The Unrealized Promise of Section 1983 Method-of-Execution Challenges

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Introduction

Until recently, habeas corpus, one of the two significant avenues for a federal constitutional challenge related to imprisonment,[1] 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 marked the boundary between habeas corpus and 42 U.S.C. § 1983,[2] the central cause of action used in federal civil rights litigation. 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 § 1983 action."[3] Because courts largely viewed method-of-execution challenges as falling under the former category,[4] § 1983 had 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.[5] When combined with the lack of a § 1983 option, these restrictions have placed death-sentenced inmates in a progressively tighter vise, unable to make

[1] *See* Muhammad v. Close, 540 U.S. 749, 750 (2004) (per curiam) ("Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983.").
[2] 42 U.S.C. § 1983 (2000).
[3] *Muhammad*, 540 U.S. at 750 (internal citations omitted).
[4] *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).
[5] *See generally infra* at Part II.

legitimate method-of-execution challenges after their first habeas corpus petition had concluded, even where such challenges were based on later-revealed factual predicates.

But two recent Supreme Court decisions – *Nelson v. Campbell*[6] and *Hill v. McDonough*[7] – upset this framework: Method-of-execution claims are no longer the exclusive province of habeas corpus and may now be brought as § 1983 actions, within limits.[8] While § 1983 shares some analogous rules with habeas, there are important distinctions between them, too.[9] 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 § 1983 has the potential to be 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.

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[6] 541 U.S. 637 (2004).

[7] 126 S. Ct. 2096 (2006).

[8] The most recent and most significant a method-of execution claim is *Baze v. Rees*, granted cert on September 27, 2007. Baze v. Rees, 128 S. Ct. 34 (2007) (grant of writ of certiorari); *see also* Robert Barnes, *Lethal Injection Ruling May Have to Wait*, WASH. POST, Jan. 8, 2008, at A2. This case has resulted in a wave of stayed executions by the Supreme Court, lower courts, and governor's offices. *See, e.g.*, Kirk Semple, *High Court Blocks Florida Execution*, N.Y. TIMES, Nov. 15, 2007; Linda Greenhouse, *Justices Stay Execution, A Signal to Lower Courts*, N.Y. TIMES, Oct. 31, 2007 (Mississippi); Linda Greenhouse, *Trying to Decipher the State of the Death Penalty*, N.Y. TIMES, Oct. 19, 2007 (Georgia); Darryl Fears, *A Reprieve in Nevada Adds to Lethal-Injection Drama*, WASH. POST, Oct. 16, 2007, at A3. But *Baze* focuses largely on the substantive legal standard to be applied to method of execution challenges under the Eighth Amendment's Cruel and Unusual Punishments Clause. *See* Petition for Writ of Certiorari, Baze v. Rees, No. 07-5439 (2007), 2007 WL 2781088. And regardless, *Baze* is a state declaratory judgment action on direct review to the Supreme Court. Thus, it involves none of the important § 1983 issues implicated by *Hill* and *Nelson*.

[9] Section 1983 in the prisoner-litigation context is significantly different than all other § 1983 litigation because it includes an exhaustion requirement not otherwise required. Where the plaintiff is incarcerated, the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, tit. I, § 101, 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. For more on this important aspect of prisoner litigation and its effect on *Hill* challenges, *see infra* at Part II.E.

As is often the case, though, theory and practice can diverge. This Note will show that lower courts seeking procedurally to limit the litigation resulting from *Hill*[10] often fall back on habeas doctrine, importing aspects of it into these § 1983 suits. Given the very different policies and rules that underlie each of these doctrines, this importation frustrates the promise of *Hill*'s § 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 § 1983 doctrine, such as by formulating unduly harsh timing rules or overlooking the applicable standard of review. *Hill*'s § 1983 vehicle has done little to loosen the method-of-execution challenge vise.

Examples abound, but two Sixth Circuit cases particularly illustrate both of these tendencies. For instance, exemplifying the propensity to fall back on habeas doctrine, *Cooey v. Strickland* explicitly imported the habeas corpus rules into the § 1983 claim at issue. 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 § 1983.[11] And in *Workman v. Bredesen*, the court took the extraordinary step of "[f]or the first time in a death-penalty case, . . . vacate[ing] a temporary restraining order."[12] Given that a temporary restraining order is the least intrusive of all injunctive relief, intended merely to give the district court a short, ten-day period in which to consider further possible

[10] *See* Douglas A. Berman, *Finding Bickel Gold In a Hill of Beans*, 2006 CATO SUP. CT. REV. 311, 322–23 ("[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. . . .").
[11] Cooey v. Strickland, 479 F.3d 412, 425 (6th Cir. 2007) (Gilman, J., dissenting).
[12] Workman v. Bredesen, 486 F.3d 896, 921 (6th Cir. 2007) (Cole, J., dissenting).

action, *Workman* is a paradigm example of an unduly strict ruling unrelated to habeas rules and not supported by either normal § 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*.[13] 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."[14] The court's full consideration of the important issues at stake through wide-ranging discovery and examination of witnesses illustrates a key advantage § 1983 holds over habeas corpus: the ability to conduct a full evidentiary hearing after the inmate had exhausted his first federal habeas challenge. Throwing off the approach taken in *Workman*, *Harbison* realized many of the advantages embodied in a § 1983 method-of-execution challenge.

This Note will show that cases like *Workman* and *Cooey* ignore the key advantages *Hill* and its § 1983 vehicle made available, resulting in a "dysfunctional patchwork of stays and executions."[15] This piecemeal litigation, litigation that is pending nationwide, in turn creates a great deal of uncertainty. 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. To some extent, then, *Hill* reintroduces the freakish and wanton randomness to death penalty litigation[16] found so objectionable in *Furman*.[17]

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[13] Harbison v. Little, 511 F. Supp. 2d 872 (M.D. Tenn. 2007).
[14] *Id*. at 891.
[15] Alley v. Little, 447 F.3d 976, 977 (6th Cir. 2006) (Boyce, J., dissenting from denial of rehearing en banc).
[16] See Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look At Constitutional Challenges to Lethal Injection Executions*, 47 SANTA CLARA L. REV. 445, 467 (2007) ("Although many states' procedures

Part I of this Note will examine the boundary between habeas and § 1983, including an analysis both of how *Hill* and *Nelson* altered that boundary and of whether habeas corpus remains a viable vehicle for method-of-execution challenges after *Hill*. Part II will explore the advantages of § 1983 over habeas corpus in the method-of-execution context, citing examples where courts import habeas doctrines, thereby frustrating the realization of these advantages. Finally, Part III will conclude by analyzing court-imposed limitations that are not related 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 key advantages inherent in § 1983 while also remaining faithful to *Hill*'s admonition that federal courts "can and should protect States from dilatory or speculative suits."[18]

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 only through a habeas corpus petition. Courts hewed to this belief based not only on Supreme Court precedent that had hinted at this conclusion,[19] but also based on cases that marked the dividing line between habeas and § 1983. This Section will provide a broad overview of the boundary the Supreme Court has developed between these two types of federal constitutional litigation,

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are almost identical and the challenges cited comparable evidence, declarations, and exhibits, courts reached different conclusions in disposing of these cases.").

[17] Furman v. Georgia, 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.")

[18] *Hill*, 126 S. Ct. at 2104.

[19] Gomez v. U.S. Dist. Court for the N.D. Cal., 503 U.S. 653, 653–54 (1992) (per curiam).

and will briefly discuss the one previous Supreme Court case that dealt with a § 1983 method-of-execution challenge.

Prisoners seeking a federal forum in which to challenge the actions of state officials have two primary options: a federal habeas corpus challenge or a § 1983 suit in federal court.[20] Habeas corpus provides the broader of the two remedies, allowing a federal court to order a sentence reduction[21] or even the outright release of a prisoner in state custody.[22] That being the case, in order to protect against undue interference with state criminal justice systems, the Supreme Court[23] and Congress developed complicated rules to channel federal habeas corpus litigation, culminating with the passage of the federal Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[24]

In contrast, § 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.[25] 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, which in turn raises particularly acute issues of

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[20] Heck v. Humphrey, 512 U.S. 477, 480 (1994) ("Both [habeas and § 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.

[21] Preiser v. Rodriguez, 411 U.S. 475, 487 (1973).

[22] *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.").

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

[24] Pub. L. 104-132, 110 Stat. 1214 (codified at various sections of the U.S.C.).

[25] *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 must show a favorable termination of his conviction or sentence in order to proceed in a § 1983 action. *Id.*

federalism and comity.[26] In contrast, 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 § 1983 civil suit.[27]

Recognizing that litigants could use § 1983 to make an end-run around the more-restrictive habeas doctrines, the Supreme Court marked a boundary between the two, starting with *Preiser v. Rodriguez* in 1972. There the Court explicitly rejected the plaintiff's argument that he should be permitted immediate access to federal court via § 1983 in order to avoid habeas corpus's exhaustion requirement. 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."[28] 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 § 1983 action.[29]

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[26] 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* at Part II.

[27] *See* Migra v. Warren City Sch. Dist. Bd. of Ed., 465 U.S. 75, 86–87 (1984) (finding that claim preclusion also applies to federal § 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 § 1983 actions in federal court, again provided that a state court would be precluded by that decision as a matter of state preclusion law).

[28] *Preiser*, 411 U.S. at 490 (citing Fay v. Noia, 372 U.S. 391, 419–20 (1963)).

[29] *See, e.g.*, Muhammad v. Close, 540 U.S. 749 (2004); Edwards v. Balisok, 520 U.S. 641 (1997); Heck v. Humphrey, 512 U.S. 477 (1994); Preiser v. Rodriguez, 411 U.S. 475 (1973).

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 "duration" of the sentence.[30] They based this conclusion not only on cases like *Preiser* and *Heck v. Humphrey*, but also on an early Supreme Court case addressing a § 1983 method-of-execution challenge. In 1992, the Ninth Circuit permitted an inmate to use § 1983 to challenge California's use of the gas chamber. The Supreme Court dismissed the suit as untimely, avoiding the question of whether § 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.[31]

B. The *Hill* and *Nelson* Decisions

It was against this backdrop that the Court decided *Hill* and *Nelson*. By allowing § 1983 method-of-execution challenges, these two cases permitted the precise end-run around habeas that once was understood to be barred. Inmates could now make an immediate § 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. Filed just three days before his scheduled execution, the district court and the Eleventh Circuit both

[30] *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).
[31] *Gomez*, 503 U.S. at 653–54.

dismissed the claim as constituting an impermissible second or successive habeas petition, barred by the AEDPA.[32]

The Supreme Court disagreed, holding that § 1983 was an appropriate vehicle for this challenge, but with key limitations. Noting that this cut-down challenge was similar to an ordinary § 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."[33]

But the Court refused to allow a broader § 1983 challenge to lethal injection. If the particular procedure in question were 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.[34] 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."[35] 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 "strong interest in proceeding with its judgment."[36] Finally, the Court also noted that because these suits are to be considered conditions of confinement cases under § 1983, the Prison Litigation Reform Act of 1995 (PLRA)[37] remains as an independent limitation.[38]

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[32] Nelson v. Campbell, 541 U.S. 637, 639–40 (2004).
[33] *Id*. at 644–45.
[34] *Id.* at 645.
[35] *Id.* at 647.
[36] *Id.* at 649–50.
[37] *See infra* at Part II.E.
[38] *Id.* at 650.

Where *Nelson* cracked opened the door to § 1983 method-of-execution claims, *Hill v. McDonough* pushed it wide open. Again filed virtually on the eve of the sentence being carried out, *Hill* involved a far broader § 1983 challenge to lethal injection, this time as to the three-drug cocktail to be used by Florida.[39] The lower courts in the Eleventh Circuit found *Nelson* inapplicable and dismissed the case as being the "functional equivalent" of a successive habeas claim.[40]

Finding *Nelson* controlling, the Supreme Court again disagreed, allowing the § 1983 challenge to the three-drug cocktail, largely because the state could proceed with the execution through other methods or alternative chemical combinations. Thus "[u]nder these circumstances, a grant of injunctive relief could not be seen as barring the execution of Hill's sentence."[41] 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.[42]

The new allowance for § 1983 method-of-execution challenges has profound doctrinal implications for death penalty litigation. This new vehicle ought to present death penalty litigants with a whole range of new advantages, but also a whole range of new limitations. On the one hand, where a state court adjudicates a method-of-execution claim on direct review, a later federal § 1983 suit will potentially be subject to the preclusive effect of that ruling,[43] an effect largely absent under habeas corpus (provided,

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[39] Hill v. McDonough, 126 S. Ct. 2096, 2100 (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 cert and issued a stay. Gibeaut, *supra* note 10.
[40] *Id.* at 2101.
[41] *Id.* at 2102. Importantly, the Court also soundly rejected the state's contention that an inmate must propose a satisfactory alternative, characterizing this as an unacceptable heightened pleading requirement. *Id.* at 2103.
[42] *Id.* at 2104.
[43] *Migra*, 465 U.S. at 86–87; *Allen*, 449 U.S. at 105.

of course, statutory and judge-made habeas restrictions are surmounted). And of course, in that it is limited only to method-of-execution challenges in the capital post-conviction setting, § 1983 holds out no hope for overturning the inmate's conviction, unlike habeas corpus.

At the same time, though, § 1983 avoids many of the restrictions imposed under habeas corpus.[44] For example, in virtually every case since *Hill*, the inmate has already exhausted all his direct and collateral appeals, including one or more federal habeas corpus petitions. The Supreme Court and Congress (through the AEDPA) have made bringing subsequent habeas petitions extremely problematic, with the net effect being that even where there is a new factual or legal predicate for the challenge, the inmate is barred from bringing it under habeas corpus. By making § 1983 available, *Hill* reopens the door to federal court for inmates seeking to assert new factual or legal claims, a door largely closed by habeas corpus rules.

C. Is Habeas Corpus Still a Viable Method-of-Execution Vehicle?

Before addressing the doctrinal implications of *Hill* and *Nelson*, one final question remains: Did *Hill* foreclose habeas corpus method-of-execution challenges or did it merely establish an additional option by which to mount such a challenge? Interestingly, courts after *Hill* are split on this issue. Some cast doubt on whether habeas is still viable as a vehicle for making narrowly-tailored method-of-execution claims.[45] For instance, in

[44] Berman, *supra* note 10.

[45] *See, e.g.*, 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"); 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 *12 (D. Nev. Feb. 20, 2007) ("While neither Nelson nor Hill hold that habeas corpus relief is unavailable to a prisoner seeking to

Haynes v. Quarterman, not only did the court clearly state that *Hill* foreclosed habeas,[46] but it even admonished counsel for not "understand[ing] the difference between civil rights and habeas law."[47] But others have held that habeas may still be used.[48]

Clearly, cases like *Preiser* and *Heck* prevent § 1983 from intruding on habeas corpus.[49] But there is a circuit split on whether they also prevent the converse, namely habeas corpus intruding on § 1983. The Ninth Circuit has persuasively argued (in a non-death penalty case) that the Supreme Court's "central concern" in these cases "has been with how far the general remedy provided by § 1983 may go before it intrudes into the more specific realm of habeas, not the other way around. . . ."[50] Likewise, while courts on either side of this split are "indistinct" about the boundary between the two doctrines, only one circuit has "implicitly suggested" that habeas corpus and § 1983 are mutually exclusive in both directions, such that habeas may not intrude on § 1983.[51]

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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 the not the [sic] only means by which the state is permitted to carry out the sentence."); Bustamante v. Quarterman, Civil Action No. H-05-1805, 2007 WL 3541565 (S.D. Tex. Dec. 6, 2006); Hill v. Mitchell, No. 1:98-cv-452, 2007 WL 2874597, at *1 (S.D. Ohio, Sept. 27 2007). One court even expressed doubts about whether a § 1983 claim and a habeas action could be filed in one complaint. Moeller v. Weber, No. Civ. 04-4200, 2007 WL 4232720, at *1–2 (D.S.D. Nov. 28, 2007).

[46] *Hankins*, 2007 WL 268374, at *8 ("Recent Supreme Court precedent [*Hill*] forecloses habeas relief on Haynes' lethal-injection claim.").

[47] *Id.* at *8 n.1.

[48] *See, e.g.*, Hankins v. Quarterman, Civil Action No. 4:04-CV-875-Y, 2007 WL 959040, at *19 n.2 (N.D. Tex. Mar. 30, 2007) ("Because the Supreme Court did not hold that an inmate *must* bring such a claim under § 1983 rather than in a habeas action pursuant to 28 U.S.C. § 2254, such as the instant case, this Court will consider the merits of this claim."); Luis-Ricardo v. Daniels, Civil No. 06-599 AS, 2006 WL 2934281, at *2 (D. Or. Aug. 17, 2006) ("The parties have not cited, and the Court has not found case law that precludes challenging conditions of confinement under § 2241."); Diaz v. State, 945 So. 2d 1136, 1154 (Fla. 2006) ("[C]ontrary to Diaz's assertions here, the United States Supreme Court did not hold that a constitutional challenge to lethal injection procedures could not be brought under a habeas petition.").

[49] *Heck*, 512 U.S. at 489–90; *Preiser*, 490 U.S. at 500.

[50] Docken v. Chase, 393 F.3d 1024, 1028 (9th Cir. 2004) ("[The Supreme Court] has policed the distinction between the two remedies solely by defining the limits of § 1983, as in *Heck*, and by defining those classes of claims that must be brought through habeas, as in *Preiser*.").

[51] *Id.* at 1030 (citing Moran v. Sondalle, 218 F.3d 647, 650–51 (7th Cir. 2000) (per curiam)). Otherwise, the court noted, the remaining circuits have been "indistinct in delineating the line," with some suggesting that they are not mutually exclusive. *Id.* at 1030 n.6 (cataloguing cases in other circuits addressing this issue).

A better formulation is to look at how *Hill* actually divided the two doctrines: by the reach of the individual claim itself, rather than simply by drawing a bright line between the two. For example, one district court has held that "[c]haracterizing a claim as a 'method of execution claim' does not, ipso facto, mandate the conclusion that it is cognizable in a § 1983 [action]."[52] Instead, where a successful claim would require legislative action in order to comply with the relief granted, it must be brought through habeas corpus.[53] This case illustrates that *Hill* did not establish a categorical rule foreclosing habeas corpus method-of-execution challenges.

Regardless, litigants face more than a simple binary choice. Section 1983 and habeas corpus are two important vehicles for such challenges, but they are not the only ones. For instance, *Baze v. Rees*,[54] the most prominent ongoing challenge to lethal injection, is a state declaratory judgment action on direct review to the Supreme Court.

II. The Unrealized Advantages of § 1983

Part II of this Note will examine the clear advantages § 1983 affords litigants over five important habeas doctrines: those intended to preserve the finality of state court judgments, such as habeas procedural default doctrine; the rule against successive petitions; the barriers to obtaining a full evidentiary hearing; the strict habeas timing restrictions; and the habeas corpus "total exhaustion" rule. This Part will also show that

[52] Moore v. Rees, Civil Action No. 06-CV-22-KKC, 2007 WL 1035013, at *17 (E.D. Ky. Mar. 30, 2007).
[53] *Id.* at *18 (citing *Hill*, 126 S. Ct. at 2101).
[54] *See supra* note 8. Likewise, a defendant may raise this issue even at his state trial and during the direct review process. *See, e.g.*, State v. Johnson, --- S.W.3d ---, --- (Mo. 2008) (refusing to address the constitutionality of Missouri's lethal injection protocol on a number of grounds); Saunders v. State, --- So. 2d ---, ---–--- (Ala. 2007) (conceding that lethal injection has been recently called into question but declining to invalidate the defendant's death sentence based on the fact that Alabama provides for alternative methods of execution). But a key problem with raising the issue at this stage is that it may not yet be ripe for adjudication. *See Johnson*, --- S.W.3d at --- ("[T]his Court has found that when an execution date has not been set, it is premature to consider a claim involving the method of execution as the type of lethal injection that the State may use in the future is unknown.").

– with the exception of a few key rulings such as *Harbison*,[55] *Morales v. Tilton*[56] and *Taylor v. Crawford*[57] – to date *Hill* has had little real impact. This is in part because decisions like *Cooey*[58] – whose approach has been followed by courts in virtually every circuit that includes multiple pro-death-penalty states, including especially the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits – depart from applicable § 1983 doctrine, continuing instead to treat the challenges as if bound by previously-applicable habeas rules.

A. *Hill* and the Need For Deference To State Court Judgments

Section 1983 and habeas corpus claims typically arise from quite different procedural postures and this simple fact is perhaps the most important difference between the two. The typical § 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 there is a final state court judgment at issue (in the *Hill* context, a conviction and sentence), § 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 preclude a later state court on that issue, a federal court is

[55] 511 F. Supp. 2d 872 (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 trial date was set and that discovery was complete, but putting 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).

[56] 465 F. Supp. 2d 972 (N.D. Cal. 2006) (effectively halting the use of lethal injection in California, and prompting Governor Schwarzenegger to convene a review of the state's procedures and policies); *see also* Megan Greer, *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, 776 (2007) (asserting that *Hill* prompted an "unprecedented four-day hearing on the constitutionality of the California lethal injection protocol"); Kreitzberg & Richter, *supra* note 16, at 478–91 (analyzing the *Morales* decision in detail); Amy L. Mottor, Note, *Morales and Taylor: The Future of Lethal Injection*, 6 APPALACHIAN J.L. 287 (2007) (analyzing the *Morales* decision).

[57] No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *1 (W.D. Mo. June 26, 2006), *vacated*, 487 F.3d 1072 (8th Cir. 2007); *see also* Mottor, *supra* note 56 (describing the *Taylor* district court decision).

[58] *See supra* at notes 11–12 and accompanying text.

similarly precluded by virtue of the Full Faith and Credit Act, 28 U.S.C. § 1738.[59] 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. In fact, *Hill* conditioned its allowance of the § 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 could execute him by another method or by adjusting its lethal injection protocol, a protocol that was not statutorily mandated.[60]

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 the state criminal justice system.[61]

This Section will examine two of these habeas corpus rules and will show how courts continue to apply them to *Hill* challenges. This tendency in turn frustrates the purpose of a § 1983 cause of action by failing to recognize that these civil rights actions inherently do not implicate the finality of state court judgments: "[The inmate's]

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[59] *See Migra*, 465 U.S. at 86–87; *Allen*, 449 U.S. at 105.

[60] *Hill*, 126 S. Ct. at 2102; *see also* Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301, 1311 (2007) (cataloguing ten states which 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).

[61] 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).

challenge, even if successful, does not foreclose his execution. He will be put to death for his crime."[62] Instead, the most a § 1983 method-of-execution challenge can do is to delay the execution of the sentence while the state is forced to revise flaws in its lethal injection protocol.

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.[63] This rule preserves finality by preventing a federal court from overturning the decision of a state judge who reasonably relied on then-existing law.

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,[64] or he must show that the new rule altered a watershed rule of criminal procedure that fundamentally affects the accuracy of decision making.[65] Consistent with its effect on many habeas doctrines, the AEDPA further narrowed the scope of habeas review, [66] although this provision applies only where a state court actually decided the constitutional issue.[67]

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[62] Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006) (Wilson, J., dissenting).
[63] Teague v. Lane, 489 U.S. 288 (1989); *see also* Caspari v. Bolen, 510 U.S. 383 (1994); Butler v. McKellar, 494 U.S. 407 (1990).
[64] *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 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).
[65] *Teague*, 489 U.S. at 312. This exception has never been found to apply. *See, e.g.*, Whorton v. Bockting, 126 S. Ct. 1173 (2007) (holding that Crawford v. Washington, 541 U.S. 36 (2004), and its progeny (which dramatically altered the court's Confrontation Clause jurisprudence) did not fall under this exception).
[66] 28 U.S.C. § 2254(d)(1) (2000).
[67] RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1335 (5th ed. 2003).

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.[68] Perhaps on this basis, many inmates have argued that a late-filed *Hill* cause of action should not be considered untimely if it was filed soon after the Court decided *Hill* because prior to that circuit precedent expressly barred this type of suit.

But a number of courts, particularly those in the Fifth, Sixth, and Eleventh Circuits, have repeatedly rejected this argument, thereby effectively importing the *Teague* nonretroactivity rule into *Hill* civil rights actions. In numerous cases, these circuits have argued 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."[69] Thus, the argument goes, despite circuit precedent clearly barring such a "legally futile" action,[70] the inmate should have filed one even before *Hill*. Because they did not, the theory goes, their current untimely action cannot be excused.[71]

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

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[68] *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).

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

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

[71] *See, e.g.*, Rutherford v. Crosby, 438 F.3d 1087, 1092–93 (11th Cir. 2006) (applying this rule even while *Hill* was still pending); Williams v. Allen, 496 F.3d 1210, 1212 (11th Cir. 2007); Grayson v Allen, 491 F.3d 1318, 1322 (11th Cir. 2007); *Cooey*, 479 F.3d at 422–23; Harris v. Johnson, 376 F.3d 414, 418–19 (5th Cir. 2004) (the earliest example of this argument being made, after *Nelson*); Hallford v. Allen, Civil Action No. 07-0401-WS-C, 20007 WL 2683672, at *5 (S.D. Ala. Sept. 6, 2007); Arthur v. Allen, Civil Action No. 07-0342-WS-C, 2007 WL 2320069, at *2–3 (S.D. Ala. Aug. 10, 2007).

this new avenue of relief was established. This stricture imports the habeas corpus "new rule" restrictions into § 1983.

Unfortunately, however, 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"[72] and "breathed life into these claims."[73] While an inmate theoretically could have filed a § 1983 method-of-execution challenge before *Hill*, there is "no justification for holding that he was required to do so."[74] 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 cert and ordered the Eleventh Circuit to at least consider the possibility of hearing the challenge if the balance of equities favored it.[75]

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, habeas doctrine was broadly forgiving of

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

[73] *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 most courts 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"); *see also* 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 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, at § 2, n.2 (cataloguing the circuit split that *Hill* resolved).

[74] Cooey v. Strickland, 479 F.3d 412, 426 (6th Cir. 2007) (Gilman, J., dissenting); *see also* 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 § 1983 was a proper vehicle and in fact excusing the inmate's delay on this issue); *Rutherford*, 466 F.3d at 1098 (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).

[75] *Rutherford*, 466 F.3d at 1098 (Wilson, J., dissenting).

procedural default,[76] but starting with *Wainwright v. Sykes* in 1977, the Court significantly restricted the ability to raise a procedurally defaulted claim during habeas.[77] *Wainwright* bars habeas review of a procedurally defaulted claim unless the defendant can show "cause" for the default[78] and "prejudice" resulting from refusal to hear the claim.[79]

Again, because § 1983 does not involve review of a state court judgment, it contains no analogue to the habeas procedural default doctrine. In fact, *Hill*'s allowance for § 1983 challenges is premised precisely on the fact that these suits do *not* implicate finality.[80] And yet, in *Jones v. Allen*, the Eleventh Circuit effectively imported habeas corpus procedural default doctrine into § 1983. 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 that "[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

[76] Fay v. Noia, 372 U.S. 391 (1963).
[77] Wainwright v. Sykes, 433 U.S. 72 (1977).
[78] A few examples of "cause" would be attorney error serious enough to constitute Sixth Amendment ineffective assistance of counsel, *see, e.g.*, Murray v. Carrier, 477 U.S. 478 (1986); new law and facts (subject to the *Teague* and AEDPA limitations); or interference by government officials, *see, e.g.*, Strickler v. Green, 527 U.S. 263 (1999).
[79] 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*, 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." United States v. Frady, 456 U.S. 152, 170 (1982). *See also* FALLON, JR., ET AL., *supra* note 67, 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*, at 1380.
[80] *Cooey*, 479 F.3d at 425 (Gilman, J., dissenting); *see also Cooey*, 489 F.3d at 776–77 (Gilman, J., dissenting from denial of rehearing en banc).

as well," but did not.[81] 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 § 1983 challenge.

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

Hill's § 1983 vehicle ought to be a key new opportunity for death penalty litigants in another way. After an inmate has concluded his 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 factual predicates that were later revealed, such as articles in medical journals,[82] academic commentary,[83] and the successes of inmates in other courts, such as *Morales*, *Taylor*, and *Harbison*. Section 1983 is not subject to such a 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 examination of newly revealed facts regarding lethal injection protocols, courts are again wrongly falling back on habeas doctrines.

[81] *Jones*, 485 F.3d at 639–40. This ruling is particularly interesting considering that other courts have held that *Hill* foreclosed bringing method-of-execution challenges through habeas corpus. *See supra* at Part I.C. Were a jurisdiction to follow *Jones*' lead while also importing a procedural default rule, method-of-execution challenges could be effectively foreclosed altogether.

[82] 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 THE LANCET 1412 (Apr. 16, 2005). This article is in large part responsible for breathing new life into lethal injection challenges.

[83] *See, e.g.*, Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49 (2007); Casey Lynn Ewart, Note, *Use of the Drug Pavulon in Lethal Injections: Cruel and Unusual?*, 14 WM. & MARY BILL RTS. J. 1159 (2006); Kristopher A. Haines, Comment, *Lethally Injected: Devolving Standards of Decency in American Society*, 34 CAP. U. L. REV. 459 (2005); 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 (2006).

The Supreme Court initially allowed a very broad ability to bring second or successive petitions after a litigant failed on the first such petition.[84] But in the 1990s, both the Court[85] and Congress[86] 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 design" to habeas procedural default doctrine[87] and the combination of the two results in the "'qualified application of the doctrine of res judicata'" to habeas corpus claims.[88]

The AEDPA imposes two such restrictions. First, where a claim was already litigated in a previous federal habeas petition, a federal court must dismiss that claim, without exception.[89] Under this rule, if a prisoner litigated a method-of-execution claim during his first habeas petition, he would be precluded from raising it again in any subsequent habeas petition, no matter what new legal or factual predicate had arisen since that first challenge.

Likewise, even where a claim was not litigated during the first federal habeas petition, the AEDPA places strict limitations on the ability to raise it in the second or successive habeas petition. Section 2244 of the AEDPA requires that the new claim be based either on a "new rule of constitutional law, made retroactive . . . by the Supreme

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[84] *See* Sanders v. United States, 373 U.S. 1, 15 (1963).
[85] *See* McClesky v. Zant, 499 U.S. 467, 494 (1991) (overturning *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).
[86] *See* 28 U.S.C. § 2244(b)(1) (2000) (*requiring* dismissal of a claim presented in a prior application); § 2244(b)(2) (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 are met); § 2244(b)(3) (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).
[87] McClesky, 499 U.S. at 490.
[88] Schlup v. Delo, 513 U.S. 298, 318–19 (1995) (quoting McCleskey, 499 U.S. at 486).
[89] 28 U.S.C. § 2244(b)(1) (2000). *See generally* FALLON, JR., ET AL., *supra* note 67, at 1384–89.

Court"[90] or on new facts that could not have been discovered with due diligence.[91] 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."[92]

Section 1983 doctrine developed quite differently. While it is subject to preclusion on the basis of both prior state[93] and federal[94] judgments, preclusion typically is not an issue in method-of-execution challenges either because the issue was not raised during a prior habeas petition or, importantly, because newly revealed facts are at issue due to changes in the execution protocol since that earlier petition.

Such newly-revealed factual predicates are especially prevalent in lethal injection challenges for a number of reasons. First, some states have proven to be notoriously secretive and obstinate about the details of their lethal injection protocols. 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.[95] In addition, in

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[90] § 2244(b)(2)(A) (2000).
[91] § 2244(b)(2)(B)(i).
[92] § 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); LeFevers 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.
[93] 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 Ed., 465 U.S. 75, 86–87 (1984) (claim preclusion); Allen v. McCurry, 449 U.S. 90, 105 (1980) (issue preclusion).
[94] 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 precluded by the previous habeas action because his § 1983 claim essentially repeated every claim from that habeas petition (which did not include a method-of-execution challenge). Hutcherson v. Riley, Civil Action No. 06-657-WS-C, 2006 WL 2989214, at *2–3 (S.D. Ala. Oct. 18, 2006). *Cf.* Beardslee v. Woodford, 395 F.3d 1064, 1067–68 (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").
[95] Oken v. Sizer, 321 F. Supp. 2d 658, 667 (D. Md. 2004). The court was offended enough by this behavior to hold it against the state in later weighing the equitable factors for whether to issue a stay. *See also Cooey*, 489 F.3d at 777 (Gilman, J. dissenting from denial of rehearing en banc) (noting that Ohio considers

most states, state agencies are vested with virtually unlimited discretion with regard to execution protocols.[96] Because the agencies enjoy so much discretion, they may change the protocol without notice and without informing inmates or the public of the change.[97] The end result is that lethal injection protocols are highly variable both within states and as compared with each other, using different medical personnel, different levels of training, and different levels of guidance and specificity.[98]

Assuming a litigant made a method-of-execution challenge in his first habeas petition, without § 1983 he 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 (because of agency secrecy) since his previous challenge. The successive petition rule would bar it outright. By avoiding this stricture, *Hill* affords a significant opportunity that was not available under the previous habeas-only regime.

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some information about the lethal injection protocol non-public); *Evans v. Saar*, 412 F. Supp. 2d 519, 522–23 (D. Md. 2006); 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, 66 (2002) (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); Denno, *supra* note 83, at 121–23 (recommending increased transparency in lethal injection procedures); Haines, *supra* note 83, at 478–82 (positing that shielding the public from details of executions prevents that prevailing view of what constitutes "standards of decency" from ever evolving).

[96] This was true of the very first lethal injection protocol, in Oklahoma, which pioneered this method not out of concern for humaneness but rather did so because the electric chair needed an expensive repair and because the gas chamber was deemed too expensive. Kreitzberg & Richter, *supra* note 16, at 452–53. Thus, the first lethal injection statute – passed with "no 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).

[97] *See Cooey*, 479 F.3d at 427 (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 non-public); *Cooey*, 489 F.3d at 776 (Gilman, J., dissenting from denial of rehearing en banc). *See generally* Denno, *supra* note 95, at 116–25; Kreitzberg & Richter, *supra* note 16, at 461–62. *But see Cooey*, 479 F.3d at 423 (rejecting that the "[f]luid nature of [the] protocol" is enough to make a late challenge timely).

[98] *See* Note, *supra* note 60, at 1309–10. *See also Harbison*, 511 F. Supp. 2d at 903 ("[*Morales* and *Taylor*] demonstrate that although lethal injection is the most prevalent form of execution, it is not sacrosanct, and the constitutionality of a three-drug protocol is dependent on the merits of that protocol.").

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."[99] Yet, courts frustrate this core advantage of the new *Hill* 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.[100]

C. *Hill* and Habeas Evidentiary Hearing Limitations

Another important difference between habeas corpus and § 1983 is that § 1983 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 more fully adjudicate the merits of a method-of-execution claim. In the few cases where such challenges have been heard, the *Hill* vehicle is realizing this advantage.

Habeas corpus places strict limits on evidentiary hearings. As one recent study revealed, after the AEDPA courts are conducting only about half as many evidentiary hearings as before it.[101] This is in part due to the fact that under habeas, federal courts are bound by specific rules of deference regarding both state court fact-finding and state court application of law to fact: the AEDPA requires that federal courts presume state

[99] John Gibeaut, *It's All In the Execution*, 92-AUG A.B.A.J. 17, 17 (Aug. 2007) (quoting the prosecutor in *Nelson*, who later filed an amicus brief in *Hill*).

[100] *See, e.g.*, *Williams v. Allen*, 496 F.3d 1210, 1215 (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 the LANCET article (*see supra* at note 82))); *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*, Civil Action 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).

[101] *See* Nancy J. King, et al., *Final Technical Report: Habeas Litigation in U.S. District Courts*, at 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 the AEDPA).

court fact-finding to be correct, a presumption that the inmate must overcome by a showing of clear and convincing evidence.[102]

In addition, the Supreme Court and Congress both have imposed increasingly strict barriers to federal court evidentiary hearings that allow additional evidence to be introduced. Whereas previously the Court focused on when an evidentiary "hearing *must* be held,"[103] later cases applied the "cause and prejudice" or "fundamental miscarriage of justice" standards for evidence not previously developed by the inmate in state court.[104] The AEDPA further tightened this requirement, precluding an evidentiary hearing in federal habeas review unless the inmate can satisfy two strict requirements.[105]

Section 1983 has the clear advantage here because it allows full Rule 26 discovery, with the attendant evidentiary hearings that can subsequently flow from such discovery. For instance, in *Harbison*, the court held a full bench trial after the publication of Tennessee's revised lethal injection protocol, including court- and litigant-appointed experts, review of academic articles, and consideration of the laws and execution protocols of other states.[106] In *Morales v. Tilton*, the court conducted five days of formal hearings and a site visit to California's execution chamber, reviewing virtually every

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[102] 28 U.S.C. § 2254(d)(2) (2000); § 2254(e)(1). *See also* Terry Williams v. Taylor, 529 U.S. 362 (2000) (holding that federal habeas courts must also defer to state court applications of law to fact).

[103] FALLON, JR., ET AL., *supra* note 67, at 1355–56 (discussing Brown v. Allen, 344 U.S. 443 (1953) and Townsend v. Sain, 372 U.S. 293 (1963)).

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

[105] 28 U.S.C. § 2254(e)(2) (2000). This provision holds that "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."

[106] *Harbison*, 511 F. Supp. 2d at 873–76.

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."[107] Finally, after the appeals court ruled that its initial telephonic 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.[108] Likewise, a number of courts have been engaged in detailed discovery disputes related to *Hill* challenges.[109] Thus, in some limited but important instances to date, *Hill* is proving its advantages 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), including the application of a strict habeas-like statute of limitations to *Hill* challenges. This Section will briefly discuss the habeas corpus timeliness rules and note examples where courts are inappropriately applying parallel rules in *Hill* § 1983 injunctive relief cases, a context not amenable to the habeas corpus statute of limitations approach.[110]

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

[107] Morales v. Tilton, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006).
[108] Taylor v. Crawford, 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).
[109] *See, e.g.*, *Moore*, 2007 WL 1035013, at *9–17 (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 an *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).
[110] Other timeliness rulings will be discussed in Part III.A of this Note.

in 1996, there was no statute of limitations on habeas corpus.[111] Instead, "[c]ourts invoked the doctrine of 'prejudicial delay' to screen out unreasonably late filings."[112] The AEDPA took an entirely different tack, creating a one-year period of limitations, which runs from the latest of four different dates[113] and which is subject to various tolling rules and limitations.[114] While some courts apply equitable tolling[115] and this provision does have a new facts exception,[116] both exceptions are difficult to meet and this time limitation is therefore quite strict.[117]

While § 1983 damages actions are subject to a statute of limitations,[118] generally speaking, § 1983 injunctive relief actions should not be. Statutes of limitations are more appropriate for a damages action to remedy a past injury and "cannot attach from an act that has yet to occur and a tort that is not yet complete."[119] Yet in a 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.

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[111] Day v. McDonough, 547 U.S. 198, 202 n.1 (2006) ("Until AEDPA [sic] took effect in 1996, no statute of limitations applied to habeas petitions.").
[112] *Id.*
[113] 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 67, at 1298 (quoting § 2244(d)(1)(A)).
[114] *See* Carey v. Saffold, 536 U.S. 214 (2002); Duncan v. Walker, 531 U.S. 167 (2001).
[115] 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).
[116] § 2244(d)(1)(D).
[117] 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.").
[118] 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); *see also* 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).
[119] *McNair*, 2007 WL 4106483, at *4 (citing Grayson v. Allen, 499 F. Supp. 2d 1228, 1235 (M.D. Ala. 2007)); *see also* Cooey v. Strickland, 489 F.3d 775, 777 (6th Cir. 2007) (Gilman, J. dissenting from denial of rehearing en banc); Rutherford v. McDonough, 466 F.3d 970, 978–79 (11th Cir. 2006) (Wilson, J., dissenting).

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." This "ripeness" triggering event is one "that should have alerted the typical lay person to protect his rights,"[120] 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."[121] By comparison, the Eleventh Circuit recently held that the statute of limitations starts to run the date the inmate selects his method of execution.[122]

Note again how directly the *Cooey* approach parallels AEDPA timing provisions: 28 U.S.C. § 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."[123] Courts taking this approach are not simply echoing habeas doctrine; they are applying it directly.

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

Both habeas corpus and prisoner-initiated § 1983 actions entail exhaustion requirements, but these requirements are completely different in both their nature and scope. The Supreme Court recently made clear that habeas total exhaustion does not

[120] Cooey v. Strickland, 479 F.3d 412, 416 (6th Cir. 2007) (citing 28 U.S.C. § 2244(d)(1)(A)).
[121] *Id.* at 421–22.
[122] Callahan v. Allen, No. 06-cv-695-WKW, 2008 WL 227945, at *1 (11th Cir. Jan. 29, 2008) (barring the 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 [AEDPA]")
[123] *Id.* at 420–21 (citing numerous Supreme Court cases applying the AEDPA statute of limitations); *see also* 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); Nooner v. Norris, 491 F.3d 804, 808 (8th Cir. 2007) (stating that a claim becomes ripe when 1) direct review, including denial of cert, 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).

apply to § 1983 and the PLRA. Therefore, this is an area where habeas doctrine has not intruded into *Hill* challenges. The final Section of Part II will briefly compare habeas and § 1983 / PLRA exhaustion requirements in order to show that this is yet another important advantage *Hill* affords capital post-conviction litigants.

Exhaustion has been required in some form under habeas corpus since the late 1800s,[124] 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 State."[125] 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").[126] 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.[127] 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."[128]

In contrast, there is no exhaustion requirement inherent in § 1983. In fact, this is the promise of § 1983 and *Ex parte Young*:[129] immediate access to federal courts to challenge allegedly unconstitutional acts of state officers. Congress has, however,

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[124] *See Ex parte* Royall, 117 U.S. 241 (1886).
[125] 28 U.S.C. § 2254(b)(1)(A) (2000).
[126] Rose v. Lundy, 455 U.S. 509, 522 (1982).
[127] Rhines v. Weber, 544 U.S. 269, 275 (2005).
[128] Jones v. Bock, 127 S. Ct. 910, 924 (2007).
[129] 209 U.S. 123 (1908).

imposed an exhaustion requirement on § 1983 suits brought by prison inmates, through the Prison Litigation Reform Act of 1995 (PLRA).[130] While these requirements are strict,[131] they essentially amount to *administrative* exhaustion. 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 § 1983 is quite different from habeas corpus, the exhaustion requirement necessarily is so as well. Unlike habeas, § 1983 claims 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 any other."[132] 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 requirement."[133] 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."[134]

While *Nelson* makes clear that the PLRA exhaustion requirement applies to § 1983 method-of-execution claims,[135] one court has expressed discomfort at even this more limited type of exhaustion preventing it from addressing a challenge where an

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[130] 42 U.S.C. § 1997e(a) (2000). Prior to 1980, prisoner-initiated § 1983 suits were not subject to any exhaustion requirement. Woodford v. Ngo, 126 S. Ct. 2378, 2382 (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)).

[131] *See Woodford*, 126 S. Ct. at 2382–83 (holding that prisoners must exhaust all available remedies, "even where the relief sought . . . cannot be granted by the administrative process"); *see also* Booth v. Churner, 532 U.S. 731, 739 (2001).

[132] Jones v. Bock, 127 S. Ct. 910, 924 (2007).

[133] *Id*. at 924–26.

[134] *Id.* at 914.

[135] *Nelson*, 541 U.S. at 650. Interestingly, though, the PLRA is *never* mentioned in *Hill*.

inmate's life was at stake. In *Evans v. Saar*, the court 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' failure to exhaust is attributable to his delay in filing his administrative claim or the State's delay in deciding it."[136] In light of *Jones v. Bock*, although PLRA exhaustion has affected a number of *Hill* claims,[137] habeas exhaustion doctrine has not intruded on these challenges.

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 these 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, appeals courts have exhibited a striking tendency to exceed the applicable standard of review, making detailed findings about particular execution protocols on the simple review of the preliminary injunctive relief, a review that should be governed by an abuse of discretion standard. The final Part of this Note will examine each of 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

[136] *Evans*, 412 F. Supp. 2d at 527–28.

[137] *See, e.g.*, *Walton v. Johnson*, No. 2:06cv258, 2006 WL 2076717, at *5 (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 (E.D. Va. 2004).

Both *Hill* and *Nelson* admonished litigants that federal courts "should protect States from dilatory or speculative suits."[138] But neither *Hill* nor *Nelson* categorically bans *any* delay caused by a particular § 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."[139] 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."[140]

Stays of execution can be vital to allowing time for both district courts to adjudicate the merits of these claims and for appeals courts to review them.[141] 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 execution date.[142] In reaching this ruling, *Hill* stated that a stay is an equitable remedy and may not be granted as a matter of right. Thus, the Court ruled, there is a "strong presumption against a stay" where the challenge could have been brought earlier.[143]

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

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[138] *Hill*, 126 S. Ct. at 2104; *see also Nelson*, 541 U.S. at 649–50.
[139] *Hill*, 126 S. Ct. at 2104.
[140] *Id. See also Nelson*, 541 U.S. at 649–50.
[141] *See generally* Slack v. McDaniel, 529 U.S. 473 (2000); Barefoot v. Estelle, 463 U.S. 880 (1983).
[142] Gibeaut, *supra* note 10 ("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.
[143] *Hill*, 126 S. Ct. at 2104. *See also* Gomez v. U.S. Dist. Court for the N.D. Cal, 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)).

denying stays according only to the length of delay between execution setting and the date of the petition"[144] 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."[145] 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.[146]

In *White v. Johnson*,[147] the Fifth Circuit addressed a challenge in which the inmate did not even ask for a stay. 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."[148] And in *Kincy v. Livingston*, the court 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."[149]

The Eleventh Circuit takes a similarly hostile approach. In *Jones v. Allen*, the Eleventh Circuit dismissed a case filed before the inmate's federal habeas cert petition had been denied, before the inmate's date of execution had been set, and soon after *Hill*

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[144] Brown v. Livingston, 457 F.3d 390, 391–92 (5th Cir. 2006) (Dennis, J., dissenting). For examples of this tendency, *see* Grayson v Allen, 491 F.3d 1318, 1322 (11th Cir. 2007); *Cooey*, 479 F.3d at 423; Arthur v. Allen, Civil Action No. 07-0341-WS-C, 2007 WL 2320069, at *2–3 (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).
[145] Reese v. Livingston, 453 F.3d 289, 290 (5th Cir. 2006).
[146] *See, e.g.*, Berry v. Epps, 506 F.3d 402, 404 (5th Cir. 2007); Reese v. Livingston, 453 F.3d 289, 290 (5th Cir. 2006); Kincy v. Livingston, 173 Fed. Appx. 341 (5th Cir. 2006); Hughes v. Johnson, 170 Fed. Appx. 341 (5th Cir. 2006); Smith v. Johnson, 440 F.3d 362 (5th Cir. 2006); Neville v. Johnson, 440 F.3d 221 (5th Cir. 2006); White v. Johnson, 429 F.3d 572, 574 (5th Cir. 2005).
[147] 429 F.3d 572 (5th Cir. 2005).
[148] *Id.* at 573.
[149] Kincy v. Livingston, 173 Fed. Appx. 341, 342 n.1 (5th Cir. 2006).

had been decided.[150] 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*.[151] 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.'"[152] 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.[153] 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."[154] But courts in these circuits are willing to dismiss a § 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

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[150] Jones v. Allen, 485 F.3d 635, 639 (11th Cir. 2007).
[151] *Id.*
[152] *Id.* at 641 (quoting *Nelson*, 541 U.S at 650); *see also* Hamilton v. Jones, 472 F.3d 814, 815–16 (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, Callahan v. Allen, No. 06-cv-695-WKW, 2008 WL 227945, at *1 (11th Cir. Jan. 29, 2008), raising for inmates in this circuit a great deal of uncertainty about precisely what timing rule applies.
[153] *See* King, *supra* note 101, at 60 (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).
[154] FALLON, JR., ET AL., *supra* note 67, 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 absent substantial grounds for relief." (quoting Delo v. Blair, 509 U.S. 823 (1993))).

jurisdiction that applies a strict statute of limitations rule, an inmate must bring his § 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. And under the approach outlined in this Section, an inmate is forced to constantly bring § 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."[155] 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.[156]

The case of Angel Diaz starkly illustrates the effects of such harsh timing rules. In *Diaz v. State*, the Florida Supreme Court refused to hear a new challenge by Diaz, despite the fact that he presented the court with a prominent new medical journal article,[157] the findings of the court in *Morales*, a letter from an expert, and an ABA report criticizing the Florida death penalty system, all of which came to light after his previous challenge.[158] The federal courts similarly declined to intervene, finding Diaz's challenge untimely in spite of substantial new evidence.[159] Angel Diaz was executed by lethal injection soon thereafter in a horrifically botched execution that clearly caused him suffering.[160] Had the federal court in *Diaz* chosen to intervene under *Hill*, it is by no

[155] *Cooey*, 479 F.3d at 429 (Gilman, J., dissenting).
[156] *Id.*; *see also* Cooey v. Strickland, 489 F.3d at 776 (Gilman, J., dissenting from denial of rehearing en banc).
[157] *See supra* note 82.
[158] Diaz v. State, 945 So. 2d 1136, 1144 (Fla. 2006).
[159] Diaz v. McDonough, 472 F.3d 849, 850 (11th Cir. 2006).
[160] *See* Lightbourn v. McCollum, No. SC06-2391, 2007 WL 3196533, at *1 (Fla. Nov. 1, 2007) (noting that the Diaz execution took thirty-four minutes, which was "substantially longer than any previous lethal injection in Florida"). In fact, this execution was so mishandled that it prompted Governor Jeb Bush to

means a foregone conclusion that Angel Diaz's 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 – namely 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, after all, should be a recourse to the principles of justice and fairness to correct or supplement the law as applied to particular circumstances."[161] Instead, the "presumption" adverted to by *Hill*[162] 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.[163] 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.[164] This approach is also exemplified by the "give and take" approach to timing in *Evans v. Saar*.[165] In *Evans*, the

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order a comprehensive review of the state's protocol. Adam Liptak & Terry Aguayo, *Florida Governor Halts the Death Penalty*, N.Y. TIMES, Dec. 16, 2006.

[161] Brown v. Livingston, 457 F.3d 390, 391–92 (5th Cir. 2006) (Dennis, J., dissenting).

[162] *Hill*, 126 S. Ct. at 2104 (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*, 541 U.S. at 649 ("A stay is an equitable remedy, and equity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation.").

[163] *See, e.g.,* Alley v. Little, 186 Fed. Appx. 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.").

[164] *Beardslee*, 395 F.3d at 1070 n.6; *see also Cooey*, 479 F.3d at 429–30 (Gilman, J., dissenting) (providing four guideposts for district courts making such equitable judgments: whether the protocol recently changed; the petitioner's diligence; the petitioner's reasonable attempts to ascertain the protocol; and the traditional equitable factors).

[165] 412 F. Supp. 2d 519 (D. Md. 2006).

district court addressed the dilemma faced by many judges addressing a relatively late-filed challenge:[166] whether simply to dismiss the suit as untimely, or whether to at least make a principled attempt to evaluate the merits of the inmate's claim. The court eventually denied equitable relief, but stated that for a number of reasons, it was prepared to make a reasoned decision on the merits, importantly refusing to accept the state's contention that the PLRA barred the claim.[167]

Ideally, *Hill* should allow for full hearings on the merits of a non-frivolous claim against a particular execution protocol, one like that accomplished in *Harbison*. But where this is not possible due to strict timing guidelines or due to 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 appeals courts 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.[168] 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*[169] with the district court opinion in *Harbison v. Little*,[170] both of which examined Tennessee's newly-revised lethal injection protocol, reaching very different conclusions.

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[166] Evans's petition was filed approximately eighteen days prior to his scheduled execution date. *Id.* at 520–21.
[167] *Id.* at 522–23.
[168] *See, e.g.*, 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).
[169] Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007).
[170] Harbison v. Little, 511 F. Supp. 2d 872 (M.D. Tenn. 2007).

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,[171] despite the fact that the inmate filed the action ninety-six hours after Tennessee released the revised protocol.[172] The court described the revised 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 certainly 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.[173]

Workman considered the merits of the new protocol based on no record or adversarial proceeding below, but rather on voluminous pleadings filed in a very short period of time.[174] The complaint, on which the district court understandably based its TRO, was eighty-two pages long, including extensive allegations and a fifty-five page memorandum in support, along with forty-five exhibits.[175] The state responded two days before the scheduled execution with a nineteen-page motion to the court of appeals to vacate the TRO by the district court, to which the inmate responded with a forty-five page reply brief.[176] The court's thirty-five page opinion was then issued *the same day* as these two briefs. Even if one supposes that these documents (which, again, were completely untested by any adversarial process) were an adequate basis, it seems highly

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[171] *Workman*, 486 F.3d at 911–12 (finding that Workman gets "no better purchase" to challenge a protocol that is "better," when he could have challenged it earlier).
[172] *Id.* at 900–01, 906–07.
[173] *Id.* at 906–07.
[174] 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.
[175] *Id.* at 924 (Cole, J., dissenting).
[176] *Id.* at 900–01.

unlikely that the court could give them proper consideration in just one day, including drafting and issuing its lengthy opinion.[177]

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.[178] Characterizing this as a "profound jurisdictional defect," he noted that this did not fall under either of the usual exceptions allowing the review of a TRO.[179] As such, there was no appealable order, "even though the State and a majority of this court may wish it."[180] He then pointed out that even if it did fall under these exceptions, the court may not overturn the district court if it acted within its discretion, even if the appeals court disagrees with the merits of that decision.[181]

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*.[182] Decided four months after *Workman*, *Harbison* concerned the very same revised protocol at issue in that case. 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

[177] Philip Workman was subsequently executed by lethal injection. Tracie Simer, *Death Penalty: Just or Unjust?*, JACKSON SUN, Jan. 26, 2008.
[178] *Id.* at 921–22 (Cole, J., dissenting).
[179] *Id.* at 921–23 (Cole, J., dissenting) (noting that TRO's are generally only reviewable when issued for greater than ten days (which this one was not) or when they are "in substance a preliminary injunction").
[180] *Id.* at 922.
[181] *Id.* at 927.
[182] 511 F. Supp. 2d 872 (M.D. Tenn. 2007).

drugs in the lethal injection "cocktail," both of which can be excruciatingly painful.[183] These were not mere 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.[184]

The court summarized its findings by characterizing the revised protocol as "not a mere 'risk of negligence' but a guarantee of accident written directly into the protocol itself."[185] And *Harbison* did not simply disagree with the court in *Workman*, it affirmatively criticized that court for praising the revised protocol and ignoring its real findings.[186]

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 courts should narrowly tailor their pronouncements on the merits of an execution protocol when ruling only on the question of preliminary injunctive relief. That a court must opine on the likelihood of success on the merits is inherent in this equitable balancing process. But courts should minimize the creation of precedent that

[183] *Id.* at 894–95.

[184] *Id.* at 895–99. 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." *Id.* at 886. 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. *Id.* at 891. The court continued on to aver that the lack of training fell equally short. In fact, the executioners were woefully under-trained laymen, one of whom had a history of drug and alcohol abuse and psychological disorders, factors for which the state does at all not screen. *Id.* at 887–88. Perhaps most egregiously, none of the execution team members were even required to read the new protocol and were largely ignorant of a whole range of problems, including setting the IV in the wrong direction, catheter slippage, and line failure. *Id.* at 888–89.

[185] *Id.* at 891.

[186] *Id.* at 899–900. 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 unilaterally overrode. But *Workman* incorrectly implied that the committee itself had considered and rejected this option on the basis of its research. *Id.* 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. *Id.*

seems to have been based on a well-developed record, when in fact it was not. More important, 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.[187]

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.[188] And in *Cooper v. Rimmer*, the court noted that its 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. Thus, the court noted, "[n]either the district court nor the parties should read today's decision as more than a preliminary assessment of the merits."[189] 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.[190]

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.[191] Inmates in a particular state are all challenging the same protocol and every challenge therefore has the same factual basis. To be sure, there are individual nuances, such as the need to

[187] *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).
[188] *Beardslee*, 395 F.3d at 1076.
[189] Cooper v. Rimmer, 379 F.3d 1029, 1033–34 (9th Cir. 2004).
[190] Hicks v. Taft, 431 F.3d 916, 917 (6th Cir. 2005).
[191] For an in-depth discussion of aggregation in criminal cases, *see* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383 (2007).

access compromised veins, but even these are sufficiently common such that courts should be able to address them. 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.[192]

This is by no means a novel concept. Courts are already accomplishing it on a smaller scale through both consolidation[193] and intervention.[194] But neither of these mechanisms fully cures many of *Hill*'s issues, instead largely only promoting judicial economy.[195] An even better solution, one that *does* promise a comprehensive solution, is to certify a class action of all similarly situated inmates in a state,[196] and indeed, one *Hill* class action has already been certified.[197]

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 intra-state level, one court would resolve common issues in the same way. It would also resolve many of the timeliness concerns: once a court finally resolves all of the factual and legal issues in the aggregated case, provided the state did not change its protocol (if the protocol is found

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[192] *Id.* at 408–10.

[193] *See, e.g.*, *McNair*, 2007 WL 4106483, at *1 (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).

[194] *See, e.g.*, *Nooner*, 491 F.3d at 806; Timberlake v. Buss, No. 1:06-cv-1859-RLY-WTL, 2007 WL 2316451, at *1 (S.D. Ind. June 12, 2007) (case where one inmate filed and two more later intervened).

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

[196] For an example of a § 1983 capital punishment class action, s*ee* Murray v. Giaratano, 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).

[197] Jackson v. Danberg, 240 F.R.D. 145, 146–48 (D. Del. 2007) (certifying a "a state-wide class consisting of all current or future prisoners in the custody of the Delaware Department of Corrections who are or will be sentenced to death" under Fed. R. Civ. P. 23(b)(1)).

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 by engendering all of the advantages in cost and efficiency that such aggregation allows. In actuality, "[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.[198]

Were an inmate to opt out of the class due to individual nuances in their own case, they are free to do so. While the result of the class action would not be preclusive on them, 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, they do so at their own peril: a court would almost certainly give very nearly preclusive effect to a fully adjudicated class action based on the very same facts.

[198] Garrett, *supra* note 191, at 408

Conclusion

Procedure matters. By making § 1983 available for method-of-execution challenges, the Supreme Court implicitly made all of its advantages over habeas corpus available as well. By importing habeas doctrines into a context where they do not belong and by adding limitations not called for by either *Hill* or *Nelson* themselves or by § 1983 doctrine generally, lower federal courts prevent these advantages from being realized. And in so doing, they frustrate the promise of the § 1983 method-of-execution vehicle.