four days before his date of execution) and undeniably intended to delay his execution, and yet the Supreme Court granted certiorari and ordered the Eleventh Circuit to at least consider the possibility of hearing the challenge if the balance of equities favored it.[87]

2. Habeas Corpus Procedural Default Rules

Another important way that federal habeas preserves the finality of state court judgments is through habeas procedural default doctrine, which holds that habeas petitioners may not raise claims on which they procedurally defaulted in either state or federal court. After *Fay v. Noia* in 1963,[88] habeas doctrine was broadly forgiving of procedural default. But starting with *Wainwright v. Sykes* in 1977,[89] the Court significantly restricted an inmate's ability to raise a procedurally defaulted claim during habeas. *Wainwright* bars habeas review of a procedurally defaulted claim unless the defendant

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Circuit and most circuit courts of appeal treated all method-of-execution challenges filed under § 1983 as de facto second or successive habeas petitions."); Robin Miller, Annotation, Timeliness of Challenge, Under 42 U.S.C.A § 1983, to Constitutionality of State Executions by Lethal Injection, 22 A.L.R. 6th 19, § 2, n.2 (2007) (cataloguing the circuit split that *Hill* resolved).

[86] Cooey v. Strickland, 479 F.3d 412, 426 (6th Cir. 2007) (Gilman, J., dissenting); see also *Rutherford*, 466 F.3d at 978 (Wilson, J., dissenting) (noting that it is unrealistic to expect an inmate to bring a claim where the factual and legal predicate only became clear six days prior to the filing date); Oken v. Sizer, 321 F. Supp. 2d 658, 664 n.4 (D. Md. 2004) (making the case that pre-*Nelson* it would be unrealistic to suppose that Section 1983 was a proper vehicle and in fact excusing the inmate's delay on the issue in question).

[87] *Rutherford*, 466 F.3d at 980 (Wilson, J., dissenting).

[88] 372 U.S. 391, 398–99 (1963).

[89] 433 U.S. 72, 87–88 (1977).

can show "cause" for the default[90] and "prejudice" resulting from a refusal to hear the claim.[91]

Again, Section 1983 contains no analogue to habeas procedural default doctrine because the *Preiser* and *Heck* line of cases do not allow litigants to use Section 1983 to obtain review a final state court judgment.[92] In fact, *Hill*'s allowance for Section 1983 challenges is premised precisely on the fact that these suits do *not* implicate finality.[93] And yet, in *Jones v. Allen*, the Eleventh Circuit effectively imported habeas corpus procedural default doctrine into Section 1983.[94] In determining whether the inmate's action was timely, the court noted that the inmate had raised a method-of-execution claim challenging Alabama's electrocution protocol in his habeas corpus petition. It then asserted, "[w]hen the Alabama Legislature changed the method of execution to lethal injection, Jones could have then amended his habeas petition to challenge lethal injection as well," but he did not.[95] While this was just one factor the court considered in finding the action untimely, it nonetheless illustrates the tendency of courts to continue to apply habeas corpus doctrines that have no place in a Section 1983 challenge, in

[90] A few examples of "cause" would be attorney error serious enough to constitute ineffective assistance of counsel within the meaning of the Sixth Amendment, see, e.g., *Murray v. Carrier*, 477 U.S. 478, 488 (1986); new law or facts, see id. at 488 (subject to the *Teague* and AEDPA limitations), or interference by government officials, see, e.g., *Strickler v. Greene*, 527 U.S. 263, 283–84 (1999).

[91] The precise meaning of this prong has not been fleshed out by the Supreme Court, with the issue being addressed in only one case. See Alan W. Clarke, Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two), 30 U. Rich. L. Rev. 303, 333–34 (1996). In *United States v. Frady*, the Court held that the inmate must show that the procedural errors at his trial "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." 456 U.S. 152, 170 (1982); see also Fallon, Jr., et al., supra note 77, at 1379 (discussing the fact that only three cases after *Wainwright* address this issue and that *Frady* is the "fullest" discussion of it). The AEDPA adds further restrictions that apply if states satisfy certain statutory standards for providing state post-conviction counsel to inmates. 28 U.S.C. § 2261 (2000). But where states have not met this standard, procedural defaults continue to be governed by Wainwright. Fallon, Jr., et al., supra note 77, at 1380.

[92] See supra Part I.A (discussing the boundary between habeas corpus and § 1983).

[93] Cooey v. Strickland, 479 F.3d 412, 425 (6th Cir. 2007); see also Cooey v. Strickland, 489 F.3d 775, 776–77 (6th Cir. 2007) (Gilman, J., dissenting).

[94] 485 F.3d 635 (11th Cir. 2007).

[95] Id. at 639–40.

this case something akin to habeas corpus procedural default doctrine.[96]

B. Hill *and Habeas "Successive Petition" Limitations*

By allowing a new method-of-execution challenge after other post-conviction relief has been exhausted, *Hill*'s Section 1983 vehicle ought to be a key new opportunity for death penalty litigants. Once an inmate concludes her first federal habeas petition, the habeas rules against second or successive habeas petitions make it nearly impossible to raise method-of-execution claims based on later-revealed factual and legal predicates, such as articles in medical journals,[97] academic commentary,[98] and the successes of inmates

[96] This ruling is particularly interesting considering that other courts have held that *Hill* foreclosed bringing method-of-execution challenges through habeas corpus. See, e.g., Rachal v. Quarterman, 265 F. App'x 371, 377 (5th Cir. 2008) ("Claims challenging the method of execution cannot be raised in a habeas proceeding because they do not concern the fact or duration of a sentence."); Amman v. Thompson, No. C07-1393RAJ, 2008 WL 110506, at *2 (W.D. Wash. Jan. 7, 2008); Henness v. Bagley, No. 2:01-cv-043, 2007 WL 3284930, at *64 (S.D. Ohio Oct. 31, 2007) (finding a method-of-execution challenge against a non-statutory three-drug protocol not cognizable under habeas corpus because it did "not present a general challenge to execution by lethal injection"); Hill v. Mitchell, No. 1:98-cv-452, 2007 WL 2874597, at *17–18 (S.D. Ohio Sept. 27, 2007); Duty v. Sirmons, No. CIV-05-23-FHS-SPS, 2007 WL 2358648, at *16 (E.D. Okla. Aug. 17, 2007); Parr v. Quarterman, Civil Action No. G-07-421, 2007 WL 2362970, at *4 (S.D. Tex. Aug. 14, 2007) (asserting that *Hill* requires that method-of-execution claims be brought via § 1983 and not via habeas corpus); Beets v. McDaniel, No. 2:04-CV-00085-KJD-GWF, 2007 WL 602229, at *13 (D. Nev. Feb. 20, 2007) ("While neither *Nelson* nor *Hill* hold that habeas corpus relief is unavailable to a prisoner seeking to invalidate a particular lethal injection procedure, both cases suggest that a § 1983 claim may be the more appropriate avenue where, as in this case, the particular procedure under scrutiny is . . . not the only means by which the state is permitted to carry out the sentence."); Bustamante v. Quarterman, Civil Action No. H-05-1805, 2006 WL 3541565, at *8–9 (S.D. Tex. Dec. 6, 2006). One court even expressed doubts about whether a § 1983 claim and a habeas action could be filed in one complaint. Moeller v. Weber, 523 F. Supp. 2d 975, 976–77 (D.S.D. 2007). Thus, were a jurisdiction to follow *Jones*'s lead while also foreclosing habeas, method-of-execution challenges could be effectively foreclosed altogether.

[97] The most prominent of these was an article published in the British medical journal, *The Lancet*. Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412 (2005). This article can rightfully be credited with bringing this issue to the forefront of public consciousness, but has since been criticized by some as resting on flawed assumptions. See Baze v. Rees, 128 S. Ct. 1520, 1532 n.2 (2008) ("The [Lancet] study was widely cited around the country in motions to stay executions and briefs on the merits . . . . But shortly after the Lancet study appeared, peer responses by seven medical researchers criticized the methodology sup-

in other courts, as in *Morales v. Tilton*,[99] *Taylor v. Crawford*,[100] and *Harbison v. Little*.[101] Section 1983 is not subject to this rule and therefore should allow these inmates to take advantage of legitimate, newly revealed factual predicates. This Section will examine the habeas corpus rule against successive petitions and will show that by barring civil rights actions that are based on newly revealed facts regarding lethal injection protocols, courts are again wrongly falling back on habeas doctrines.

The Supreme Court initially was very lenient regarding second or successive habeas corpus petitions.[102] But in the 1990s, both the Court[103] and Congress[104] drastically cut back on this flexibility, virtually foreclosing an inmate's ability to bring a second or successive habeas petition. Also known as "abuse of the writ," this limit is "similar in purpose and desig[n]" to habeas procedural default doctrine,[105] and the combination of the two results in the "'qualified

porting the original conclusions." (citing Jonathan I. Groner, Inadequate Anaesthesia in Lethal Injection for Execution, 366 Lancet 1073, 1073–74 (2005))); see also *Baze*, 128 S. Ct. at 1540–41 (Alito, J., concurring); id. at 1564–65 (Breyer, J., concurring) (noting that the "Lancet Study . . . may be seriously flawed" and that not one of the briefs in that case cited it).

[98] See, e.g., Denno, supra note 17; Ewart, supra note 17; Haines, supra note 17; Wong, supra note 17.

[99] 465 F. Supp. 2d 972 (N.D. Cal. 2006).

[100] No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006), vacated, 487 F.3d 1072, 1085 (8th Cir. 2007).

[101] 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007).

[102] See Sanders v. United States, 373 U.S. 1, 15–17 (1963), abrogated by McCleskey v. Zant, 499 U.S. 467 (1991).

[103] See McCleskey v. Zant, 499 U.S. 467, 494–95 (1991) (abrogating *Sanders* and holding that a successive petition would only be permitted upon a showing of either cause and prejudice, or "that a fundamental miscarriage of justice would result from a failure to entertain the claim").

[104] See 28 U.S.C. § 2244(b)(1) (2000) (requiring dismissal of a claim presented in a prior application); § 2244(b)(2)(A) (only allowing a federal court to hear a second or successive claim that was not previously presented to a federal court where "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," or where specific strictures are met regarding later revealed factual predicates for the successive claim); § 2244(b)(3)(A) (erecting a significant procedural barrier to bringing a successive habeas petition by requiring that a federal appeals court first authorize the bringing of such a challenge before a district court may hear it).

[105] *McCleskey*, 499 U.S. at 490.

application of the doctrine of res judicata'" to habeas corpus claims.[106]

The AEDPA imposes two such restrictions. First, where an inmate already litigated a claim in a previous federal habeas petition, a federal court must dismiss that claim, without exception.[107] Under this rule, if a prisoner litigated a method-of-execution claim during his first habeas petition, he may not raise that claim in any subsequent habeas petition, no matter what new legal or factual predicate subsequently arose.

Likewise, even where the inmate did not litigate a claim during his first federal habeas petition, the AEDPA strictly limits the ability to raise it in a second or successive habeas petition. The AEDPA requires that the new claim be based either on a "new rule of constitutional law, made retroactive . . . by the Supreme Court"[108] or on new facts that could not have been discovered with due diligence.[109] In addition, the petitioner must "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[110]

Section 1983 doctrine developed quite differently. In contrast to habeas corpus's categorical bar on newly revealed facts, Section 1983 prevents suits based on newly revealed facts only where either issue or claim preclusion applies based on a prior state[111] or federal[112] judgment. This is not typically the case in method-of-

[106] Schlup v. Delo, 513 U.S. 298, 318–19 (1995) (quoting *McCleskey*, 499 U.S. at 486).

[107] 28 U.S.C. § 2244(b)(1) (2000). See generally Fallon, Jr., et al., supra note 77, at 1384–89.

[108] § 2244(b)(2)(A).

[109] § 2244(b)(2)(B)(i).

[110] § 2244(b)(2)(B)(ii). The "underlying offense" wording of this provision has created a circuit split on whether it applies to challenges related to sentencing. See Ross v. Berghuis, 417 F.3d 552, 557 n.4 (6th Cir. 2005); LaFevers v. Gibson, 238 F.3d 1263, 1267 (10th Cir. 2001). Thus, it is likewise uncertain that it would apply to a method-of-execution challenge.

[111] If an inmate has previously litigated the same method-of-execution challenge in state court, and state preclusion law dictates that a state court would be precluded by the ruling on that challenge, a federal court is similarly bound by the state court's ruling. See Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 86–87 (1984) (claim preclusion); Allen v. McCurry, 449 U.S. 90, 105 (1980) (issue preclusion).

[112] Federal common law will dictate the preclusive effect of a prior federal ruling on the same issue or claim. Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507–08 (2001). In *Hutcherson v. Riley*, the court dismissed the § 1983 claim as pre-

execution challenges, either because the issue was not raised during a prior habeas petition or state criminal proceeding, or, importantly, because newly revealed facts are at issue due to changes in the execution protocol that were made after the earlier adjudications.

For a number of reasons, such newly revealed factual predicates are especially prevalent in lethal injection challenges. First, some states have proven to be notoriously secretive and obstinate about revealing the details of their lethal injection protocols.[113] For instance, in *Oken v. Sizer*, the State repeatedly frustrated the court's efforts to obtain details of the protocol at issue and only provided them after redacting sixteen pages.[114]

In addition, states often vest their departments of corrections with virtually unlimited discretion regarding execution protocols.[115]

cluded by the previous habeas action because the Section 1983 claim essentially repeated every claim from that habeas petition (which did not include a method-of-execution challenge). No. 06-657-WS-C, 2006 WL 2989214, at *1–4 (S.D. Ala. Oct. 18, 2006); cf. Beardslee v. Woodford, 395 F.3d 1064, 1067–69 (9th Cir. 2005) (finding a § 1983 challenge coming after a habeas method-of-execution claim not to be barred by res judicata because the habeas challenge was "generic" whereas the § 1983 claims were "different").

[113] See Baze v. Rees, 128 S. Ct. 1520, 1570 n.5 (2008) (Ginsburg, J., dissenting) ("Because most death-penalty States keep their protocols secret, a comprehensive survey of other States' practices is not available."). But cf. Walker v. Epps, No. 4:07CV176-P-B, 2008 WL 2788074, at *4–5 (N.D. Miss. July 15, 2008) (rejecting the plaintiff's request to toll the statute of limitations based on fraudulent concealment by the state of the lethal injection protocol because there was no "affirmative act" of concealment by the state).

[114] 321 F. Supp. 2d 658, 660 (D. Md. 2004). This behavior offended the court enough to prompt it to hold it against the State in weighing the equitable factors to determine whether to issue a stay. Id. at 667–68; see also Cooey v. Strickland, 489 F.3d 775, 777 (6th Cir. 2007) (Gilman, J., dissenting from denial of rehearing en banc) (noting that Ohio considers some information about the lethal injection protocol non-public); Evans v. Saar, 412 F. Supp. 2d 519, 522–23 (D. Md. 2006); Denno, supra note 17, at 121–23 (recommending increased transparency in lethal injection procedures); Denno, supra note 8, at 66 (noting that courts routinely dismiss media accounts of executions, which are in fact one of the only reliable windows into these procedures and their effects); Haines, supra note 17, at 478–82 (positing that shielding the public from details of executions prevents the prevailing view of what constitutes "standards of decency" from ever evolving).

[115] See *Baze*, 128 S. Ct. at 1528 (noting that Kentucky does not specify by statute what drugs must be used, instead only generally mandating that death be caused by intravenous injection and leaving the specifics to the state's Department of Corrections); id. at 1545 (Stevens, J., concurring in the judgment) ("In the majority of States that use the three-drug protocol, the drugs were selected by unelected Department of

Because these agencies enjoy so much discretion, they may change the protocol without notice and without informing inmates or the public of the change.[116] The result is that lethal injection protocols are highly variable both within states and from state to state, each using different medical personnel, different levels of training, and different levels of guidance and specificity.[117]

Corrections officials with no specialized medical knowledge and without the benefit of expert assistance or guidance. As such, their drug selections are not entitled to the kind of deference afforded legislative decisions."); id. at 1569 (Ginsburg, J., dissenting) (noting that Kentucky left the development of the lethal injection protocol to its Department of Corrections, which copied other states without challenge); Emmett v. Johnson, 532 F.3d 291, 293 (4th Cir. 2008) (noting that Virginia statutes provide only "broad directives" and leave "development and implementation of the specific procedures for lethal injection to the discretion of the Director [of the Department of Corrections] and those he appoints to assist him"); Moeller v. Weber, No. Civ. 04-4200, 2008 WL 1957842, at *1 (D.S.D. May 2, 2008) (noting that South Dakota leaves the choice of chemical agents totally to the discretion of the secretary of corrections and the warden).

This was true of the very first lethal injection protocol, in Oklahoma, which pioneered the method not out of concern for humane treatment of the condemned, but rather because the electric chair needed an expensive repair and because the construction of a gas chamber was deemed too expensive. Kreitzberg & Richter, supra note 8, at 453. Thus, the first lethal injection statute—passed with "[n]o committee hearings, research, or expert testimony"—provided no guidance on the cocktail to be used, leaving this task to a doctor who today admits that he did no research in concocting it. Id. at 453–54; see also Robin Miller, Annotation, Substantive Challenges to Propriety of Execution by Lethal Injection in State Capital Proceedings, 21 A.L.R. 6th 1, § 2 (2007).

[116] See *Cooey*, 489 F.3d at 776 (Gilman, J., dissenting from denial of rehearing en banc); Cooey v. Strickland, 479 F.3d 412, 427–28 (6th Cir. 2007) (Gilman, J., dissenting) (noting that the fluid nature of the Ohio protocol is important because Ohio does not require the Ohio Department of Rehabilitation and Correction ("ODRC") to publish changes and the ODRC has a policy of keeping some of the information nonpublic). But see id. at 423 (majority opinion) (holding that the "fluid nature of [the] protocol" is not enough to make a late challenge timely). See generally Denno, supra note 8, at 116–25; Kreitzberg & Richter, supra note 8, at 461–62.

[117] As previously noted, this is one of the main reasons *Baze v. Rees*, decided by the Supreme Court in April of 2008, "may resolve some of the controversy [surrounding lethal injection] in the short term. . . . [while] the long-term picture is much more unclear." Shah, supra note 6, at 1102. Shah also notes that "[t]he Court's splintered decision does not make the task facing lower courts much easier, and litigation on these issues is certain to continue." Id. at 1141; see also Harbison v. Little, 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007) ("[*Morales* and *Taylor*] demonstrate that, although lethal injection is the most prevalent form of execution, it is not sacrosanct, and that the constitutionality of a three-drug protocol is dependent on the merits of that protocol."); Note, supra note 17, at 1309–10 (discussing unique challenges that are associated with lethal injection litigation).

Assuming a litigant challenged her method-of-execution in her first habeas petition, without Section 1983, she would never again be able to challenge a lethal injection protocol, no matter how different it had become (because of agency discretion) or how many new facts about it had been revealed (which previously had been unavailable because of agency secrecy). The successive petition rule would bar it outright. By avoiding this stricture, *Hill* allows a significant opportunity that was not available under the previous habeas-only regime.

Ironically, while complaining about *Hill* and *Nelson*, one state official precisely captured their value: they allow inmates to "refocus their complaints every time a state changes its execution protocol."[118] Yet, courts frustrate this core advantage of *Hill*'s method-of-execution vehicle when they reflexively reject the argument that an earlier challenge was infeasible because the factual predicate for that argument was not in place.[119]

C. Hill *and Habeas Evidentiary Hearing Limitations*

Another important difference between habeas corpus and Section 1983 is that the latter allows for full evidentiary hearings on the merits of a petitioner's claim. A further promise of the *Hill* vehicle, then, is that it should allow prisoners to adjudicate more fully the merits of a method-of-execution claim. In the few cases where courts have heard such challenges, the *Hill* vehicle allows prisoners to realize this evidentiary advantage.

Habeas corpus places strict limits on evidentiary hearings. As one recent study revealed, after the passage of the AEDPA, courts

[118] John Gibeaut, It's All In the Execution: Prosecutors Fear Limitless Civil Rights Complaints Over Lethal Injection Procedure, 92 A.B.A. J. 17, 17 (2006) (discussing the reaction of prosecutors, including Kevin Newsom, the prosecutor in *Nelson*, who later filed an amicus brief in *Hill*).

[119] See, e.g., Rutherford v. McDonough, 466 F.3d 970, 975–76 (11th Cir. 2006) (rejecting the Lancet article as an insufficient new factual predicate); Arthur v. Allen, No. 07-0341-WS-C, 2007 WL 2320069, at *2–3 (S.D. Ala. Aug. 10, 2007) (rejecting the assertion that the confidentiality of a protocol is sufficient reason to allow a late-filed challenge); Diaz v. State, 945 So. 2d 1136, 1144 (Fla. 2006). But cf. Williams v. Allen, 496 F.3d 1210, 1215 n.1 (11th Cir. 2007) (Barkett, J., dissenting) (disagreeing with the dismissal in part because "[r]ecent developments in medical research have raised questions about the degree of pain and suffering caused by the method of lethal injection that some states, including Alabama, use" (citing Koniaris et al., supra note 97)).

are conducting only about half as many evidentiary hearings as before.[120] This is partly because under habeas, federal courts are bound by specific rules of deference regarding state court fact-finding and application of law to fact: the AEDPA requires that federal courts presume state court fact-finding to be correct, a presumption that the inmate must overcome by a showing of clear and convincing evidence.[121]

In addition, the Supreme Court and Congress both have imposed increasingly strict barriers to federal habeas evidentiary hearings that allow additional evidence to be introduced. Whereas in the past the Court focused on when an evidentiary "hearing *must* be held,"[122] later cases applied the "cause and prejudice" or "fundamental miscarriage of justice" standards for evidence not previously developed by the inmate in state court.[123] The AEDPA further tightened this requirement, precluding an evidentiary hearing in federal habeas review unless the inmate can satisfy two strict requirements.[124]

Section 1983 has the clear advantage here because it allows both for full discovery under Federal Rule of Civil Procedure 26[125] and for the evidentiary hearings that can subsequently result from such

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[120] See Nancy J. King et al., Final Technical Report: Habeas Litigation in U.S. District Courts 60 (2007), available at http://law.vanderbilt.edu/article-search/article-detail/download.aspx?id=1639 (noting that pre-AEDPA, 19% of capital federal habeas petitions received an evidentiary hearing, compared with only 9.5% after enactment of the AEDPA).

[121] 28 U.S.C. § 2254(d)(2), (e)(1) (2000); see also Terry Williams v. Taylor, 529 U.S. 362, 386 (2000) (holding that federal habeas courts must also defer to state court applications of law to fact).

[122] Fallon, Jr., et al., supra note 77, at 1355–56 (discussing Brown v. Allen, 344 U.S. 443 (1953), and Townsend v. Sain, 372 U.S. 293 (1963)).

[123] Id. at 1356 (discussing Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)).

[124] 28 U.S.C. § 2254(e)(2) (2000). This provision holds:

> the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

[125] Fed. R. Civ. P. 26.

discovery. For instance, in *Harbison*, the court held a full bench trial after the publication of Tennessee's revised lethal injection protocol, including testimony from court- and litigant-appointed experts, review of academic articles, and consideration of the laws and execution protocols of other states.[126] In *Morales v. Tilton*, the court conducted five days of formal hearings and a site visit to California's execution chamber, reviewing virtually every aspect of that state's lethal injection protocol through "a mountain of documents, including hundreds of pages of legal briefs, expert declarations, and deposition testimony . . . ."[127] Finally, after the appeals court ruled that its initial hearing was inadequate, the district court in *Taylor v. Crawford* engaged in thirty days of discovery and conducted a full two-day hearing on Missouri's lethal injection protocol.[128] Likewise, a number of courts have been engaged in detailed discovery disputes related to *Hill* challenges.[129] Thus, at least in some limited but important instances to date, *Hill* provides this advantage over habeas corpus.

D. Hill *and Habeas Timing Requirements*

The most important bar to *Hill* suits to this point has been the tendency of courts to find such suits untimely under a variety of doctrines (not all of which mirror habeas rules[130]), including the application of a strict habeas-like statute of limitations. This Section will briefly discuss the habeas corpus timeliness rules and note examples where courts inappropriately apply parallel rules in *Hill* Section 1983 injunctive relief cases, a context not amenable to the habeas corpus statute of limitations approach.

[126] Harbison v. Little, 511 F. Supp. 2d 872, 873–76 (M.D. Tenn. 2007).
[127] 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006).
[128] No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *1–2 (W.D. Mo. June 26, 2006), vacated, 487 F.3d 1072 (8th Cir. 2007).
[129] See, e.g., Moeller v. Weber, No. Civ. 04-4200, 2008 WL 1957842, at *4 (D.S.D. May 2, 2008) (ordering in camera review of South Dakota's execution protocol, which the state had refused to turn over to the plaintiff); Moore v. Rees, No. 06-CV-22-KKC, 2007 WL 1035013, at *9–17 (E.D. Ky. March 30, 2007) (issuing an opinion that included eight pages dealing with discovery issues); Evans v. Saar, 412 F.Supp.2d 519, 522–23 (D. Md. 2006) (imposing some limits during in camera review, but nonetheless ordering production of a redacted version of Maryland's execution log and of post mortem reports regarding the previous three executions in that state).
[130] See infra at Part III.A.

Like almost every other area of habeas corpus law, the AEDPA significantly altered the timing requirements applicable to habeas petitions. In fact, prior to its passage in 1996, there was no statute of limitations on habeas corpus.[131] Instead, "[c]ourts invoked the doctrine of 'prejudicial delay' to screen out unreasonably late filings."[132] The AEDPA took an entirely different tack, creating a one-year period of limitation, which runs from the latest of four different dates[133] and which is subject to various tolling rules and limitations.[134] While some courts apply equitable tolling[135] and this provision does have a new facts exception,[136] both exceptions are difficult to meet and this time limitation is therefore quite strict.[137]

While Section 1983 damages actions are subject to a statute of limitations,[138] generally speaking, Section 1983 injunctive relief actions should not be. Statutes of limitations apply to damages actions to remedy past injuries and "cannot attach from an act that has yet to occur and a tort that is not yet complete."[139] Yet in a

[131] Day v. McDonough, 547 U.S. 198, 202 n.1 (2006) ("Until AEDPA took effect in 1996, no statute of limitations applied to habeas petitions.").

[132] Id.

[133] 28 U.S.C. § 2244(d)(1) (2000). Generally, "the operative date is that 'on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.'" Fallon, Jr., et al., supra note 77, at 1298 (quoting § 2244(d)(1)(A)).

[134] See, e.g., Carey v. Saffold, 536 U.S. 214, 220–21 (2002) (holding a pending application for State-court collateral review to be a basis for tolling the statute of limitations); Duncan v. Walker, 533 U.S. 167, 172 (2001) (holding that "a properly filed federal habeas petition does not toll the limitation period").

[135] The Supreme Court has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." Pace v. DiGuglielmo, 544 U.S. 408, 418 n.8 (2005).

[136] See § 2244(d)(1)(D).

[137] Regarding equitable tolling, see, e.g., Burger v. Scott, 317 F.3d 1133, 1141 (10th Cir. 2003) ("[W]e have limited equitable tolling of the one-year limitations period to 'rare and exceptional' circumstances." (quoting Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000))); Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998). Regarding the "new facts" exception, see, e.g., Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000) ("Time begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance.").

[138] This statute of limitations generally is the state's period of limitation for personal injury actions. Wallace v. Kato, 127 S. Ct. 1091, 1094–95 (2007) (damages action); City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 123 n.5 (2005); Owens v. Okure, 488 U.S. 235, 240–41 (1989); Wilson v. Garcia, 471 U.S. 261, 275–76 (1985).

[139] McNair v. Allen, Nos. 2:06-cv-00695-WKW, 2:06-cv-00919-WKW, 2007 WL 4106483, at *4 (M.D. Ala. Nov. 16, 2007) (citing Grayson v. Allen, 499 F. Supp. 2d

number of cases, this is precisely the rule courts are importing from habeas corpus, applying a strict statute of limitations to *Hill* method-of-execution claims.

In *Cooey v. Strickland*, the court mandated that inmates have two years (based on the state's general personal injury statute of limitations) to file an action once the claim is ripe.[140] This "ripeness" triggering event is one "that should have alerted the typical lay person to protect his or her rights,"[141] which in a method-of-execution challenge is defined as "conclusion of direct review in the state court or the expiration of time for seeking such review."[142] By comparison, the Eleventh Circuit recently held that the statute of limitations starts to run the date the inmate selects his method of execution.[143]

Note again how directly the *Cooey* approach parallels the AEDPA's timing provisions: 28 U.S.C. Section 2244(d)(1)(A) mandates that the statute of limitations is triggered when "the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." In fact, *Cooey* explicitly adverted to and cited the AEDPA, holding that because *Hill* challenges fall at "the margins of habeas," Supreme Court habeas doctrine and the AEDPA "apply with equal force in this case."[144] Courts taking this approach are not simply echoing habeas doctrine; they are applying it directly.

1228, 1235 (M.D. Ala. 2007)); see also Walker v. Epps, No. 08-70028, 2008 WL 2796878, at *6 (5th Cir. July 21, 2008) (King, J., dissenting) (cautioning against applying a statute of limitation to method-of-execution claims because "to the extent that the Supreme Court has discussed the measures available to federal courts to protect the states against dilatory or speculative § 1983 method-of-execution challenges that threaten to disrupt the states' legitimate interest in carrying out executions, it has spoken purely in terms of the requirements for equitable relief"); Cooey v. Strickland, 489 F.3d 775, 778 (6th Cir. 2007) (Gilman, J. dissenting from denial of rehearing en banc); Rutherford v. McDonough, 466 F.3d 970, 979 (11th Cir. 2006) (Wilson, J., dissenting); Cooey v. Strickland, No. 2:04-cv-1156, 2008 WL 471536, at *8–15 (S.D. Ohio Feb. 15, 2008); Jones v. Allen, 483 F. Supp. 2d 1142, 1147–51 (M.D. Ala. 2007).

[140] 479 F.3d 412, 416 (6th Cir. 2007).

[141] Id. (citing Trzebuckowski v. City of Cleveland, 319 F.3d 853, 856 (6th Cir. 2003)).

[142] Id. at 421–22.

[143] McNair v. Allen, 515 F.3d 1168, 1170 (11th Cir. 2008) (barring the action under a statute of limitations).

[144] *Cooey*, 479 F.3d at 420–21 (citing numerous Supreme Court cases applying the AEDPA statute of limitations); see also Crowe v. Donald, 528 F.3d 1290, 1292–93 (11th Cir. 2008); McNair v. Allen, 515 F.3d 1168, 1175 (11th Cir. 2008) (barring the

E. Hill *and the Habeas "Total Exhaustion" Requirement*

Both habeas corpus and prisoner-initiated Section 1983 actions entail exhaustion requirements, but these requirements are quite different in both their nature and scope. This final Section of Part II will briefly compare habeas exhaustion requirements with those of Section 1983 Prison Litigation Reform Act of 1995 ("PLRA") in order to show that this is yet another important advantage *Hill* affords capital post-conviction litigants. Because the Supreme Court recently clarified that habeas total exhaustion does not apply to Section 1983 and the PLRA, this is one area where courts categorically cannot prevent litigants from realizing that advantage. More importantly, this also indicates a broader unwillingness on the part of the Court to allow habeas corpus doctrines to be imported into Section 1983 civil rights actions.

Exhaustion has been required under habeas corpus in some form since the late 1800s,[145] and like habeas doctrine generally, this requirement has become increasingly strict in the modern age. Today, habeas corpus incorporates what has come to be known as a "total exhaustion" requirement, which requires that all habeas applicants have "exhausted the remedies available in the courts of the

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action under a statute of limitations and noting that "[i]n considering when a method-of-execution claim accrues under § 1983, we are especially mindful of [the AEDPA]"); Nooner v. Norris, 491 F.3d 804, 808 (8th Cir. 2007) (stating that a claim becomes ripe when: (1) direct review, including denial of certiorari, is final; (2) lethal injection is established as the method of execution; (3) the state's lethal injection protocol is known; and (4) no state administrative remedies are available); Walker v. Epps, No. 4:07CV176-P-B, 2008 WL 2788074, at *1–6 (N.D. Miss. July 15, 2008) (finding, on first impression in the Fifth Circuit, that the Mississippi three-year personal injury statute of limitations barred the inmates' method-of-execution challenges); cf. Anderson v. Evans, No. CIV-05-0825-F, 2006 WL 83093, at *2 (W.D. Okla. Jan. 11, 2006) (finding that the statute of limitations did not bar the challenge because the current lethal injection protocol had been revealed within two years of the filing date).

Lee Kovarsky recently argued that adverting to the "legislative purpose" of the AEDPA has caused courts to "erect unintended obstacles to habeas relief with alarming regularity." Kovarsky, supra note 19, at 446. Applying the AEDPA's "purpose" to a Section 1983 action, as *Cooey* did in this instance, makes even less sense. See id. at 487 & n.281.

Interestingly, a district court in the Sixth Circuit recently expressed doubt about whether *Cooey* constitutes a final judgment that binds that court regarding *Cooey* and eight inmates seeking to intervene in that suit. Cooey v. Strickland, No. 2:04-cv-1156, 2008 WL 471536, at *8–15 (S.D. Ohio Feb. 25, 2008).

[145] See Ex parte Royall, 117 U.S. 241, 251–52 (1886).

State."[146] In addition, *Rose v. Lundy* requires district courts to dismiss habeas corpus petitions containing a mix of both exhausted and unexhausted claims unless the inmate amends the complaint to delete the unexhausted claims (which later could be barred as being successive).[147] This rule is particularly stringent because it can mean the termination of any federal review where a court applies *Lundy* after the AEDPA statute of limitations has run.[148] As the Court recently explained, habeas total exhaustion is premised on the fact that "[s]eparate claims in a single habeas petition generally seek the same relief from custody, and success on one is often as good as success on another."[149]

In contrast, there is no exhaustion requirement inherent in Section 1983. In fact, this is the promise of Section 1983 and *Ex parte Young*:[150] immediate access to federal court in order to challenge allegedly unconstitutional acts of state officers. Congress has, however, imposed an exhaustion requirement on Section 1983 suits brought by prison inmates, through the PLRA.[151] While these requirements are strict,[152] they essentially amount to *administrative* exhaustion—or in other words, exhaustion of the procedures imposed within the state prison system. Given that habeas requires exhaustion of state *judicial* remedies, the two types of exhaustion are wholly distinct from one another.

In addition, because the nature of Section 1983 is quite different from habeas corpus, its exhaustion requirement is different as well. Unlike habeas, Section 1983 actions often involve multiple claims each seeking different types of relief. Thus, the Court has held that "[t]here is no reason failure to exhaust on one necessarily affects

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[146] 28 U.S.C. § 2254(b)(1)(A) (2000).

[147] 455 U.S. 509, 522 (1982).

[148] See Rhines v. Weber, 544 U.S. 269, 275 (2005).

[149] Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 924 (2007).

[150] 209 U.S. 123, 166–68 (1908).

[151] 42 U.S.C. § 1997e(a) (2000). Prior to 1980, prisoner-initiated § 1983 suits were not subject to any exhaustion requirement. Woodford v. Ngo, 548 U.S. 81, 84 (2006). And between 1980, when Congress instituted the predecessor provision to the PLRA, and 1996, exhaustion was "'in large part discretionary.'" Id. (quoting Porter v. Nussle, 534 U.S. 516, 523 (2002)).

[152] See id. at 85 (holding that prisoners must exhaust all available remedies, "even where the relief sought . . . cannot be granted by the administrative process"); Booth v. Churner, 532 U.S. 731, 739 (2001).

any other."[153] In *Jones v. Bock*, the Court emphasized this when it struck down the Sixth Circuit's effort to convert the PLRA exhaustion requirement into a heightened pleading standard and a "total exhaustion rule."[154] Specifically, that circuit had begun to expand PLRA exhaustion into something akin to habeas exhaustion by "requir[ing] courts to dismiss the entire action if the prisoner fails to satisfy the exhaustion requirement as to any single claim in his complaint."[155]

While *Nelson* makes clear that the PLRA exhaustion requirement applies to Section 1983 method-of-execution claims,[156] one court has expressed discomfort at even this more limited type of exhaustion where it prevented the court from addressing a challenge where an inmate's life was at stake. In *Evans v. Saar*, the District Court of Maryland admitted that the PLRA might have barred the action, but then refused to find that the State carried its burden on this issue, noting that it was "unprepared to decide whether Evans's failure to exhaust is attributable to his delay in filing his administrative claim or the State's delay in deciding it."[157]

In light of *Jones v. Bock*, although PLRA exhaustion has affected a number of *Hill* claims,[158] habeas exhaustion doctrine has not intruded on these challenges. Indeed, *Jones*'s distinction between habeas and Section 1983 exhaustion is important not just for its effect on specific *Hill* challenges, but also because it indicates a broader unwillingness on the part of the Court to allow habeas doctrines to be imported into Section 1983 challenges.

[153] *Jones*, 127 S. Ct. at 924.

[154] Id. at 924–26.

[155] Id. at 914.

[156] Nelson v. Campbell, 541 U.S. 637, 650 (2004). Interestingly, though, the PLRA is never mentioned in *Hill*.

[157] 412 F. Supp. 2d 519, 527–28 (D. Md. 2006).

[158] See, e.g., Walton v. Johnson, No. 2:06cv258, 2006 WL 2076717, at *5–6 (E.D. Va. July 21, 2006) (agreeing with the State that the inmate failed to follow up on his informal grievance process, thereby failing to complete "all the steps" in the grievance process in accordance with the rules, and therefore holding that the prisoner did not exhaust in compliance with the PLRA); Reid v. Johnson, 333 F. Supp. 2d 543, 552 (E.D. Va. 2004).

III. NON-HABEAS RELATED LIMITATIONS ON *HILL* CHALLENGES

The limitations that mimic previously applicable habeas doctrines are not the only ones courts are imposing. Just as courts limit *Hill* challenges by applying something akin to habeas corpus statute of limitations rules, they likewise have limited them with unduly harsh timing rules that do not stem from habeas corpus. In addition, courts of appeal have exhibited a striking tendency to exceed the applicable standard of review, making detailed findings about particular execution protocols on the simple review of preliminary injunctive relief, a review that should be governed by an abuse of discretion standard. The final Part of this Note will examine these phenomena and will propose some limited solutions to each. The Note will then conclude by explaining the promise of aggregation for solving many of the problems illustrated throughout.

A. Hill-*Challenge Timeliness Rulings*

1. The Effect of Harsh Timeliness Rulings

Both *Hill* and *Nelson* admonished litigants that federal courts "should protect States from dilatory or speculative suits."[159] But neither *Hill* nor *Nelson* categorically bans *any* delay caused by a particular Section 1983 method-of-execution challenge. To the contrary, in *Hill*, the Supreme Court stated that "[a]ny incidental delay caused by allowing Hill to file suit does not cast on his sentence the kind of negative legal implications that would require him to proceed in a habeas action."[160] In fact, the court explicitly mandated that "inmates seeking time to challenge" their method of execution are to be treated "like [any] other stay applicants."[161]

Stays of execution can be vital to allow time for both district courts to adjudicate the merits of these claims and courts of appeal to review them.[162] The Supreme Court itself entered a stay while Hill was strapped to a gurney awaiting the needle, despite the fact that Hill himself filed his challenge only *four days* before his execu-

[159] Hill v. McDonough, 547 U.S. 573, 585 (2006); see also *Nelson*, 541 U.S. at 649–50.
[160] *Hill*, 547 U.S. at 583.
[161] Id. at 584; see also *Nelson*, 541 U.S. at 649–50.
[162] See generally Slack v. McDaniel, 529 U.S. 473 (2000); Barefoot v. Estelle, 463 U.S. 880, 889 (1983).

tion date.[163] In reaching this ruling, the Court noted that a stay is an equitable remedy that courts may not grant as a matter of right. Instead, there is a "strong equitable presumption against the grant of a stay" where the challenge could have been brought earlier.[164]

A "presumption" against a stay, however strong, is *not* an outright ban. But in the Fifth, Tenth, and Eleventh Circuits, there is a strong tendency "toward mechanically denying stays according only to the length of delay between execution setting and the date of the petition"[165] such that there is a de facto ban on stays in these circuits.

For instance, in *Reese v. Livingston*, the court held that "a plaintiff cannot wait until a stay must be granted to enable him to develop facts and take the case to trial[,] not when there is no satisfactory explanation for the delay."[166] To date, not a single plaintiff in the Fifth Circuit has advanced a "satisfactory explanation" that persuaded the court to hear the challenge, regardless of the factual predicate on which the challenge was based.[167]

In *White v. Johnson*, the Fifth Circuit addressed a challenge in which the inmate did not even ask for a stay.[168] The court dismissed it as untimely, holding that the rule above applies for any "equitable relief, including permanent injunction, sought by inmates facing imminent execution."[169] And in *Kincy v. Livingston*, the court

[163] Gibeaut, supra note 16 ("Hill was strapped to a prison gurney awaiting execution when the justices accepted his case."). Likewise, Nelson filed his § 1983 challenge just three days prior to his date of execution. *Nelson*, 541 U.S. at 639.

[164] *Hill*, 547 U.S. at 584; see also Gomez v. U.S. Dist. Court, 503 U.S. 653, 654 (1992) (per curiam) ("A court *may consider* the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." (emphasis added)).

[165] Brown v. Livingston, 457 F.3d 390, 391 (5th Cir. 2006) (Dennis, J., dissenting). For examples of this tendency, see also Grayson v. Allen, 491 F.3d 1318, 1325–26 (11th Cir. 2007); Cooey v. Strickland, 479 F.3d 412, 423 (6th Cir. 2007); Arthur v. Allen, Civil Action No. 07-0341-WS-C, 2007 WL 2320069, at *2 (S.D. Ala. Aug. 10, 2007); Moreno v. Livingston, Civil Action No. H-07-418, 2007 WL 1217954, at *3 (S.D. Tex. Apr. 24, 2007).

[166] 453 F.3d 289, 291 (5th Cir. 2006).

[167] See, e.g., Berry v. Epps, 506 F.3d 402, 404 (5th Cir. 2007); *Reese*, 453 F.3d at 290–91; Kincy v. Livingston, 173 F. App'x 341, 342 (5th Cir. 2006); Hughes v. Johnson, 170 F. App'x 878, 879 (5th Cir. 2006); Smith v. Johnson, 440 F.3d 262, 263 (5th Cir. 2006); Neville v. Johnson, 440 F.3d 221, 223 (5th Cir. 2006); White v. Johnson, 429 F.3d 572, 574 (5th Cir. 2005).

[168] 429 F.3d 572 (5th Cir. 2005).

[169] Id. at 574.

noted that dilatoriness is a bar to "*any* method of execution challenge that could have been brought after [the inmate's] conviction and sentence [had become] final."[170]

The Eleventh Circuit takes a similarly hostile approach. In *Jones v. Allen*, the Eleventh Circuit dismissed a case filed before the Supreme Court declined to review the inmate's federal habeas petition, before the inmate's date of execution had been set, and soon after *Hill* had been decided.[171] Noting that the inmate should have foreseen that Alabama would set his execution date soon after his federal habeas appeal was denied (as is their custom), the Court initially made a nod to the "strong equitable presumption against . . . a stay" mandated by *Hill*.[172] But later in the opinion, it went beyond a "presumption," holding that "the proper query in this case is whether Jones could have brought his claim 'at such a time as to allow consideration of the merits without requiring entry of a stay.'"[173] The pattern of these cases is that the "strong equitable presumption" has become a rule, not a presumption.

These jurisdictions are in fact applying even harsher standards than those applicable under habeas.[174] The Supreme Court has "come close to laying down a rule that a petitioner under sentence of death is entitled to a stay of execution in connection with a first habeas petition."[175] But courts in these circuits seemingly are will-

[170] 173 F. App'x at 342 n.1.

[171] 485 F.3d 635, 638 (11th Cir. 2007).

[172] Id.

[173] Id. at 641 (quoting *Nelson*, 541 U.S at 650); see also Hamilton v. Jones, 472 F.3d 814, 816 (10th Cir. 2007) (rejecting as sufficient reason for a five-month delay the inmate's efforts to obtain counsel in order to file the action); Rutherford v. McDonough, 466 F.3d 970, 974–76 (11th Cir. 2006); Siebert v. Allen, No. 2:07-cv-295-MEF, 2007 WL 2903009 (M.D. Ala. Oct. 3, 2007). Note also that another panel in the Eleventh Circuit recently ruled that a statute of limitations applies to § 1983 method-of-execution challenges, *McNair v. Allen*, 515 F.3d 1168, 1170 (11th Cir. 2008), raising for inmates in this circuit a great deal of uncertainty about precisely what timing rule applies.

[174] See King, supra note 120, at 60 (citing a study of post-AEDPA federal habeas litigation noting that only 4.1% of capital cases in the study's sample were dismissed on the basis of being untimely).

[175] Fallon, Jr., et al., supra note 77, at 1301 (citing Lonchar v. Thomas, 517 U.S. 314, 324 (1996) (allowing a stay of execution for a death-sentenced inmate who filed his first habeas petition on the day of his scheduled execution)). But cf. Bowersox v. Williams, 517 U.S. 345, 346 (1996) ("Entry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is 'particularly egregious' to enter a stay

ing to dismiss a Section 1983 *Hill* challenge that is the inmate's first post-conviction challenge of *any* kind where hearing the merits of that challenge would necessitate the entry of a stay.

Furthermore, rigid timing rules encourage future litigants to do the very thing that these courts ostensibly seek to prevent: file frivolous, obviously barred suits. In a jurisdiction that applies a strict statute of limitations rule,[176] an inmate must bring his Section 1983 suit within two years of his conviction and direct appeal becoming final, regardless of any factual or legal developments that occur subsequent to this time. Under the approach outlined in this Section, an inmate is forced to constantly bring Section 1983 suits to discover whether changes are being made to the protocol by secretive and obstinate state officials. Furthermore, requiring an inmate to file both habeas and parallel civil rights actions challenging their method of execution (often three to five years before their likely execution date) is "counterintuitive, unduly harsh, and just plain wrong."[177] This is especially true given that the two actions have wholly conflicting bases, which can create "cognitive dissonance and inefficiency" for the attorneys and the court.[178]

The botched execution of Angel Diaz[179] starkly illustrates the effect of this type of harsh timing rulings. Had the federal court in Mr. Diaz's case chosen to intervene under *Hill*, it is by no means a foregone conclusion that his execution would have been any different. But perhaps it would have.

2. The Promise of Conforming to Hill*'s Mandated Approach to Timing*

Because dismissals on timeliness grounds are so prevalent, treating the timing issue as what *Hill* and *Nelson* say it is—an exertion of a court's equitable powers—promises to have immediate effect. There is no reason to read *Hill* "as encouraging [courts] to overlook all other considerations that are called for in equity, which, af-

absent substantial grounds for relief." (quoting Delo v. Blair, 509 U.S. 823, 823 (1993))).

[176] See supra at Section II.D.

[177] Cooey v. Strickland, 479 F.3d 412, 429 (6th Cir. 2007) (Gilman, J., dissenting).

[178] Id.; see also Cooey v. Strickland, 489 F.3d 775, 776 (6th Cir. 2007) (Gilman, J., dissenting from denial of rehearing en banc).

[179] See supra notes 1–9 and accompanying text.

ter all, should be a recourse to principles of justice and fairness to correct or supplement the law as applied to particular circumstances."[180] Instead, the "presumption" mandated by *Hill*[181] should be read merely as guidance to lower courts on how to balance particular equitable relief factors.

Not every court approaches timeliness in a rigid fashion; some courts do conscientiously weigh the equitable factors.[182] For instance, the Ninth Circuit balances the equity/timeliness issue by examining whether the claim could have been brought earlier and whether the defendant had good cause for the delay.[183] This balancing approach is exemplified by the "give and take" approach to timing in *Evans v. Saar*.[184] In *Evans*, the district court addressed the dilemma faced by many judges addressing a relatively late-filed challenge: whether simply to dismiss the suit as untimely or to make at the least a principled attempt to evaluate the merits of the inmate's claim.[185] The court eventually denied equitable relief, but

[180] Brown v. Livingston, 457 F.3d 390, 392 (5th Cir. 2006) (Dennis, J., dissenting).

[181] Hill v. McDonough, 547 U.S. 573, 583–84 (2006) (stating that a stay is not a matter of right and that there is a strong presumption against a stay where the claim could have been brought earlier); Nelson v. Campbell, 541 U.S. 637, 649 (2004) ("A stay is an equitable remedy, and '[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation.'" (citing Gomez v. United States Dist. Court, 503 U.S. 653 (1992) (per curiam))); see also Walker v. Epps, No. 08-70028, 2008 WL 2796878, at *6 (5th Cir. July 21, 2008) (King, J., dissenting) (cautioning against applying a statute of limitations to method-of-execution claims because "to the extent that the Supreme Court has discussed the measures available to federal courts to protect the states against dilatory or speculative § 1983 method-of-execution challenges that threaten to disrupt the states' legitimate interest in carrying out executions, it has spoken purely in terms of the requirements for equitable relief").

[182] See, e.g., Alley v. Little, 186 F. App'x 604, 607 (6th Cir. 2006) ("[T]he timeliness of a petitioner's filing is an important—but is not the only important—consideration when a federal court determines the appropriate method of disposing of a death row inmate's § 1983 challenge to lethal injection.").

[183] See Beardslee v. Woodford, 395 F.3d 1064, 1069–70 n.6 (9th Cir. 2005); see also Cooey v. Strickland, 479 F.3d 412, 429–30 (6th Cir. 2007) (Gilman, J., dissenting) (providing four guideposts for district courts making such equitable judgments: (1) whether the protocol recently changed; (2) the petitioner's diligence; (3) the petitioner's reasonable attempts to ascertain the protocol; and (4) whether the traditional equitable factors exist in favor of granting a preliminary injunction to stay the execution).

[184] 412 F. Supp. 2d 519 (D. Md. 2006).

[185] Evans filed his petition approximately eighteen days prior to his scheduled execution date. Id. at 520–21.

stated that for myriad reasons, it was prepared to issue a reasoned decision on the merits.[186]

Ideally, *Hill* would allow for full hearings on the merits of a nonfrivolous claim against a particular execution protocol, like that conducted in *Harbison*. But where such review is not possible due to strict timing guidelines or a district court's desire to balance the state's interest in finality, it is certainly preferable to provide an inmate with *some* review on the merits, which is at least what *Evans* accomplished.

B. The Standard of Review of Preliminary Injunctive Relief Decisions

1. The Effect of Broad Pronouncements on Review of Preliminary Injunctive Relief

Some courts of appeal have treated the review of a district court's preliminary injunctive relief decision as an opportunity to issue opinions that appear to address the merits of a particular protocol.[187] This Section will examine the pitfalls of this phenomenon, pitfalls that are clearly illustrated by the juxtaposition of the Sixth Circuit's opinion in *Workman v. Bredesen*[188] with the district court opinion in *Harbison v. Little*[189]—both of which examined Tennessee's newly revised lethal injection protocol, but reached very different conclusions.

In *Workman*, the Sixth Circuit found the inmate's petition untimely and ruled that the district court's issuance of a temporary restraining order ("TRO") was an abuse of discretion,[190] despite the fact that the inmate filed the action ninety-six hours after Tennessee released the revised protocol.[191] The court described the revised

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[186] Id. at 522–23.

[187] See, e.g., Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007); Hamilton v. Jones, 472 F.3d 814, 816–17 (10th Cir. 2007) (referencing other state protocols and addressing merits-type issues in a very cursory fashion); Alley v. Little, 181 F. App'x 509, 511–12 (6th Cir. 2006) (finding Tennessee's lethal injection protocol constitutional on review of the district court's grant of a preliminary injunction).

[188] 486 F.3d 896 (6th Cir. 2007).

[189] 511 F. Supp. 2d 872 (M.D. Tenn. 2007).

[190] *Workman*, 486 F.3d at 911 (finding that Workman gets "no purchase" to challenge a "better procedure," when he could have previously challenged it in a timely manner).

[191] Id.

protocol in quite laudatory terms, implying that the protocol revision committee went to extensive lengths to improve it:

> Call the requirements of the Eighth Amendment what you will . . . [but] they do not prohibit the adoption, implementation and refinement of a lethal-injection procedure in as comprehensive manner as this. The efforts of the Governor and the corrections department suggest a State intent not just on satisfying the requirements of the Eighth Amendment, but on far exceeding them.[192]

Workman considered the merits of the new protocol based on no record or adversarial proceeding of the court below, but rather only on voluminous pleadings filed in a very short period of time.[193] The complaint, on which the district court understandably based its TRO, was eighty-two pages long, including extensive allegations, a fifty-five page supporting memorandum, and forty-eight exhibits.[194] The State responded two days before the scheduled execution with a nineteen-page motion to the court of appeals to vacate the TRO entered by the district court, to which the inmate responded with an eighty-two page reply brief.[195] The court issued its thirty-five page opinion *the same day* that it received these two briefs. Even if one supposes that these documents (which, again, were completely untested by any adversarial process) provided an adequate basis for the decision, it seems highly unlikely that the court could have given them proper consideration in one day, while also drafting and issuing its lengthy opinion.[196]

The dissent in *Workman* excoriated the majority on a number of grounds. Judge Cole began by noting that this was the first time to his knowledge that a court in a death penalty case had *ever* overturned a simple TRO—which has the modest purpose of preserving the status quo to allow further initial proceedings.[197] Character-

[192] Id. at 908–09.
[193] The inmate filed his complaint five days before his scheduled execution (which, again, was only four days after the new protocol was released). Id. at 900–01.
[194] Id. at 924 (Cole, J., dissenting).
[195] Id. at 900–01.
[196] Philip Workman was subsequently executed by lethal injection. Theo Emery, Tennessee Carries Out First Execution Since Lethal Injection Review, N.Y. Times, May 9, 2007, available at http://www.nytimes.com/2007/05/09/us/09cnd-death.html?pagewanted=print.
[197] *Workman*, 486 F.3d at 921–22 (Cole, J., dissenting).

izing this as a "profound jurisdictional defect," he noted that this case did not meet either of the usual exceptions allowing the review of a TRO.[198] As such, there was no appealable order, "even though the State and a majority of this court may wish it."[199] Judge Cole then pointed out that even if it did fall within these exceptions, the court may not overturn the district court if it acted within its discretion, regardless of whether the appeals court disagrees with the merits of that decision.[200]

Compare the majority opinion in *Workman* with the more recent decision by Judge Aleta Trauger of the Middle District of Tennessee in *Harbison v. Little*.[201] Decided four months after *Workman*, *Harbison* concerned the very same revised protocol. But in *Harbison*, the court based its opinion on a full, three-day evidentiary hearing, a hearing that revealed incredible shortcomings on the part of the executive branch regarding the lack of execution team training and the lack of any effective verification of unconsciousness prior to administering the second and third drugs in the lethal injection "cocktail," both of which can be excruciatingly painful.[202]

In fact, the State ultimately even rejected simple measures like pinching the inmate or moving something along his foot to verify unconsciousness because such actions were, in their view, not "appropriate."[203] Instead, the state left in place its meager requirement that one non-medically-trained person observe the inmate *through a window*, which doctors testified to be totally insufficient.[204]

The court declared that the lack of training fell equally short. The executioners were woefully undertrained laymen, one of whom had a history of drug and alcohol abuse and psychological disorders, factors for which the State did not screen.[205] Perhaps most egregiously, none of the execution team members were even required to read the new protocol and were largely ignorant of a

[198] Id. at 922–23 (Cole, J., dissenting) (noting that TROs are generally only reviewable when issued for a period greater than ten days, which the one at issue was not, or when they are "in substance a preliminary injunction").
[199] Id. at 922.
[200] Id. at 924.
[201] 511 F. Supp. 2d 872 (M.D. Tenn. 2007).
[202] Id. at 895–96.
[203] Id. at 886.
[204] Id. at 891–92.
[205] Id. at 887–88.

whole range of problems, including setting the IV in the wrong direction, catheter slippage, and line failure.[206] Further, these were not oversights on the part of the committee that revised the new protocol: the State knew about both shortcomings and yet failed to include reliable safeguards in the revision.[207] The court summarized its findings by concluding that the revised protocol was "not a mere 'risk of negligence' but a guarantee of accident written directly into the protocol itself."[208]

Harbison did not simply disagree with the court in *Workman*; it affirmatively criticized that court for praising the revised protocol.[209] In fact, Judge Trauger pointed out that state officials in large part rejected the committee's recommendations out of hand. For instance, after consulting with experts, the committee recommended unanimously to the State that it adopt a one-drug protocol, a recommendation that the State summarily overrode. But *Workman* incorrectly implied that the committee itself had considered and rejected this option on the basis of its research.[210] Likewise, *Workman* implied that the new protocol required the participation of a certified IV team and the presence of a doctor. Judge Trauger pointed out that both of these conclusions were patently wrong.[211] The comparison of *Harbison* and *Workman* thus illustrates the pitfalls associated with appellate courts inappropriately reviewing the merits of a protocol.

2. The Promise of Narrow Pronouncements on Review of Preliminary Injunctive Relief

The solution to this phenomenon is as simple as the solution to the timeliness issue: federal appeals courts should narrowly tailor their pronouncements on the merits of an execution protocol when ruling only on the question of preliminary injunctive relief. As part of the equitable balancing process, courts inherently must opine on the likelihood of success on the merits, but courts should minimize the creation of precedent that seems to have been based on a well-

[206] Id. at 888–89.
[207] Id. at 895–99.
[208] Id. at 891.
[209] Id. at 899–900.
[210] Id.
[211] Id.

developed record, when in fact it was not. More importantly, later courts should recognize the inherently limited nature of such decisions and not rely on them in their own opinions regarding a particular execution protocol.[212]

Courts recognize that this will cut both ways. For instance, in *Beardslee v. Woodford*, the Ninth Circuit briefly expressed serious doubts about California's lethal injection procedure, but then noted it was bound by the abuse of discretion standard. With no further opinion on the merits, it affirmed the district court's denial of injunctive relief.[213] And as Judge Browning pointed out in his concurrence to *Cooper v. Rimmer*, the court's review of the district court's denial of injunctive relief was for abuse of discretion, based on a lower court opinion that itself did not fully review the merits of the protocol.[214] Thus, he noted, "[n]either the district court nor the parties should read today's decision as more than a preliminary assessment of the merits."[215] Finally, in *Hicks v. Taft*, the Sixth Circuit (in sharp contrast to its sister panel in *Workman*), refused to weigh in on the likelihood of success on the merits issue at all, instead simply declaring that the district court did not abuse its discretion in denying a stay.[216]

C. The Promise of Aggregation

A promising solution to many of the flaws discussed so far is the possibility of aggregating numerous challenges within a state into one or only a few cases.[217] In fact, the ability to aggregate these actions is yet another key advantage of the *Hill* vehicle over habeas corpus, an area of the law where class actions have disappeared.[218] Because all death-sentenced inmates in a particular state are subject to the same protocol, every challenge has the same factual basis. To be sure, there are individual nuances, such as the need to

[212] See, e.g., id. at 899–900 (rejecting the applicability of *Workman* and one other Sixth Circuit decision, stating that they were each merely opinions in dicta, issued in the course of various stays and injunctions).
[213] Beardslee v. Woodford, 395 F.3d 1064, 1076 (9th Cir. 2005).
[214] 379 F.3d 1029, 1033–34 (9th Cir. 2004) (Browning, J., concurring).
[215] Id.
[216] 431 F.3d 916, 917 (6th Cir. 2005).
[217] For an in-depth discussion of aggregation in criminal cases, see Brandon L. Garrett, Aggregation in Criminal Law, 95 Cal. L. Rev. 383 (2007).
[218] Id. at 408–10.

access compromised veins, but even these are sufficiently common so as to permit courts to address them through aggregated actions.

Aggregation is by no means a novel concept. Courts are already accomplishing it on a smaller scale through both consolidation[219] and intervention.[220] But neither of these mechanisms fully cures many of the issues discussed in this Note, instead largely only promoting judicial economy.[221] An even better solution, one that *does* promise a comprehensive remedy, is to certify a class action of all similarly situated inmates in a state.[222]

In fact, one court has already certified a *Hill* class action. In *Jackson v. Danberg*, the Federal District Court for the District of Delaware certified "a state-wide class . . . consisting of all current and future prisoners in the custody of the Delaware Department of Correction who are, or will be, sentenced to death."[223] The court found that the class of sixteen inmates satisfied the numerosity requirement and that it satisfied Federal Rule of Civil Procedure 23(b)(1) because allowing individual actions would create a risk of inconsistent decisions based on the same facts and law.[224]

Aggregation promises both to cure many of the states' objections to *Hill* while at the same time curing many of the flaws noted above. For one thing, it would remove some of the randomness from the process: at least at the intrastate level, one court would resolve common issues in the same way. It would also resolve many of the timeliness concerns expressed by courts: once a court finally resolves all of the factual and legal issues in the aggregated case,

[219] See, e.g., Clemons v. Crawford, No. 07-4129-CV-C-FJG, 2008 WL 2783233, at *1 (W.D. Mo. July 15, 2008) (consolidated challenge of four inmates); McNair v. Allen, Nos. 2:06-cv-00695-WKW, 2:06-cv-00919-WKW, 2007 WL 4106483, at *1 (M.D. Ala. Nov. 16, 2007) (consolidated challenge of two inmates); Walker v. Epps, Civil Action No. 4:07CV176-P-B, 2007 WL 3124551, at *1–2 (N.D. Miss. Oct. 24, 2007) (consolidated challenge of five inmates).

[220] See, e.g., Nooner v. Norris, 491 F.3d 804, 806–07 (8th Cir. 2007); Timberlake v. Buss, No. 1:06-cv-1859-RLY-WTL, 2007 WL 2316451, at *1 (S.D. Ind. June 12, 2007) (discussing case where one inmate filed and two additional inmates later intervened).

[221] See, e.g., *Timberlake*, 2007 WL 2316451, at *1 (noting that one of the intervening inmates was executed during the pendency of the case).

[222] For an example of a § 1983 capital punishment class action, see Murray v. Giarratano, 492 U.S. 1, 3–4 (1989) (addressing a class action by Virginia death row inmates challenging the lack of state-paid post-conviction counsel).

[223] 240 F.R.D. 145, 146 (D. Del. 2007).

[224] Id. at 147–48.

provided the state did not change its protocol (if the protocol is found constitutional), or provided it complied with the changes ordered by the court, later challenges would have a more principled basis for decision than simple timing.

Presumably, the class of inmates represented in the aggregated action would be represented by one of the many expert capital post-conviction attorneys that litigate such claims. This approach therefore also promises to provide the sharpest possible litigation on these very important issues. And the aggregated action would allow full discovery combined with a comprehensive remedy that prevents state regulatory agencies from changing the protocol without full disclosure, potentially curing many of the issues surrounding the secretive nature of these protocols and the obstinacy of state agencies in revealing them.

Finally, aggregation would alleviate state fears that *Hill* will open a "floodgate" of challenges[225] by engendering all of the advantages in cost and efficiency that class action suits allow. Indeed, "[a]ggregation may be no boon for" death-sentenced inmates: when class actions were feasible under habeas corpus, they were often an efficient way for a class of prisoners to be *denied* relief.[226]

[225] See Gibeaut, supra note 118, at 17–18 (noting that the prosecutor in *Nelson* filed an amicus brief in *Hill* and later complained that "in neither *Nelson* nor *Hill* do the justices offer significant guidance on how trial courts can stop litigation that could continue forever by allowing inmates to refocus their complaints every time a state changes its execution protocol"—a tactic that Nelson himself later employed to challenge central line procedures he previously conceded as being acceptable); see also Greer, supra note 17, at 768 ("[T]he *Hill* decision has unnecessarily complicated Eighth Amendment lethal injection challenges by inviting a flood of litigation on a single, narrow issue.").

In some sense, this debate rehashes the debate that followed the Court's ruling in *Monroe v. Pape*, 365 U.S. 167 (1961), which revitalized § 1983 as a vehicle for challenging the actions of state officials. In the years following *Monroe*, states and some federal judges decried that case for opening the floodgates to civil lawsuits against state officials. In a seminal study in 1987, however, Professors Eisenberg and Schwab showed that in fact Monroe did not have this effect. Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641, 643 (1987) ("[T]he image of a civil rights litigation explosion is overstated and borders on myth."). Instead, the increase in § 1983 filings in federal court was largely in proportion to federal civil litigation generally. Id. at 644 (asserting that civil rights litigation while certainly an "essential part of the federal court system. . . [is not] engulfing both that system and local governments").

[226] Garrett, supra note 217, at 408.

Were an inmate inclined to opt out of the class due to individual nuances in his own case, he would be free to do so. While the result of the class action would not be preclusive on him, it certainly would have *stare decisis* weight as to the major aspects of the protocol. This then would allow the individual case to be disposed of more efficiently by focusing only on the individual nuances presented to the court. And where the inmate opts out of an aggregated case merely to gain time, he does so at his own peril: a court would almost certainly give very nearly preclusive effect to a fully adjudicated class action based on the very same facts.

CONCLUSION

Section 1983 holds a special place in American jurisprudence. During the last half century, this short provision has played a vital role in vindicating federal constitutional rights. While habeas corpus fills an equally important role in our federal system, it has developed quite differently, evolving a raft of restrictions that do not apply to Section 1983 actions.

By making Section 1983 available for method-of-execution challenges, the Supreme Court implicitly made all of its advantages over habeas corpus available as well. *Hill* and *Nelson* meant what they said: Section 1983 is now a viable vehicle for method-of-execution challenges. Nonetheless, lower courts persist both in importing habeas doctrines into a context where they do not belong and in adding limitations—such as unduly harsh timing rules and detailed review of preliminary lower court decisions—not called for by either *Hill* or *Nelson* themselves or by Section 1983 doctrine generally.

Courts can and should balance the important interests at stake on both sides: those of the states and those of the inmates. But this is possible within the constraints outlined in both *Hill* and *Nelson* and inherent in already-extant Section 1983 doctrine. Likewise, aggregating these actions can eliminate or ameliorate many of the potential problems states and inmates face. But as it stands now, courts are unduly frustrating the promise of the Section 1983 method-of-execution vehicle.