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BLIND DATES: WHEN SHOULD THE STATUTE OF LIMITATIONS BEGIN TO RUN ON A METHOD-OF-EXECUTION CHALLENGE?

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ABSTRACT

This Article is the first to take a comprehensive look at the issue of statute-of-limitations accrual in method-of-execution cases. In other words, when does the clock start ticking on a death row inmate's right to challenge the way in which the state intends to execute him? Most circuit courts have held that method-of-execution challenges accrue at the completion of the direct appeal process. This means that death row inmates in these jurisdictions must file method-of-execution challenges years, and sometimes even decades, before an actual execution is scheduled. Although this approach has been the subject of much criticism, even the dissenting view would tie the accrual date to a particular stage of the death row inmate's appeals.

This Article examines whether either rule—the majority's or the dissenters'—makes sense in light of the nature of method-of-execution

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challenges and the purposes of statutes of limitations. It concludes that, rather than using the appellate and postconviction process as a guide in determining when an unrelated challenge to the state's method of execution should accrue, courts should treat method-of-execution claims as the unique tort claims that they are and should tie accrual to the future constitutional injury that has yet to occur.

The approach proposed in this Article would allow death row inmates with meritorious claims to have their days in court. And it is more faithful to the historical purposes of statutes of limitations, more practical to administer, and no less consistent with the desire expressed by many courts to preclude dilatory lawsuits.

TABLE OF CONTENTS

Introduction	866
I. The State of the Law	873
A. <i>Cooey v. Strickland</i>	877
B. <i>Cooey's Progeny</i>	881
C. Dissenting Judges and <i>Jones v. Allen</i>	883
II. Falling at the Margins of Habeas? Incorporation of AEDPA Rules and Principles.....	886
III. Unnecessary Conflation of Statute-of-Limitations and Equitable Considerations	896
A. Rejection of the "Veto Power" Myth	897
B. Dangers of an Unnecessarily Early Accrual Date	899
1. Forcing Unripe Claims	903
2. Judicial Inefficiency	905
3. Fostering Uncertainty and Confusion	908
IV. No Functional Accrual Date	910
Conclusion.....	916

INTRODUCTION

Romell Broom is the only death row inmate in the United States to survive a state's attempt to execute him by lethal injection. On September 15, 2009, Ohio prison officials spent more than two hours trying to access Broom's veins, puncturing his skin at least eighteen

times.¹ After unsuccessfully attempting to access a vein in Broom's right ankle (and hitting his bone with the needles in the process),² the Director of the Ohio Department of Corrections halted the execution and called the Governor.³ The Governor's decision to postpone the execution received international attention because it was the first time an American lethal-injection execution attempt had been abandoned due to an inability to gain access to the condemned inmate's veins.⁴

What is less known about Broom's case is that he had previously filed a § 1983⁵ civil rights lawsuit challenging the way in which Ohio administered lethal injection, and he had specifically alleged that Ohio executioners were ill-equipped to achieve venous access.⁶ He sought injunctive relief enjoining the state from executing him until, among other things, the training of the execution team members was sufficient to remove the likelihood of vein-access difficulties.⁷ But Broom never had his day in court. Although he filed his lawsuit more than two years before the state attempted to execute him, it was dismissed for failing to comply with the statute of limitations.⁸ As a

1. Ariane de Vogue, *Ohio Execution Fails After 18 Attempts to Puncture Inmate's Veins*, ABCNEWS.COM (Sept. 18, 2009), <http://abcnews.go.com/Politics/US/convicted-killer-romell-broom-appeals-state-federal-court/story?id=8613608&page=1>.

2. Affidavit of Romell Broom at 3, *Broom v. Strickland*, No. 2:09-cv-00823 (S.D. Ohio Sept. 18, 2009).

3. *Governor Strickland Delays Ohio Execution of Romell Broom After Trouble Finding Suitable Vein*, N.Y. DAILY NEWS, Sept. 16, 2009, http://www.nydailynews.com/news/national/2009/09/16/2009-09-16_governor_delays_ohio_execution_after_vein_troubles.html.

4. *E.g.*, Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 862–63 (2010) (“The Broom reprieve was not only unprecedented in Ohio, it was the first time in the [modern] era that authorities who had ‘botched’ an execution did not persist until they had succeeded.”); Giles Whittell, *Lethal Injection for Killer Romell Broom Delayed After Botched Execution*, TIMES (London), Sept. 16, 2009, at 36.

5. 42 U.S.C. § 1983 “gives individuals a civil cause of action against any person who, under color of state law, deprives them of rights guaranteed by federal law or the Constitution.” Paul Rathburn, Note, *Amending a Statute of Limitations for 42 U.S.C. § 1983: More Than “A Half Measure of Uniformity,”* 73 MINN. L. REV. 85, 85 (1988). Put another way, § 1983 “provides the statutory authorization for most federal court suits against local governments or state and local government officials to redress violations of federal civil rights.” *Beardslee v. Woodford*, 395 F.3d 1064, 1068 (9th Cir. 2005).

6. Intervenor-Plaintiff's Proposed Complaint for Injunctive and Declaratory Relief, Attorney Fees, and Costs of Suit Pursuant to 42 U.S.C. § 1983 at 11–12, 17, *Broom v. Strickland*, No. 2:04-cv-01156 (S.D. Ohio Apr. 25, 2007).

7. *Id.* at 17.

8. *Cooley v. Strickland (Cooley IV)*, No. 2:04-cv-1156, 2008 WL 4065809, at *5, *7 (S.D. Ohio Aug. 25, 2008).

result, he was subjected to the same faulty execution procedures that he had complained about in his lawsuit—and he lived to tell the tale.

When is the right time to object to how you are going to die? For the thousands of men and women on death row in the United States, this question has taken on “exceptional importance,”⁹ but only recently so. For more than a century, death row inmates have challenged the method by which the state intends to execute them.¹⁰ Only in the past several years, however, have courts begun to dismiss many of these challenges on statute-of-limitations grounds. They have done so by deciding a question that, for most courts, has been one of first impression: when does the statute of limitations begin to run on a constitutional violation that has not yet occurred?

Without any real precedent to guide them, and over a number of vigorous dissents, most federal circuit courts have held that method-of-execution challenges accrue at the completion of the direct appeal process.¹¹ This means that death row inmates in these jurisdictions must file method-of-execution challenges years, and sometimes even decades, before an actual execution is scheduled. Some judges, writing either in dissent or at the district court level, have argued that the accrual date should be tied to the inmates’ appeals and postconviction processes; they would start running the statute of limitations at the completion of federal habeas corpus proceedings. This Article explores whether either rule makes sense given the nature of method-of-execution challenges and the purposes of statutes of limitations.

The dominant approach to this issue has its roots in a March 2007 decision of the Sixth Circuit. A divided panel of that court, in

9. *Cooley v. Strickland (Cooley III)*, 489 F.3d 775, 776 (6th Cir. 2007) (Gilman, J., dissenting from denial of rehearing en banc).

10. *E.g.*, *Gomez v. U.S. Dist. Court*, 503 U.S. 653 (1992) (challenging the gas chamber as a method of execution); *In re Kemmler*, 136 U.S. 436 (1890) (challenging electrocution as a method of execution); *Wilkerson v. Utah*, 99 U.S. 130 (1879) (challenging the firing squad as a method of execution). In *Baze v. Rees*, 128 S. Ct. 1520 (2008), a plurality of the Supreme Court articulated what now appears to be the governing standard for establishing an Eighth Amendment violation in a method-of-execution challenge. *Id.* at 1532 (plurality opinion). Under *Baze*, the plaintiff must establish “both (1) that the current [execution] procedure poses ‘a substantial risk of serious harm’ and (2) that the state has refused to adopt a ‘feasible, readily implemented’ alternative ‘significantly’ reducing that risk.” Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL’Y REV. 259, 274 (2009) (quoting *Baze*, 128 S. Ct. at 1532 (plurality opinion)).

11. *See infra* Part I.A–B.

Cooley v. Strickland,¹² was the first to wrestle with the appropriate accrual date for the statute of limitations in a § 1983 challenge to a method of execution.¹³ After considering a number of possible dates, the *Cooley* court decided that the most “attractive choice” for an accrual date was the date upon which the direct appeal process concluded in state court.¹⁴

This approach consciously mirrors the accrual date found in the statute of limitations created by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁵ which governs federal habeas proceedings.¹⁶ The court in *Cooley* also held that when a state does not choose lethal injection as a method of execution until after the defendant’s direct review had concluded, the statute of limitations begins to run on the date the state adopted lethal injection or the date the state made lethal injection the sole method of execution.¹⁷ But when it is clear that lethal injection is the governing method of execution, most death row inmates, under the *Cooley* approach, must file constitutional challenges to the execution procedure relatively soon after their convictions and death sentences are affirmed on direct appeal.

This Article explores whether there can ever be a functional accrual date in a method-of-execution challenge and concludes that there cannot. Such challenges are civil rights actions seeking to enjoin activity that has not yet occurred—the infliction of pain and suffering on a condemned inmate. Applying a statute of limitations to such a lawsuit, filed in advance of the anticipated injury, is not only conceptually nonsensical but also does little to vindicate the primary historical purpose of statutes of limitations: protecting defendants from having to defend against stale claims. A more doctrinally sound approach, and one that would avoid the counterproductive policy

12. *Cooley v. Strickland (Cooley II)*, 479 F.3d 412 (6th Cir. 2007). The *Cooley* line of cases spans four rulings, two in the Southern District of Ohio and two in the Sixth Circuit. For clarity, this Article simply refers to *Cooley* in general, but citations are provided to the appropriate rulings.

13. *Id.* at 416–24; *see also* *Jones v. Allen*, 483 F. Supp. 2d 1142, 1147 (M.D. Ala. 2007) (referring to *Cooley* as “the first and only published decision on when a method-of-execution claim brought under [§ 1983] accrues for statute-of-limitations purposes”).

14. *Cooley II*, 479 F.3d at 419.

15. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S.C.); *Cooley II*, 479 F.3d at 422 (“[I]t stands to reason that the . . . most appropriate accrual date should mirror that found in the AEDPA . . .”).

16. 28 U.S.C. § 2244(d)(1)(A) (2006).

17. *Cooley II*, 479 F.3d at 422.

implications of *Cooey*, would be one in which there is no functional accrual date for method-of-execution challenges. Under such an approach, inmates seeking to enjoin the use of certain execution procedures would have to meet the same stringent legal standards applied in other contexts in which plaintiffs seek injunctions, but would not have the added burden of overcoming a statute-of-limitations defense. This Article advocates for courts to adopt such an approach.

Part I examines the current state of the law. In the wake of a pair of Supreme Court decisions establishing the ability of death row inmates to file method-of-execution challenges as § 1983 civil rights actions, lower courts have seen a proliferation of such lawsuits.¹⁸ The states were somewhat slow to latch onto the statute-of-limitations defense as a mechanism for quick dismissal of these challenges, but it is now the rare case in which the defense is not raised. The Supreme Court has never addressed when the statute of limitations accrues on a method-of-execution challenge, but several circuit courts have now taken a position. Although *Cooey* is the seminal case thus far and has been adopted by other circuits, a number of dissenting circuit judges and district court judges have taken exception to its reasoning. Most of these dissenters would set the accrual date at a different step in the appellate and postconviction process: the conclusion of federal habeas proceedings.

Part II discusses why it is a mistake for courts to import AEDPA rules, as well as the motivations behind those rules, when determining the accrual date for method-of-execution challenges. The Supreme Court has made clear that § 1983 method-of-execution lawsuits are not challenges to inmates' convictions or sentences.¹⁹ The concerns that led to the passage of AEDPA are therefore not implicated in such lawsuits, and the use of that statute as a guideline arbitrarily removes the ability of most death row inmates to challenge the means by which the state will execute them. The selection of any accrual date that is tied to the appellate or postconviction process, in fact, divorces the filing rules from the primary purpose of statutes of limitations, which is to provide repose to defendants.²⁰ Such statutes

18. See sources cited *infra* note 30.

19. See *Hill v. McDonough*, 547 U.S. 573, 576 (2006); *Nelson v. Campbell*, 541 U.S. 637, 641–42 (2004). *Hill* and *Nelson* are discussed in greater detail later in this Article. See *infra* text accompanying notes 27–31, 63–72 & 127–39.

20. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (“[Statutes of limitations] are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable

“represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that ‘the right to be free of stale claims in time comes to prevail over the right to prosecute them.’”²¹ Nothing about a method-of-execution claim implicates concerns of staleness, forgetful witnesses, or missing evidence, however, because the constitutional tort has not yet taken place.

Part III discusses the way in which most courts to address this issue have improperly conflated statute-of-limitations and equitable concerns. Equitable concerns—that death row inmates are filing lethal-injection challenges merely to forestall their impending executions—animate most of the recent statute-of-limitations jurisprudence. Part III explains why equitable concerns should play no role in a statute-of-limitations analysis. Equity will take care of the truly dilatory lethal-injection challenges. But when death row inmates have good reason to have waited to file a lethal-injection challenge—because, for example, improprieties in the state’s administration of the protocol only recently came to light—and when they can demonstrate a likelihood of success on the merits, they should be permitted to proceed with a constitutional challenge. The approach taken by most courts so far has not only foreclosed that option, but has also created an unnecessarily confusing regime that wastes judicial resources and does little to ensure the finality and certainty that it was intended to produce.

Finally, Part IV argues that tying the accrual date to any step in the appeals or postconviction process is a flawed approach. Rather, the statute of limitations should start running on the date the unconstitutional execution occurs. Because the condemned inmate cannot wait that long to file suit, as a practical matter there is no functional accrual date for a method-of-execution challenge. This approach makes the most sense doctrinally, and it avoids the arbitrary and confusing line drawing of the other approaches. It also takes into account the nature of lethal-injection challenges, which have far more to do with the record of past executions and the current plans to administer lethal injection than with the simple availability of a

time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”).

21. *Id.* (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)).

written protocol. In other words, these tend to be fact-bound cases in which the evidentiary record is continuously developing; they do not tend to present, for example, abstract questions of statutory interpretation dependent on a factual record that is static and can be fixed in time. The approach advocated here protects inmates who could not have brought their challenges earlier and does nothing to inhibit the ability of courts to dismiss on equitable grounds challenges that have been brought solely for the purpose of delay.

Cooley and its progeny are explicitly concerned that death row inmates—and, by implicit extension, their attorneys—are using method-of-execution challenges as last-ditch efforts to forestall executions that are otherwise judicially unimpeded.²² This Article demonstrates that it is not necessary to distort the doctrine of statute of limitations, as these courts have done, to ensure that states have the ability to enforce their death-penalty judgments. Indeed, even if it were accurate to characterize most method-of-execution challenges as frivolous lawsuits filed solely for the purposes of delay, that would not justify distorting the doctrine in a way that precludes meritorious claims from being heard. And most such claims are not frivolous at all. Counsel for death row inmates must—and will—file method-of-execution challenges whenever and however it is ethical to do so and is in their clients' interests.²³ Many of these claims have been unsuccessful, but many others have exposed serious problems in the administration of lethal injection in this country.²⁴ The approach advocated in this Article permits death row inmates to file objections to the manner and means by which the state intends to execute them, so long as they are not filed solely for the purpose of delaying the execution. It also achieves the stated goals of the courts that are concerned with dilatory filings but does so without distorting the statute-of-limitations doctrine.

22. See *infra* Part III.A.

23. See Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 66 (2009) (“[L]awyers must continue to vindicate their clients’ rights, including the Eighth Amendment right not to be subjected to an execution procedure that is likely to involve excruciating pain and suffering.”).

24. See *infra* notes 29 & 43.

I. THE STATE OF THE LAW

Death row inmates have been filing method-of-execution challenges for more than a century.²⁵ But only relatively recently have they used § 1983 as the vehicle for doing so.²⁶ Once the Supreme Court established in *Nelson v. Campbell*²⁷ and *Hill v. McDonough*²⁸ that § 1983 is an appropriate vehicle for bringing method-of-execution challenges, and once litigation in several states began to uncover “numerous flaws in states’ lethal injection procedures,”²⁹ courts began to see a proliferation of such challenges.³⁰ As Deborah Denno has written, “Challenges to lethal injection protocols existed years before *Nelson* and *Hill*, but the Court’s spark of encouragement [in those cases], no matter how indirect, propelled attorneys to bring claims that may have remained dormant otherwise.”³¹

Because § 1983 was not the preferred method for bringing method-of-execution challenges prior to *Hill* and *Nelson*,³² courts did

25. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 333–39 (1997) (describing the history of method-of-execution challenges); see also Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789, 792–95 (2008) (discussing various method-of-execution challenges).

26. See Denno, *supra* note 25, at 342–43 (noting that death row inmates began filing method-of-execution challenges as § 1983 cases in the mid-1990s).

27. *Nelson v. Campbell*, 541 U.S. 637 (2004).

28. *Hill v. McDonough*, 547 U.S. 573 (2006).

29. Berger, *supra* note 10, at 263–64, 268–72 (discussing various flaws, including that the procedure “create[s] an unnecessary risk of pain,” that the state “use[s] . . . untrained and unqualified personnel,” that the architecture of the execution chambers prevents executions from being carried out in a safe, efficient manner, and that “some states have failed to adopt consistent, predictable procedures, leading to inconsistent behavior and recordkeeping”).

30. See Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301, 1301 (2007) (referring to an “explosion” of lethal-injection challenges filed as § 1983 lawsuits following the Supreme Court’s ruling in *Hill*); Liam J. Montgomery, Note, *The Unrealized Promise of Section 1983 Method-of-Execution Challenges*, 94 VA. L. REV. 1987, 1989–90 (2008) (noting that, prior to *Hill*, “[b]ecause courts largely viewed method-of-execution challenges as [habeas challenges], Section 1983 played little role in capital post-conviction litigation”); Daniel R. Oldenkamp, Note, *Civil Rights in the Execution Chamber: Why Death Row Inmates’ Section 1983 Claims Demand Reassessment of Legitimate Penological Objectives*, 42 VAL. U. L. REV. 955, 988 (2008) (noting that *Hill* “mobilized death row inmates nationwide to test the [§ 1983] avenue for relief”).

31. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 107 (2007) (footnote omitted).

32. Before *Hill* and *Nelson*, method-of-execution challenges were typically brought in habeas petitions. See Montgomery, *supra* note 30, at 1995–96 (“Before [*Nelson*] was decided in 2004, it was generally accepted that federal method-of-execution claims were cognizable only through a habeas corpus petition.”).

not have occasion to address the statute-of-limitations issue until § 1983 lawsuits became more common. Even then, however, states were slow to raise the statute of limitations as a defense.³³ Until the Sixth Circuit accepted Ohio's statute-of-limitations defense in *Cooley*, the issue was not even litigated in some of the most prominent lethal-injection cases.³⁴ Perhaps it had never before occurred to states' lawyers to raise a statute-of-limitations defense to an action seeking to enjoin activity that had not yet occurred. In any event, now that courts have begun to adopt the *Cooley* approach, states' lawyers, seeking to take advantage of an expeditious method of getting cases dismissed, routinely raise the defense in lethal-injection challenges.³⁵

Before examining the state of the law with respect to the accrual issue, it is important to clarify the nature of most § 1983 challenges to state lethal-injection practices.³⁶ States that employ lethal injection, with the exceptions of Ohio and Washington, use a three-drug formula to carry out executions.³⁷ The first drug is intended to anesthetize the inmate; the second to paralyze him; and the third drug to stop his heart, killing him.³⁸ Many of the § 1983 lawsuits filed in recent years on behalf of death row inmates allege that states do not employ adequate safeguards to ensure that the person being executed is properly anesthetized before the second and third drugs are

33. For example, the issue was never litigated in *Taylor v. Crawford*, 445 F.3d 1095 (8th Cir. 2006), the lethal-injection litigation in Missouri that served as one of the catalysts for serious questioning of lethal-injection practices around the country. *Nooner v. Norris*, 491 F.3d 804, 810 (8th Cir. 2007) (“[T]he issue of unjustified delay by the inmate was not raised or litigated in *Taylor*.”); see also *Berger*, *supra* note 10, at 268–70 (discussing revelations about lethal-injection practices in Missouri that were discovered during the *Taylor* litigation).

34. For a history of lethal-injection challenges, see sources cited *supra* note 25.

35. See *infra* text accompanying notes 86–97.

36. Although § 1983 can be used to challenge any method of execution, this Article focuses almost exclusively on challenges to lethal injection, the dominant method of execution in the vast majority of death penalty states. *Denno*, *supra* note 31, at 59. The legal analysis discussed herein would be similar if not identical in the context of a challenge to another method of execution, such as electrocution, but this Article uses “method-of-execution challenge” and “lethal-injection challenge” interchangeably for simplicity's sake.

37. 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, 97 (2002). Ohio announced in 2009 that it had abandoned the three-drug formula in favor of a one-drug, anesthetic-only alternative. Ian Urbina, *Ohio Is First to Change to One Drug in Executions*, N.Y. TIMES, Nov. 14, 2009, at A10. The State of Washington adopted Ohio's approach in March 2010. Rachel La Corte, *WA Changes Execution Method*, ABCNEWS.COM, Mar. 3, 2010, <http://abcnews.go.com/US/wireStory?id=9992489>.

38. *Denno*, *supra* note 37, at 97–98.

administered.³⁹ Because the second drug in the formula paralyzes the inmate, the concern is that an inadequately anesthetized person “may have the sensation of paralysis without anesthesia (known as awareness) and may feel the burning of the highly concentrated potassium chloride.”⁴⁰ If this were to happen, the inmate “could lie paralyzed, suffocating and experiencing intense burning in his veins, and yet appear peaceful.”⁴¹

Because there is no dispute that, if implemented properly, the three-drug formula will result in a constitutional execution,⁴² the primary challenges to lethal injection are tied to the implementation of the protocol and the specific personnel involved rather than to the drugs used in the procedure.⁴³ As Professor Eric Berger has put it, “Probably the most serious and complicated problem with many states’ lethal injection procedures is the use of untrained and unqualified personnel.”⁴⁴ Some challenges do implicate the design of the protocol and the drugs, but for the most part they rely on evidence of maladministration of those drugs in order to establish a “substantial risk”⁴⁵ that the execution will result in an unconstitutional level of pain to the condemned inmate. The factors that create the risk—such as inadequate equipment, poor training, and unqualified execution personnel—are based on aspects of the procedure that are subject to constant revision and are therefore inherently malleable.⁴⁶

39. Berger, *supra* note 10, at 265; Denno, *supra* note 31, at 54–58.

40. David Waisel, *Physician Participation in Capital Punishment*, 82 MAYO CLINIC PROC. 1073, 1074 (2007).

41. Berger, *supra* note 10, at 265; *see also* Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 FORDHAM URB. L.J. 817, 819 (2008) (“Because pancuronium paralyzes the inmate during the execution process, the inmate may experience excruciating pain and suffering but be unable to cry out or even blink an eyelid to let anyone know if the anesthesia has failed.” (citing Waisel, *supra* note 40, at 1074)).

42. *See, e.g., Morales v. Tilton*, 465 F. Supp. 2d 972, 978 (N.D. Ca. 2006) (“The parties . . . agree . . . that assuming effective anesthesia, the use in executions of pancuronium bromide or potassium chloride as such does not violate the Eighth Amendment.”).

43. *E.g., Alper, supra* note 41, at 820 (“Litigation on behalf of death row inmates has exposed problems at every step of the process, including the mixing of the drugs; the setting of the IV lines; the administration of the drugs; and the monitoring of their effectiveness.”); Berger, *supra* note 10, at 268 (describing some noted deficiencies in the implementation of lethal injections).

44. Berger, *supra* note 10, at 268.

45. *Baze v. Rees*, 128 S. Ct. 1520, 1532 (2008) (plurality opinion).

46. *See, e.g., McNair v. Allen*, 515 F.3d 1168, 1178 (11th Cir. 2008) (Wilson, J., dissenting) (“Callahan’s § 1983 action is not based on the fact of his death sentence or even on the fact that he is to be executed by lethal injection. Rather, Callahan is asserting that the specific lethal

For example, in 2006, a federal judge held that the record before him was “replete with evidence that in actual practice [California’s written lethal-injection protocol] does not function as intended.”⁴⁷ The state’s “implementation of lethal injection is broken,” he wrote, “but it can be fixed.”⁴⁸ In other cases, the states themselves have emphasized that changes to the personnel and implementation procedures, even with no accompanying changes to the written protocol or the drugs used, can seriously affect the plaintiff’s entitlement to relief.⁴⁹ More recently, questions have surfaced about the availability of sodium thiopental, the drug that most states use to anesthetize the prisoner before paralyzing him and injecting him with deadly potassium chloride.⁵⁰ The sole U.S. manufacturer of sodium thiopental has temporarily stopped production, leaving states scrambling to use stockpiles of the drug before they expire⁵¹ or acquire the drug from foreign sources not approved by the Food and Drug Administration (FDA).⁵² In light of the manufacturing stoppage, questions abound about the integrity of thiopental used in recent executions and where it was obtained.⁵³ These questions have little, if anything, to do with the states’ written lethal-injection

injection protocol presently employed by Alabama is likely to cause him undue pain and suffering when his execution is carried out.”).

47. *Morales*, 465 F. Supp. 2d at 979.

48. *Id.* at 974.

49. For example, in Arizona and Missouri, prison officials changed protocols after issues arose with doctors who were involved in executions. *See, e.g.*, Alper, *supra* note 23, at 46–47. In Missouri, litigation revealed that Dr. Alan Doerhoff, who had been responsible for “virtually all aspects of executions,” was unqualified and incompetent to perform the executions. *Id.* at 46. This was a change in the personnel that was entirely at the states’ discretion, and it had the potential to fundamentally affect the plaintiffs’ claim for relief.

50. *See* Kathy Lohr, *States Delay Executions Owing to Drug Shortage*, NPR (Sept. 16, 2010), <http://www.npr.org/templates/story/story.php?storyId=129912444> (reporting on delays in executions due to shortages of sodium thiopental).

51. *See* Kevin Fagan, *Execution: Expiration Date Near for Death Drug*, S.F. CHRON., Sept. 29, 2010, http://articles.sfgate.com/2010-09-29/news/24102111_1_sodium-thiopental-pancuronium-bromide-fatal-drugs (“[N]ever before has the state faced a problem such as the one confronting officials intending to lethally inject a rapist-murderer Thursday—the expiration, on that same night, of one of the fatal drugs.”).

52. *See* Amanda Lee Myers & Andrew Welsh-Huggins, *State Goes Overseas for Lethal Injection Drug*, YAHOO! NEWS, Oct. 26, 2010, http://news.yahoo.com/s/ap/20101026/ap_on_re_us/us_arizona_execution (“Facing a nationwide shortage of a lethal injection drug, Arizona has taken an unusual step that other death penalty states may soon follow: get their supplies from another country.”).

53. *See* Lohr, *supra* note 50 (noting “concerns about this haphazard method of implementing the ultimate punishment”).

protocols, yet they are critical to an understanding of how the states intend to carry out those protocols.

In short, § 1983 challenges to lethal injection revolve around the *current* plans to implement the state's written protocols. With that in mind, this Part now turns to the state of the law with respect to when the statute of limitations begins running on such challenges. Because § 1983 cases are generally characterized as constitutional tort claims, federal courts borrow the length of the state statute of limitations for personal injury actions,⁵⁴ which is typically one to three years.⁵⁵ But the accrual date—that is, when the statute of limitations begins to run—is a question of federal law.⁵⁶ Establishing the accrual date in a method-of-execution challenge is a matter of first impression in most jurisdictions. *Cooley* was the first published decision to address the accrual date of a method-of-execution challenge. A bit of history is in order, as this case has set the tone for all courts that have subsequently examined the issue.

A. *Cooley v. Strickland*

In 1997, on the eve of his scheduled execution, a Kentucky death row inmate named Harold McQueen filed a § 1983 civil action in federal court alleging that the state's then-used method of execution—electrocution—violated the Eighth Amendment.⁵⁷ The Sixth Circuit faulted McQueen for filing the challenge as a civil action, characterizing the complaint as “a challenge seeking to interfere with the sentence itself.”⁵⁸ As such, the court construed the complaint as a petition for habeas and dismissed it for failure to comply with the rules for filing such petitions.⁵⁹

54. See *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (“When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law”); see also *Owens v. Okure*, 488 U.S. 235, 249–50 (1989) (“[W]here state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.”).

55. See Michael B. Brennan, Note, *Okure v. Owens: Choosing Among Personal Injury Statutes of Limitations for Section 1983*, 82 NW. U. L. REV. 1306, 1324–25 (1988) (discussing how different circuits have applied different state statutes of limitations).

56. *Wallace v. Kato*, 549 U.S. 384, 388 (2007). Defendants have the burden of demonstrating that the statute of limitations has run. See, e.g., *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002).

57. *McQueen v. Patton (In re Sapp)*, 118 F.3d 460, 461 (6th Cir. 1997).

58. *Id.* at 462.

59. *Id.* at 463.

Six years later, an Ohio death row inmate named Lewis Williams filed a similar civil action in federal court challenging Ohio's lethal-injection procedures.⁶⁰ Relying on the precedent from McQueen's case, the Sixth Circuit affirmed the dismissal of Williams's lawsuit on the grounds that § 1983 was not the appropriate vehicle for challenging a method of execution.⁶¹ Both McQueen and Williams were executed soon after the Sixth Circuit dismissed their respective cases.⁶²

In 2004, however, the Supreme Court decided *Nelson v. Campbell*, which held for the first time that § 1983 is an appropriate vehicle for challenging a state's method of execution.⁶³ The Court reasoned that, because the challenge was not to the constitutionality of the conviction or sentence but rather to the manner and means by which the state intended to carry out the sentence, the case was more akin to a prison-conditions lawsuit than a collateral attack on the constitutionality of the trial.⁶⁴

Richard Coeey, another Ohio death row inmate, filed a lethal-injection challenge immediately following the *Nelson* ruling. Coeey had been sentenced to death in 1986, and his postconviction appeals were finally denied in March 2003.⁶⁵ Coeey filed his lethal-injection challenge under § 1983, as the Supreme Court had deemed appropriate just two weeks earlier in *Nelson*. The state sought to dismiss Coeey's lethal-injection challenge—not because it was filed as a § 1983 case, but because it was filed after the statute of limitations had run.⁶⁶ The state argued that the two-year statute of limitations for constitutional torts accrued either in 1993, when Ohio adopted lethal

60. *In re Williams*, 359 F.3d 811 (6th Cir. 2004).

61. *Id.* at 813–14 (citing *In re Sapp*, 118 F.3d at 464).

62. See *Execution Database*, DEATH PENALTY INFO. CENTER, <http://deathpenaltyinfo.org/executions> (last visited Nov. 19, 2010) (providing a database of executions carried out in the United States). Lewis Williams's case was dismissed on January 14, 2004, and he was executed two days later. Harold McQueen was executed on July 1, 1997, just days after the Sixth Circuit dismissed his appeal on June 27, 1997.

63. *Nelson v. Campbell*, 541 U.S. 637, 641–42 (2004).

64. *Id.* at 645; see also *Beardslee v. Woodford*, 395 F.3d 1064, 1068–69 (“[Petitioner’s] claim is more properly considered as a ‘conditions of confinement’ challenge, which is cognizable under § 1983, than as a challenge that would implicate the legality of his sentence, and thus be appropriate for federal habeas review.”).

65. *Coeey v. Strickland (Coeey I)*, No. 2:04 CV 1156, 2005 WL 5253337, at *2 (S.D. Ohio Mar. 28, 2005).

66. *Id.*

injection as a method of execution, or in 2001, when lethal injection became the sole method of execution in the state.⁶⁷

The district court rejected the state's statute-of-limitations defense, holding that the lethal-injection challenge accrued both when Cooley's execution became imminent—that is, when his direct and postconviction appeals had been exhausted—and when he had reason to know of the facts that gave rise to his specific method-of-execution challenge.⁶⁸ The district court wrote that requiring a death row inmate to file a method-of-execution challenge any sooner “strikes this Court as potentially wasteful and possibly absurd,” given that he may win relief on appeal or see the execution protocols changed during the lengthy appeals process.⁶⁹ The district court also questioned how Cooley could have been required to file a § 1983 lawsuit prior to *Nelson*, when circuit precedent squarely held that such lawsuits were improper.⁷⁰

The Sixth Circuit reversed. The court acknowledged that clear Sixth Circuit precedent had “precluded” a death row inmate from filing a § 1983 action challenging his method of execution until the Supreme Court decided *Nelson*, and it acknowledged that Cooley had filed his lawsuit only weeks after *Nelson* was decided.⁷¹ Nevertheless, the court reasoned, Cooley could have filed a § 1983 lawsuit earlier, anticipating either that the Sixth Circuit would revisit the issue en banc or that the Supreme Court would overrule circuit precedent. After all, the court noted, nothing stopped Lewis Williams from filing a § 1983 lawsuit in Ohio even though the precedent from Harold McQueen's case six years earlier foreclosed such an avenue of relief.⁷²

The Sixth Circuit's primary justification for rejecting the district court's accrual-date test was that it “adds a significant period of delay to a state's ability to exercise its sovereign power and to finalize its

67. *Id.* at *3.

68. *Id.* at *7.

69. *Id.* at *5.

70. *Id.* at *4.

71. *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 422 (6th Cir. 2007).

72. *Id.* As the dissent in *Cooley* pointed out, Williams's lawsuit was unsuccessful—his suit was dismissed, his petition for certiorari to the Supreme Court was denied, and he was executed. *Id.* at 426 (Gilman, J., dissenting). Holding Williams out as an example for what Cooley should have done is arguably disingenuous. The Sixth Circuit's reasoning in *Cooley* on this point, however, was echoed by the Eleventh Circuit in *Grayson v. Allen*, 491 F.3d 1318, 1322–23 (11th Cir. 2007). In *Grayson*, the court held that a death row inmate could have filed a § 1983 lawsuit challenging lethal injection prior to *Hill* despite the fact that Eleventh Circuit precedent on point precluded such a lawsuit. *Id.*

judgments.”⁷³ Allowing death row inmates to file method-of-execution challenges after they have gone through lengthy appeals and habeas proceedings, the court explained, threatens to frustrate the states’ ability to enforce their laws.⁷⁴ The court recalled that Congress passed AEDPA in response to the same concern and to “restore and maintain the proper balance between state criminal adjudications and federal collateral proceedings.”⁷⁵ Stating that “[a]ll of the same concerns . . . reflected in . . . AEDPA are relevant here,” the Sixth Circuit in *Cooley* chose to borrow AEDPA’s statute-of-limitations accrual date.⁷⁶ Under AEDPA, the one-year statute of limitations for filing a federal habeas petition begins to run at the conclusion of direct review or the expiration of time for seeking such review.⁷⁷ Accordingly, the Sixth Circuit held that a death row inmate’s statute of limitations for filing a method-of-execution challenge generally would accrue at that same time.⁷⁸

The only exception to AEDPA’s accrual-date formula, according to *Cooley*, would be a situation in which a prisoner did not know what the method of execution would be when the statute of limitations would otherwise accrue.⁷⁹ In that case, the statute of limitations would accrue when it became clear what that method would be. For example, Ohio did not adopt lethal injection until 1993 or make it the exclusive method of execution until 2001.⁸⁰ One of those dates would mark the accrual date for *Cooley*, the court reasoned, because his direct appeal was completed in 1991. Because his 2004 complaint would have been filed late under either a 1993 or a 2001 accrual date, the court did not need to decide which would have been the

73. *Cooley II*, 479 F.3d at 419.

74. *See id.* at 419 (emphasizing the importance of permitting states to bring finality to the process).

75. *Id.* at 420.

76. *Id.* at 422.

77. 28 U.S.C. § 2244(d)(1)(A) (2006).

78. *Cooley II*, 479 F.3d at 422. It is worth noting that under AEDPA the statute of limitations is tolled during the pendency of often very lengthy state postconviction proceedings. *See* 28 U.S.C. § 2244(d)(2) (“The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.”). The *Cooley* approach to the statute of limitations in the method-of-execution context includes no such tolling mechanism, nor does the court seem to have contemplated the possibility of equitable tolling. *See Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (holding that AEDPA’s statute of limitations may be tolled for equitable reasons).

79. *Cooley II*, 479 F.3d at 422.

80. *Id.*

appropriate accrual date.⁸¹ Unable to obtain review of the state's lethal-injection procedures, Coeey was executed by lethal injection on October 14, 2008.⁸²

In an era in which lawyers for death row inmates are often criticized for filing appeals and claims that are allegedly frivolous,⁸³ it is odd that Coeey was faulted for *not filing* a lawsuit that was precluded by binding circuit precedent.⁸⁴ But the Sixth Circuit's opinion in *Coeey* stands for more than just the particularly harsh application of procedural rules in a death penalty case. After all, now that *Nelson* is the law of the land, there is no longer any question that § 1983 is the appropriate forum for raising a challenge to a state's method of execution.⁸⁵ Death row inmates, going forward, know how to file a challenge, so there should be no confusion over whether § 1983 or habeas is the appropriate vehicle. But do they know when to do so? Most courts have followed *Coeey's* lead, setting an accrual date years in advance of the inmate's execution.

B. Coeey's Progeny

More than 60 percent of executions since 2000 have taken place in the Fifth, Sixth, and Eleventh Circuits.⁸⁶ It is the states in these circuits that primarily comprise the modern administration of capital

81. See *id.* (holding that Coeey's § 1983 action was barred by the statute of limitations without noting when the statute began to run).

82. *Execution Database, supra* note 62.

83. See, e.g., Dorothy Nash Holmes, *Habeas Corpus or Hocus Pocus*, 8 NEV. LAW. 28, 28 (2000) (criticizing the delay in postconviction litigation); Franco Ordoñez, *Death Row Appeal Challenges Rule Limiting Filings*, BOSTON GLOBE, Feb. 17, 2004, at A1 (referring to the complaint of death penalty supporters that defense attorneys “[tie] up the court system with frivolous claims”); Jim Vertuno, *Few Appeals Follow Execution Ruling*, HOUS. CHRON., July 21, 2002, at 43A (“[C]ritics continue to warn about frivolous appeals that would drain time and money from the court system.”).

84. See, e.g., *Rutherford v. McDonough*, 466 F.3d 970, 979 (11th Cir. 2006) (Wilson, J., dissenting) (noting that “there would have been little point” to death row inmates bringing a § 1983 method-of-execution challenge in the Eleventh Circuit prior to the Supreme Court's decision in *Hill*).

85. See *Hill v. McDonough*, 547 U.S. 573, 576 (2006) (reiterating the *Nelson* rule). It remains an open question whether method-of-execution challenges *must* be brought as § 1983 challenges. See, e.g., *Duty v. Workman*, No. 07-7073, 2010 WL 533117, at *11 (10th Cir. Feb. 12, 2010) (“Neither the Supreme Court nor this Circuit has definitively resolved whether claims challenging the specific method of execution may never be considered in a habeas proceeding.”).

86. *Execution Database, supra* note 62.

punishment in this country.⁸⁷ Not surprisingly, then, it is the courts in these circuits that have had occasion, in the wake of the increase in § 1983 method-of-execution challenges, to rule on the statute-of-limitations accrual-date issue. When they have done so, they have followed *Cooley*. Both the Fifth and Eleventh Circuits have, in large part, adopted *Cooley*'s approach, as has one other federal court.

In *McNair v. Allen*,⁸⁸ an Alabama case, the Eleventh Circuit acknowledged that the question of when the statute of limitations accrues in a method-of-execution challenge was novel in that circuit,⁸⁹ presumably because no state in the circuit had ever before raised statute of limitations as a defense in such a case. Instead, the court noted, it had traditionally employed an equitable analysis to determine whether method-of-execution challenges were filed in a timely manner.⁹⁰ Now that Alabama had raised the statute of limitations as a threshold defense, the court was in a position to address the question of first impression.

Relying in large part on the reasoning of *Cooley*, the Eleventh Circuit rejected several possible accrual dates before concluding that the completion of review on direct appeal will "ordinarily" trigger the statute of limitations in a method-of-execution challenge.⁹¹ When, as in *McNair*, the petitioner did not choose his method of execution under Alabama law until after his direct appeal had been concluded, the statute of limitations began running on the date that he chose his method of execution.⁹² In sum, the standard for determining the accrual date in the Eleventh Circuit looks very similar to that in

87. Except for Ohio, the states in these circuits are all in the southern United States. See Franklin E. Zimring, *The Wages of Ambivalence: On the Context and Prospects of New York's Death Penalty*, 44 BUFF. L. REV. 303, 307 (1996) ("The outstanding regional characteristic of executions in the 1990s is Southern dominance. The consistent tradition of heavy concentration of executions in the South extends well back into American history."); Lawrence Kilman, *Are Southern States More Likely to Execute Killers?*, GAINESVILLE SUN (Fla.), Jan. 29, 1985, at 8A ("Studies show the South has a historical tradition of executing more people than the rest of the country, and some experts say a 'tradition of retribution' may also contribute to the execution rate there."); Ned Walpin, *Why Is Texas #1 in Executions*, PBS (Dec. 5, 2000), <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/texas.html>.

88. *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008).

89. *Id.* at 1172.

90. *Id.*

91. *Id.* at 1176.

92. *Id.* at 1177. When the Alabama legislature changed the state's preferred method of execution to lethal injection in 2002, inmates were given thirty days to choose whether they wanted to die by electrocution or lethal injection. Those that did not make a choice were deemed to have chosen lethal injection. *Id.*

Cooley—in the Eleventh Circuit’s words, “the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol.”⁹³

The Fifth Circuit in *Walker v. Epps*⁹⁴ followed both *Cooley* and *McNair*, holding that the accrual date for a method-of-execution challenge was “the later of two dates: the date direct review of an individual case is complete or the date on which the challenged [execution] protocol was adopted.”⁹⁵ Likewise, the District Court for the District of Columbia, in *Roane v. Holder*,⁹⁶ held that a method-of-execution claim accrues “upon completion of the plaintiff’s direct appeal or, if the challenged protocol is not known upon conclusion of direct appeal, at the time the plaintiff ‘knew or should have known based upon reasonable inquiry’ about the protocol giving rise to the challenge.”⁹⁷

In sum, the precedent on this issue is largely uniform. If the challenged execution protocol exists and is applicable to the death row inmate, the statute of limitations begins to run when direct review is completed. If the protocol is not adopted or made available at that point, or it does not apply to the inmate at the time direct review is completed, the statute of limitations begins to run when the protocol is adopted, is made available, and is applicable to the inmate.

C. *Dissenting Judges and Jones v. Allen*

Uniformity, however, does not preclude controversy. The *Cooley* approach has been met by a drumbeat of criticism from dissenting circuit court judges and district court judges. The critics of *Cooley* fall into two camps. Most argue that *Cooley* sets the accrual date too early; a minority argues there should be no functional accrual date at all.

Thus far, the dissenting circuit court judges fall into the first camp. For example, Judge Ronald Gilman, dissenting in *Cooley*, agreed with the district court in that case and would have set the accrual date “at the time when a prisoner’s execution becomes imminent and the prisoner knows or has reason to know of the facts

93. *Id.* at 1174. Courts thus far have employed a narrow definition of what it means for a state to “substantially change” an execution protocol. *See infra* Part III.B.2.

94. *Walker v. Epps*, 550 F.3d 407 (5th Cir. 2008).

95. *Id.* at 414.

96. *Roane v. Holder*, 607 F. Supp. 2d 216 (D.D.C. 2009).

97. *Id.* at 221 (quoting *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 422 (6th Cir. 2007)).

giving rise to his § 1983 claim.”⁹⁸ In the context of a challenge to lethal injection, Judge Gilman would have held that a prisoner knows or has reason to know of the facts giving rise to his claim “when he learns the details of the protocol that will be used for his execution.”⁹⁹ As for when the execution becomes imminent, Judge Gilman would define that point as the completion of federal habeas proceedings, which “have become, for good or for ill, a routine part of carrying out a death sentence in our criminal justice system.”¹⁰⁰ When *Cooley* went up for an en banc vote, five other Sixth Circuit judges joined Judge Gilman in dissenting from the court’s denial of rehearing en banc.¹⁰¹

In a subsequent Sixth Circuit case that relied on *Cooley*, several judges wrote stinging opinions criticizing the *Cooley* rationale and citing with approval Judge Gilman’s dissent. Judge Karen Moore wrote that the court had “fundamentally erred” in its approach to setting the accrual date.¹⁰² Dissenting circuit court judges in other circuits have also agreed with Judge Gilman’s proposed approach. For example, Judge Charles Wilson, dissenting from the Eleventh Circuit’s opinion in *McNair*, wrote that he found Judge Gilman’s approach preferable to that of the *Cooley* majority, “which effectively requires a death-sentenced prisoner to file a method-of-execution claim years before his execution is to take place, during which time the challenged protocol could be materially changed.”¹⁰³

98. *Cooley II*, 479 F.3d at 426 (Gilman, J., dissenting).

99. *Id.*

100. *Id.* at 429.

101. *Cooley v. Strickland (Cooley III)*, 489 F.3d 775, 776 (6th Cir. 2007) (Gilman, J., dissenting from denial of rehearing en banc). The district judge who originally denied the state’s statute-of-limitations defense in *Cooley* has noted in subsequent cases (which are confusingly also captioned *Cooley*) his continued disagreement with the Sixth Circuit’s rationale in *Cooley*. See *Cooley v. Strickland (Cooley IV)*, No. 2:04-cv-1156, 2008 WL 4065809, at *7 (S.D. Ohio Aug. 25, 2008) (“The Court can continue to disagree with the *Cooley* rationale But this Court’s opinion on those issues no longer matters.”).

102. *Getsy v. Strickland (Getsy II)*, 577 F.3d 320, 321 (6th Cir. 2009) (Moore, J., dissenting from denial of rehearing en banc); see also *Getsy v. Strickland (Getsy I)*, 577 F.3d 309, 316 (6th Cir. 2009) (Moore, J., concurring) (“I find it unconscionable that by invoking a statute-of-limitations defense, the State should be able to execute a person by a procedure that a court may ultimately find cannot withstand constitutional scrutiny.”).

103. *McNair v. Allen*, 515 F.3d 1168, 1178 (11th Cir. 2008) (Wilson, J., dissenting). As discussed previously, the district court in *Cooley* also rejected as “potentially wasteful and possibly absurd” the requirement that a death row inmate file a method-of-execution challenge years before his actual execution. See *supra* text accompanying note 69. In 2006, one district court in Oklahoma dismissed a statute-of-limitations defense in a lethal-injection challenge with little discussion. In *Anderson v. Evans*, No. Civ-05-0825-F, 2006 WL 83093, at *2 (W.D. Okla. Jan. 11, 2006), the state alleged that the statute of limitations began at the time the plaintiffs

Alabama District Judge Myron Thompson took a different approach in his critique of the *Cooley* rationale. In *Jones v. Allen*,¹⁰⁴ Judge Thompson focused on the fact that a method-of-execution challenge is fundamentally different from most § 1983 challenges because the allegedly unconstitutional act has not yet occurred at the time the suit is filed; it is the execution itself that may violate the rights of the plaintiffs.¹⁰⁵ In such a case, Judge Thompson held, “it defies logic, and is contrary to the common law of torts, to conclude that the statute of limitations has already run on a suit to prevent an unconstitutional act that has not yet occurred.”¹⁰⁶

Although Judge Thompson’s view on the statute-of-limitations issue was ultimately rejected by the Eleventh Circuit,¹⁰⁷ several dissenting circuit judges have alluded to it in their critiques of *Cooley*. For example, dissenting from the denial of en banc review in *Cooley*, Judge Gilman cited Judge Thompson’s critique of the *Cooley* majority, saying that it “serves to support my view that the panel opinion in our case was wrongly decided.”¹⁰⁸ Judge Wilson, dissenting in *McNair*, wrote that it was “noteworthy” that Judge Thompson had recognized in *Jones* that the statute of limitations is, for all intents and purposes, not even applicable in a case challenging the constitutionality of an event that has not yet occurred.¹⁰⁹ In the Fifth Circuit, Judge Carolyn King recently noted that, although the statute of limitations was not squarely before the court and therefore was unnecessary to resolve in that particular case, “I am content to refer

were sentenced to death. The court disagreed, holding that the statute of limitations accrued, at the earliest, when the state revealed its execution procedures. Because the lawsuit was timely filed under that conception of the accrual date, the discussion in *Anderson* was not extensive. *Id.*

104. *Jones v. Allen*, 483 F. Supp. 2d 1142 (M.D. Ala. 2007).

105. *Id.* at 1149.

106. *Id.* In *Jones*, the court went on to hold that, although the lawsuit was not precluded by the statute of limitations, it was filed too late (under equitable principles) to warrant a stay of execution. *Id.* at 1154. Because the court’s order had the practical effect of barring Jones’s lawsuit, Jones appealed to the Eleventh Circuit, which affirmed Judge Thompson’s stay denial. *Id.* Because the State of Alabama did not appeal from the rejection of its statute-of-limitations argument, Judge Thompson’s opinion on the matter remained good law (and was followed by at least one other federal district court judge in Alabama) until the Eleventh Circuit decided *McNair*. See *Grayson v. Allen*, 499 F. Supp. 2d 1228, 1235 (M.D. Ala. 2007) (concurring with Judge Thompson’s opinion in *Jones* and adopting it by reference).

107. See *supra* text accompanying notes 91–93.

108. *Cooley v. Strickland (Cooley III)*, 489 F.3d 775, 778 (6th Cir. 2007) (Gilman, J., dissenting from denial of rehearing en banc).

109. *McNair v. Allen*, 515 F.3d 1168, 1179 n.2 (11th Cir. 2008) (Wilson, J., dissenting).

the reader to Judge Myron Thompson's thoughtful discussion of this subject" in *Jones*.¹¹⁰

None of these circuit judges, however, went so far as to actually adopt Judge Thompson's reasoning and dispense with a functional accrual date altogether. Judge Wilson, for example, despite favorably alluding to Judge Thompson's reasoning, nonetheless concluded that the best approach to the accrual-date problem was to set the date after the completion of federal habeas review and when the prisoner has reason to know the details of the execution procedures.¹¹¹ The vast majority of judges to consider the issue, then, would tie the accrual date to some event in the lengthy process by which a death row inmate seeks to overturn his conviction and death sentence. Part II discusses why this approach is misguided. Part III discusses its counterproductive policy implications. Then Part IV explains why Judge Thompson's approach—that the statute of limitations does not apply when the tort has not yet occurred—is preferable in all regards.

II. FALLING AT THE MARGINS OF HABEAS? INCORPORATION OF AEDPA RULES AND PRINCIPLES

Appeals from capital convictions and sentences—including postconviction attacks on those convictions and sentences—have virtually nothing in common with § 1983 method-of-execution challenges. The former challenge the fairness of the trial proceedings in an effort to secure a new trial. The latter do not seek to disturb the underlying conviction or sentence. Instead, they are civil rights actions that allege that the procedures the state has in place to conduct the execution are constitutionally insufficient to protect the condemned inmate from an unacceptably high risk of serious harm. Whereas an appeal or habeas petition seeks to vacate the underlying conviction or death sentence, a § 1983 action seeks only an injunction prohibiting the execution until the unconstitutional circumstances have been rectified. Although courts following *Cooley* have claimed that method-of-execution challenges “implicate many of the same comity concerns AEDPA was designed to address,”¹¹² the analogy is faulty. For this reason—as several of the dissenting judges have

110. *Walker v. Epps*, 287 F. App'x 371, 379 (5th Cir. 2008).

111. *Id.* at 1179.

112. *McNair*, 515 F.3d at 1175; *see also* *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 421–22 (6th Cir. 2007).

pointed out—it is fundamentally wrong to look to AEDPA for guidance in the absence of any established accrual date.¹¹³

Prior to the passage of AEDPA in 1996, there was no statute of limitations for the filing of a federal petition for writ of habeas corpus.¹¹⁴ Congress established a statute of limitations in AEDPA to “reduce delays in the execution of state and federal criminal sentences, particularly capital cases.”¹¹⁵ In particular, Congress wanted to limit the ability of death row inmates to delay their executions by filing habeas petitions challenging their state court convictions and sentences.¹¹⁶ As President Bill Clinton stated when he signed AEDPA into law, “For too long, and in too many cases, endless death row appeals have stood in the way of justice being served.”¹¹⁷ The problem, in the view of AEDPA’s drafters, was that the late filing of federal habeas petitions initiated necessarily lengthy review processes that worked to forestall the executions of prisoners sentenced long ago in state court.¹¹⁸ After all, once a federal habeas petition is filed, it can take years for the case to be resolved.¹¹⁹

113. See, e.g., *Cooley II*, 479 F.3d at 425 (Gilman, J., dissenting) (criticizing the majority’s use of the AEDPA statute-of-limitations accrual date).

114. See *Day v. McDonough*, 547 U.S. 198, 202 n.1 (2006) (“Until AEDPA took effect in 1996, no statute of limitations applied to habeas petitions.”); see also Brandon Segal, *Habeas Corpus, Equitable Tolling, and AEDPA’s Statute of Limitations: Why the Schlup v. Delo Gateway Standard for Claims of Actual Innocence Fails to Alleviate the Plight of Wrongfully Convicted Americans*, 31 U. HAW. L. REV. 225, 231 (2008) (“[T]hroughout its history, habeas corpus was not subject to any statute of limitations or time limit. The [AEDPA], in turn, represented a distinct milestone and change in direction for the function of habeas.”).

115. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); see also Jake Sussman, *Unlimited Innocence: Recognizing an “Actual Innocence” Exception to AEDPA’s Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 358–59 (2001) (referring to AEDPA’s “clearly stated purpose to reduce delay and induce finality in postconviction collateral attacks”).

116. See, e.g., Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 20–21 (1997) (discussing the Republican Contract with America, which claimed that “prisoners on death row [could] almost indefinitely delay their punishment” and sought strict filing deadlines as a result).

117. Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996).

118. See, e.g., Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 400 (1996) (describing the legislative history of AEDPA and the concern regarding abuse of habeas to delay punishment).

119. One judge on the Ninth Circuit has calculated that, in California, federal habeas proceedings in capital cases take an average of 6.2 years to be resolved at the district court level. Arthur L. Alarcon, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697, 748 (2007). The cases take another several years to make their way through the appellate process. See *id.* at 749 (providing the average delays in various appellate stages).

But it only makes sense to incorporate AEDPA principles in the § 1983 method-of-execution challenge context if habeas proceedings are sufficiently akin to § 1983 suits. Until the Supreme Court decided *Nelson* in 2004, it was not clear whether a method-of-execution challenge was properly the subject of a habeas petition or a § 1983 lawsuit; if anything, most attorneys assumed the former.¹²⁰ Prior to *Nelson*, then, one could argue (and states routinely did) that method-of-execution challenges that were treated as habeas petitions should be subject to the same restrictions as actual habeas petitions.¹²¹

It is now clear, however, that method-of-execution challenges brought pursuant to § 1983 are not properly treated as habeas petitions.¹²² In *Nelson*, an Alabama inmate filed a § 1983 lawsuit shortly before his scheduled execution, alleging that the state's intent to use a "cut-down procedure" to establish venous access—an intent which he had just learned about days earlier—violated his rights under the Eighth Amendment.¹²³ The state moved to dismiss, arguing that the § 1983 lawsuit was the "functional equivalent" of a second or successive habeas petition that should be denied for failure to comply with the stringent requirements necessary to file such petitions.¹²⁴ The Supreme Court disagreed, holding that, so long as a successful § 1983 action would not necessarily invalidate the inmate's conviction or death sentence, it did not have to be characterized as a habeas petition.¹²⁵ Put another way, only if the § 1983 action threatened to invalidate the underlying conviction or sentence would it have to comply with the rules governing habeas petitions.¹²⁶

120. See *supra* note 32.

121. See *Berger*, *supra* note 10, at 273 n.68 (explaining that, prior to *Nelson* and *Hill*, "some lower courts had dismissed lethal injection claims by treating them as 'successive' habeas petitions, even though they had been filed as § 1983 actions").

122. It remains unsettled whether method-of-execution challenges *must* be filed as § 1983 lawsuits as opposed to incorporated within habeas petitions. See *supra* note 85.

123. *Nelson v. Campbell*, 541 U.S. 637, 641–42 (2004). According to Alabama prison officials, the plan was to "make a 2-inch incision in petitioner's arm or leg" using only local anesthesia. *Id.* at 641. "There was no assurance that a physician would perform or even be present for the procedure." *Id.*

124. *Id.* at 642.

125. *Id.* at 646–47.

126. For example, in *Heck v. Humphrey*, 512 U.S. 477 (1994), the plaintiff sought to recover damages under § 1983 for an allegedly unconstitutional arrest and conviction. *Id.* at 479. The Supreme Court held that under those circumstances, the plaintiff must establish that the conviction or sentence has been legally invalidated. *Id.* at 486–87. If not, the claim for damages is not cognizable under § 1983. *Id.* at 487. Accordingly, "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would

Just two years after *Nelson*, the Court took up the issue again in *Hill v. McDonough* and reaffirmed the principle it had articulated in *Nelson*. As opposed to the “cut-down” procedure challenged in *Nelson*, the petitioner in *Hill* was challenging the three-drug lethal-injection formula Florida intended to use to execute him.¹²⁷ Otherwise, the issues were quite similar, and the Court made quick work of the state’s attempt to convince the Court to water down or overrule outright its decision in *Nelson*. Instead, the Court unanimously reiterated that method-of-execution challenges, so long as they do not seek to overturn the underlying conviction or sentence, may properly be filed as § 1983 lawsuits rather than habeas petitions.¹²⁸

If, as *Nelson* and *Hill* demonstrate, a method-of-execution challenge is an altogether separate matter from a collateral challenge to a conviction or death sentence, one may legitimately question why the statute-of-limitations accrual dates should mirror each other. After all, one significant difference between a habeas claim and a § 1983 challenge is that the former, if timely filed, must go through a lengthy review process that can take more than a decade to complete,¹²⁹ whereas a timely filed but dilatory § 1983 lawsuit will be dismissed almost immediately if the prisoner cannot win a stay of execution.¹³⁰

Moreover, although *Cooley* and its progeny tend to state in conclusory fashion that the concerns that animated AEDPA are relevant in the method-of-execution context, none of these cases actually explores whether the parallel holds up. *Cooley* itself, for example, stated that “[a]ll of the same concerns” are relevant in the method-of-execution context but explained this statement only by saying that, “[l]ike federal habeas actions, a § 1983 method of

necessarily imply the invalidity of his conviction or sentence.” *Id.* But “if the district court determines that the plaintiff’s action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.” *Id.*

127. *Hill v. McDonough*, 547 U.S. 573, 581 (2006).

128. *Id.*

129. *See supra* note 119.

130. When a court determines that a method-of-execution challenge has been filed for the purpose of delay, it will deny a stay of execution, and the litigation will typically be unable to proceed. *See infra* text accompanying notes 160–67.

execution challenge ‘implicates values beyond the concerns of the parties.’”¹³¹

It is true that both method-of-execution challenges and habeas petitions are filed by death row inmates and have the potential to delay scheduled execution dates. But the analogy to AEDPA employed by *Cooley* and its progeny appears to be based on nothing more than that fact. Some courts’ liberal use of one line from the Supreme Court’s *Nelson* opinion is illustrative of the thin reed supporting the comparison.

In *Nelson*, the Court stated that method-of-execution challenges “fall at the margins of habeas.”¹³² On its face, and devoid of context, such a statement could mean a number of things. One interpretation could be that § 1983 challenges are not identical to habeas actions but are similar enough to be considered habeas actions “at the margins,” and perhaps for statute-of-limitations purposes. The Sixth Circuit in *Cooley* and the Eleventh Circuit in *Jones* both employed this interpretation. *Cooley* noted that the concerns that led to the passage of AEDPA “apply with equal force” in a lethal-injection challenge because such challenges “fall at the margins of habeas.”¹³³ Likewise, *McNair* quoted *Nelson*’s “margins of habeas” language and concluded that method-of-execution challenges therefore “implicate many of the same comity concerns AEDPA was designed to address.”¹³⁴

But the line from *Nelson* supports no such conclusion. The full context of the quote is as follows:

We note that our holding here is consistent with our approach to civil rights damages actions, which, like method-of-execution challenges, fall at the margins of habeas. Although damages are not an available habeas remedy, we have previously concluded that a § 1983 suit for damages that would “necessarily imply” the invalidity of the fact of an inmate’s conviction, or “necessarily imply” the invalidity of the length of an inmate’s sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence.¹³⁵

131. *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 422 (6th Cir. 2007) (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)).

132. *Nelson v. Campbell*, 541 U.S. 637, 646 (2004).

133. *Cooley II*, 479 F.3d at 421 (citing *Nelson*, 541 U.S. at 646).

134. *McNair v. Allen*, 515 F.3d 1168, 1175 (11th Cir. 2008) (quoting *Nelson*, 541 U.S. at 646).

135. *Nelson*, 541 U.S. at 646.

In other words, a § 1983 suit is not like a habeas petition, unless its success would necessarily undermine the underlying conviction and sentence. Some civil rights suits seeking damages—such as when a prisoner seeks damages for an unlawful arrest¹³⁶—implicate habeas relief because a successful suit necessarily implies the invalidity of the prisoner’s sentence. In *Nelson*, however, the Court went on to make clear that the method-of-execution challenge at issue in that case was not such a lawsuit.¹³⁷ As a result, the § 1983 challenge could not be re-characterized as a habeas petition.¹³⁸ The Court reiterated this precise point in *Hill*. The lethal-injection lawsuits at issue in *Nelson* and *Hill*, the Court explained, “did not challenge an execution procedure required by law, so granting relief would not imply the unlawfulness of the lethal injection sentence.”¹³⁹

Thus, the extent of the analogy appears to be that both federal habeas petitions and method-of-execution challenges have the potential to delay the executions of death row inmates. Because AEDPA was intended to cut down on such delays, the theory seems to go, why not use the same statute of limitations for method-of-execution challenges? Perhaps this approach has surface appeal, to the extent it is desirable to have some symmetry in one procedural aspect of two different kinds of legal actions initiated by death row inmates. But it is difficult to avoid the conclusion that the selection of an accrual date based on a loose analogy to a statute governing a different kind of proceeding is simply arbitrary.¹⁴⁰

136. See *supra* note 126.

137. *Nelson*, 541 U.S. at 646.

138. See *id.*

139. *Hill v. McDonough*, 547 U.S. 573, 588 (2006); see also *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 425 (6th Cir. 2007) (Gilman, J., dissenting) (“[A] § 1983 action is not an attack on the validity of the death-sentenced inmate’s conviction or sentence.”). Interestingly, the district judge in *Cooley* who originally rejected the state’s statute-of-limitations defense referred to the Sixth Circuit’s comment about method-of-execution challenges falling “at the margins of habeas” as “unfortunate.” *Cooley v. Strickland (Cooley IV)*, No. 2:04-cv-1156, 2008 WL 4065809, at *4 n.3 (S.D. Ohio Aug. 25, 2008). The court did so, however, in the context of rejecting a death row inmate’s claim that certain favorable federal habeas case law applied to his lethal-injection challenge. The Sixth Circuit’s use of the “margins of habeas” language was not, the court noted, “a blanket invitation to conflate habeas principles at will.” *Id.*

140. One Sixth Circuit judge described the use of habeas rules to bar § 1983 civil rights suits as follows: “[*Cooley*’s] ill-advised rule unduly entangles a prisoner’s challenges to the validity of his or her sentence with the wholly distinct question of whether the method by which he or she will be executed—assuming the Court ultimately denies habeas relief—can withstand constitutional scrutiny.” *Getsy v. Strickland (Getsy I)*, 577 F.3d 309, 315 (6th Cir. 2009) (Moore, J., concurring). Indeed, the twin keystones of modern habeas jurisprudence—comity with the states and finality—have little application here. Finality is not an issue because courts’ broad

The reasoning supplied by *Cooley* and its progeny does not dispel the concern that the choice of accrual date is arbitrary. *Cooley* pointed out that a tort claim generally accrues when the plaintiff “can file suit and obtain relief,”¹⁴¹ and reasoned that a death row inmate can do so after his conviction has become final on direct review.¹⁴² For the reasons discussed in Part III.B, it is not at all clear that a death row inmate can actually obtain relief on a method-of-execution challenge filed years before his scheduled execution. In many cases, such a lawsuit would likely be dismissed as unripe, or perhaps as lacking standing.¹⁴³ But if one does assume that a death row inmate could file a method-of-execution challenge and obtain relief following direct appeal, one would also have to assume that he could file suit the day after his death sentence is imposed. Why should he have to wait until his direct appeal is complete?

This question was not addressed in *Cooley*, but the Eleventh Circuit in *McNair* answered it sua sponte. “[B]y requiring a defendant to wait to bring a claim [until] after direct review is complete (as opposed, say, to when the sentence is first imposed),” the *McNair* court noted, “we ensure claims are not brought prematurely, before the state courts have had an adequate opportunity to correct any infirmities in the defendant’s conviction or sentence.”¹⁴⁴ This reasoning does not withstand scrutiny.

First, it is not true that setting the accrual date after direct appeal precludes a suit from being filed prior to that date. As discussed in Part IV, a claim can be ripe before it accrues.¹⁴⁵ More fundamentally, however, the selection of direct appeal as the point at which one can be sure that there has been an adequate opportunity to review the constitutionality of inmates’ trials is simply one such spot along the timeline of the appeals process. Why not at the conclusion of state postconviction proceedings, when the state courts have had the opportunity to review the extra-record evidence, such as claims of ineffective assistance of counsel, that so often form the basis of

equitable power guards against the use of method-of-execution challenges as vehicles for delay. See *infra* text accompanying notes 162–71. And comity also need not apply because there has been no state court adjudication.

141. *Cooley II*, 479 F.3d at 416 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).

142. *Id.* at 419.

143. See *infra* text accompanying notes 198–200.

144. *McNair v. Allen*, 515 F.3d 1168, 1176 (11th Cir. 2008).

145. See *infra* text accompanying notes 253–55.

constitutional challenges to death row inmates' trials?¹⁴⁶ Why not, as the dissenting circuit judges have suggested, at the conclusion of federal habeas review, when the federal courts have had the opportunity to review the state court convictions?¹⁴⁷ After all, as many as 40 percent of capital cases get overturned in federal habeas proceedings "due to serious error."¹⁴⁸ If courts are genuinely concerned with discouraging lethal-injection challenges until the constitutional infirmities have been rooted out of capital trials, waiting until federal habeas review is complete would appear to be the most rational approach.¹⁴⁹

None of these choices, however, have anything to do with the purposes of statutes of limitations. Therein lies the fallacy of tying the accrual date to a step in the appeals and postconviction process. The primary purpose of a statute of limitations is to provide repose to defendants, protecting them from having to litigate "stale claims."¹⁵⁰ The idea is to ensure "essential fairness to defendants and . . . [bar] a plaintiff who has 'slept on his rights.'"¹⁵¹ More specifically, the Supreme Court has explained that statutes of limitations "are designed to promote justice by preventing surprises through the

146. See Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 16 (1990) (discussing "manifold colorable claims of ineffective assistance of counsel" that typically comprise most postconviction proceedings).

147. See, e.g., *McNair*, 515 F.3d at 1179 (Wilson, J., dissenting) (suggesting that a better approach is to fix the date of accrual when the defendant's habeas challenge is exhausted); *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 428–29 (6th Cir. 2007) (Gilman, J., dissenting) ("This accrual date provides clarity and certainty to both the death-sentenced inmate and the State that the sentence is final and not susceptible to attack, that the execution date is set, and that the protocol for that execution is likely fixed.").

148. James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1849 (2000).

149. It may be suggested that placing the accrual date at the conclusion of direct review accounts for the fact that the state can technically initiate execution proceedings at that point, and it cannot do so until that point. But a death-sentenced inmate's ability to file a method-of-execution challenge is not necessarily related to the state's technical ability to initiate execution proceedings. In fact, capital charged defendants occasionally challenge the method of execution in pretrial litigation. One such challenge in Ohio was successful. See *State v. Rivera*, No. 04-CR-065940 (Ohio Ct. Com. Pl. June 10, 2008) (ordering that "if defendants herein are convicted and sentenced to death by lethal injection, that the protocol employ the use of a lethal injection of a single, anesthetic drug"). In any event, there is no evidence that any state in the modern death-penalty era has made a serious attempt to execute an inmate immediately upon the conclusion of direct review.

150. 51 AM. JUR. 2D *Limitation of Actions* § 15 (2000); see also *infra* text accompanying notes 194–98.

151. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (quoting *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 428 (1965)).

revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”¹⁵²

Such concerns are nonexistent in the method-of-execution context. When the tort has yet to take place, there can be no concern about staleness. Method-of-execution challenges—and particularly lethal-injection challenges—are about the prison officials’ *present intentions* with respect to the administration of their execution procedures.¹⁵³ By definition, the evidence cannot be lost and the claims cannot be stale because the litigation seeks to stop a process that the state intends to carry out in the future. In this way, challenges to lethal injection are akin to other requests for injunctive relief seeking to stop a proposed action from occurring, such as the chopping down of a sacred tree,¹⁵⁴ in which the statute of limitations never even enters the picture. Or perhaps they are like continuing-violation cases, in which “conduct which repeats itself or that is continuing in nature is subject to ready investigation and confirmation and does not present the staleness problems that statutes of limitations are primarily designed to prevent.”¹⁵⁵ One of the reasons that the courts addressing this issue in the lethal-injection context have found themselves with so little precedent to guide them is that defendants do not typically raise the statute of limitations as a defense to actions seeking injunctive relief.

152. R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944); see also James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 590–92 (1996) (discussing various policies that statutes of limitations are designed to promote).

153. See *supra* text accompanying notes 42–46.

154. See Richard Brennehan, *Tree-Sitters Get a Day in Court, Cal Bears to Move to Interim Venue*, BERKELEY DAILY PLANET, Nov. 20, 2008, at 1, available at <http://www.berkeleydailyplanet.com/issue/2008-11-20/article/31626?headline=Tree-Sitters-Get-a-Day-in-Court-Cal-Bears-to-Move-to-Interim-Venue> (discussing a lawsuit filed to enjoin the cutting down of a grove of trees on the campus of the University of California, Berkeley). Indeed, one might legitimately question whether the statute of limitations can even be raised in a suit seeking solely injunctive—that is, equitable—relief. As several of the cases following *Cooey* have pointed out, however, the Supreme Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), appears to have held that statutes of limitations apply to all § 1983 cases (although *Wilson* itself was a damages case). *Id.* at 275–76; see also *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008) (citing *Wilson* to justify the application of the statute of limitations); *Chester v. Beard*, 657 F. Supp. 2d 534, 539–40 (M.D. Pa. 2009) (discussing whether *Wilson* stands for the proposition that the statute of limitations applies to § 1983 cases seeking solely injunctive relief).

155. MacAyeal, *supra* note 152, at 616–17. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court applied the continuing-violation doctrine to the statute of limitations in the Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3631 (2006). *Havens Realty Corp.*, 455 U.S. at 380 (construing 42 U.S.C. § 3612(a)).

Nonetheless, the Sixth Circuit in *Cooley* applied the statute of limitations and selected completion of direct review as an “attractive choice” for accrual. It did not do so, however, to vindicate the principles of statutes of limitations, but rather to “mark[] the point at which the state has rendered its criminal judgment final and, absent collateral civil proceedings, the point at which the state sets the execution date.”¹⁵⁶ For reasons already discussed, it makes little sense to so casually dismiss the “collateral civil proceedings” that are an integral part of virtually every death penalty case and that can take more than a decade to complete.¹⁵⁷ It is far more realistic to give death row inmates the practical ability to file a method-of-execution challenge closer to their impending execution. For that reason, starting the statute of limitations at the end of federal habeas review, as the dissenting circuit court judges would have it, makes more practical sense than requiring prisoners to file claims years, and even decades, before their executions.

As a doctrinal matter, however, it is no less arbitrary to choose the end of habeas review as the accrual date than it is to choose an earlier point.¹⁵⁸ Neither is tied to the purposes of statutes of limitations. As Judge Thompson put it in *Jones*, “There is no rhyme or reason in choosing among these options precisely because they are little more than stand-ins for the actual tortious event the court would otherwise look for in a run-of-the-mill § 1983 case.”¹⁵⁹

Not only is it arbitrary to select any date, let alone one as early in the process as the completion of direct review, but it is also unnecessary. To the extent courts have adopted the AEDPA statute of limitations to reduce delays or impede the ability of death row inmates to game the system and forestall their executions, there is a simple alternative mechanism available—denying a request to stay an execution.

156. *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 419 (6th Cir. 2007).

157. *See supra* text accompanying note 103.

158. Imagine, for example, a death row inmate who files a § 1983 lawsuit alleging that dangerous conditions in the prison have risen to the level of a constitutional violation and seeks an injunction to improve those conditions. The defendant prison officials in that hypothetical case could never credibly allege that the statute of limitations on such a challenge should be tied to the date on which the plaintiff inmate completed his direct appeals (or his federal habeas proceedings, for that matter). Because the constitutional violation alleged has nothing to do with the underlying conviction and sentence for which the plaintiff is on death row, the statute-of-limitations accrual date would be similarly unrelated. In fact, as a matter of practice, the statute of limitations is never invoked by defendant prison officials in such cases.

159. *Jones v. Allen*, 483 F. Supp. 2d 1142, 1149 (M.D. Ala. 2007).

III. UNNECESSARY CONFLATION OF STATUTE-OF-LIMITATIONS AND EQUITABLE CONSIDERATIONS

When a death row inmate files a § 1983 lawsuit challenging a state's method of execution, an execution date may or may not have already been set. As long as no execution date has been set, there is no need for the inmate to request a stay of execution. But if a date has been set prior to the lawsuit, or if it is set during the pendency of the lawsuit, the inmate will typically need to request a stay from the court to complete the § 1983 litigation before his impending execution renders the proceedings moot.¹⁶⁰

Courts presented with stay-of-execution requests have familiar principles to guide them, as they typically look to the criteria necessary to grant a preliminary injunction: a strong likelihood of success on the merits, the possibility of irreparable injury to the plaintiff, a balance of the hardships favoring the plaintiff, and the advancement of the public interest.¹⁶¹ With respect to stays of execution in particular, the Supreme Court has explained that states have a “strong interest in enforcing [their] criminal judgments without undue interference from the federal courts”¹⁶² and has established a “strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.”¹⁶³ In other words, if the § 1983 lawsuit is not filed in time to run its course before the execution date, but it could have been, courts typically will not grant a stay. The § 1983 litigation can proceed, but it can also be mooted by the plaintiff's execution.¹⁶⁴

160. 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, 464–65 (2007) (describing stay litigation in the context of a § 1983 method-of-execution challenge).

161. *Id.* at 464 n.110 (citing *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)).

162. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

163. *Nelson v. Campbell*, 541 U.S. 637, 650 (2004).

164. See Kreitzberg & Richter, *supra* note 160, at 465 (“[E]ven though a § 1983 claim requires a plaintiff only to prove the constitutional challenge by a preponderance of the evidence, if an inmate does not make a greater showing, the execution stay will not be granted. The execution takes place before a hearing can be held on the constitutional issue.”). This is precisely what happened in *Hill* and in *Jones*. See *infra* text accompanying notes 169–71. In both cases, the petitioner's § 1983 action would have been allowed to proceed but for the fact that, according to the court, the equities did not favor the granting of the stay that would be necessary to actually litigate the case.

The most successful § 1983 challenges to lethal injection have taken many months to litigate.¹⁶⁵ As a result, depending on the circumstances, it may not be prudent for a death row inmate to wait until the completion of federal habeas review to file a method-of-execution challenge. In many states, the completion of that review triggers the setting of an execution date, sometimes within months or even weeks.¹⁶⁶ An inmate who files a § 1983 suit on the day the Supreme Court denies review of his habeas petition may well need to request a stay of execution to litigate his civil case. If he had the information necessary to file the claim sooner, the district court may deny the stay request for equitable reasons.¹⁶⁷

All of this raises the question: why is the statute-of-limitations defense necessary to ward off dilatory method-of-execution challenges? If a death row inmate waits too long to file a § 1983 challenge, such that a court can say that he could have brought it in time to “allow consideration of the merits without requiring entry of a stay,”¹⁶⁸ the court will deny the stay, and there likely will not be time to litigate the method-of-execution challenge. If the claim could not have been filed any earlier, then the court will grant the stay, and the plaintiff will be able to litigate his case without fear of his execution mooting the case. This latter scenario should not be the subject of any concern, however, because, by definition, if the court grants a stay, there has been no undue delay on the part of the plaintiff. If there is no dilatory filing, and thus no attempt to abuse the legal process to stave off an execution, the concerns animating the AEDPA statute of limitations simply do not apply.

A. Rejection of the “Veto Power” Myth

The *Cooley* approach suffers from a fundamental flaw: the conflation of statute-of-limitations and equitable principles. What makes the conflation of these principles puzzling is that the Supreme Court could not have been clearer in both *Nelson* and *Hill* that

165. See Denno, *supra* note 31, at 107–16 (providing a lengthy history of the most successful modern method-of-execution challenges).

166. See, e.g., *McNair v. Allen*, 515 F.3d 1168, 1175–76 (11th Cir. 2008) (discussing the practice in Alabama of setting execution dates soon after the Supreme Court denies review in federal habeas).

167. See Kreitzberg & Richter, *supra* note 160, at 465–67 (discussing the “strong equitable presumption” that courts frequently apply in refusing to grant a stay when a claim could have been brought earlier).

168. *Nelson*, 541 U.S. at 650.

equitable considerations are available and sufficient to protect the state from dilatory lawsuits. In *Nelson*, the Court said, “[T]he mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right.”¹⁶⁹ In *Hill*, the Court said, “Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course.”¹⁷⁰ In fact, although the Supreme Court ruled in his favor, Clarence Hill was ultimately executed because the lower federal courts refused to grant him a stay of execution following the Court’s ruling.¹⁷¹

Judge Thompson was well aware of the distinction between the statute-of-limitations and the equitable considerations available to him. In *Jones*, the court rejected the state’s statute-of-limitations defense.¹⁷² But, because the lawsuit was filed while an execution date was pending, the court necessarily went on to consider whether to grant a stay. Judge Thompson reviewed the history of the case and concluded that, although Jones filed his § 1983 lawsuit within the statute of limitations, he could have filed it sufficiently earlier such that he would not have had to seek a stay of execution at all.¹⁷³ As a result, citing *Hill* and *Nelson*, the court denied the stay.¹⁷⁴ But that inquiry was entirely separate from the inquiry about the statute-of-limitations accrual date. In fact, the § 1983 lawsuit technically survived Judge Thompson’s ruling; the court explicitly noted that if Jones were able to obtain a stay of his execution on some other grounds, “the instant § 1983 litigation [would] proceed as scheduled.”¹⁷⁵ Jones did not receive any other stay, and he was executed on May 3, 2007.¹⁷⁶ His challenge to lethal injection was never heard in the federal courts because he filed the lawsuit too late—not too late under the statute of limitations, but too late to obtain a stay of his execution.

Jones demonstrates the ease with which the two concepts can be doctrinally separated. Yet the *Cooley* line of cases is riddled with equitable concerns masquerading as statute-of-limitations doctrine.

169. *Id.* at 649.

170. *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006).

171. *See Denno*, *supra* note 31, at 113 (“While Hill emerged successful from the Supreme Court, the victory proved to be of little use to Hill himself.”).

172. *Jones v. Allen*, 483 F. Supp. 2d 1142, 1151 (M.D. Ala. 2007).

173. *Id.* at 1151–53.

174. *Id.* at 1154.

175. *Id.*

176. *Execution Database*, *supra* note 62.

method-of-execution challenges cannot be used simply to delay an otherwise lawful execution. The problem lies in those cases in which a petitioner did not unduly delay the filing of a method-of-execution challenge but did file the lawsuit many years after his direct appeals concluded, when, for example, recent information casts doubt upon the reliability of the procedures the state intends to implement. Such a case would be precluded by the *Cooley* approach, but there is no principled reason why that should be.

Recall the case of Ohio death row inmate Romell Broom.¹⁸¹ Broom's case is infamous, as it is the only time in U.S. history that a lethal-injection execution has been cancelled because prison officials could not carry out the process.¹⁸²

Well before his execution, however, Broom and his counsel were aware that Ohio prison officials had a troubling record when it came to accessing inmates' veins during executions. Joseph Clark's execution in May 2006 lasted almost ninety minutes, during which time prison officials tried and initially failed to access Clark's veins.¹⁸³ At one point, Clark raised his head off the gurney and said, "It's not working."¹⁸⁴ Later in the execution, Clark asked, "Can you just give me something by mouth to end this?"¹⁸⁵ After more struggling to set a new intravenous line, the execution continued and Clark was finally pronounced dead.¹⁸⁶ Following the Clark execution, and in light of the

181. See *supra* text accompanying notes 1–8.

182. Bob Driehaus, *Ohio Plans to Try Again as Execution Goes Wrong*, N.Y. TIMES, Sept. 17, 2009, at A16 ("This is the first time an execution by lethal injection in the United States has failed and then been rescheduled."); see also Pete Krouse, *Gov. Ted Strickland Orders a Temporary Halt to the Planned Execution of Romell Broom*, PLAIN DEALER (Cleveland), Sept. 15, 2009, at A1 (referring to Broom's halted execution as "unprecedented").

183. Adam Liptak, *Trouble Finding Inmate's Veins Slows Lethal Injection in Ohio*, N.Y. TIMES, May 3, 2006, at A16.

184. *Id.*

185. Jim Provance, *Ohio Designs Single-Drug Execution*, THE BLADE (Toledo), Nov. 14, 2009, <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20091114/NEWS24/911140361> ("Following similar problems in the 2006 execution of Joseph Lewis Clark, formerly of Toledo, the state made minor changes but decided to retain the three-drug process.").

186. Andrew Welsh-Huggins, *Botched Execution Leads to Ohio Review*, WASH. POST, May 12, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/11/AR2006051101618.html> ("The team then attached a shunt to Clark's other arm but apparently tried to administer the lethal drugs through the first shunt by mistake . . . Clark . . . was executed after officials switched the drugs to the proper line."); see also Lloyd de Vries, *Ohio Execution Problems Raise Qualms*, CBSNEWS.COM, May 3, 2006, <http://www.cbsnews.com/stories/2006/05/03/national/main1576011.shtml> ("The execution team . . . worked for about 25 minutes to find a vein in Clark's right arm before continuing with just the shunt in his left arm.").

difficulties the execution team had in carrying out their tasks, Ohio prison officials convened to revise their lethal-injection protocol.¹⁸⁷

Broom filed a § 1983 complaint on April 25, 2007,¹⁸⁸ more than two years before the state actually attempted to execute him. Referencing Clark's botched execution, Broom alleged that Ohio prison officials had failed to include in their most recent lethal-injection protocols "a requirement that the personnel assigned to establish and maintain the intravenous (IV) lines are properly trained."¹⁸⁹ Broom went on to complain that Ohio officials had failed to account for the "real possibility . . . that IV access to Plaintiff's veins cannot be successfully established or maintained."¹⁹⁰ Nevertheless, on August 25, 2008, the district court, bound by *Cooley*, dismissed Broom's complaint for failure to comply with the statute of limitations.¹⁹¹

Unable to litigate his challenge to Ohio's lethal-injection procedures, Broom was ultimately subjected to those procedures, suffering a botched execution attempt that elicited worldwide scorn and was the impetus for Ohio's decision to abandon the three-drug lethal-injection formula altogether.¹⁹² What went wrong in his execution was exactly what he had filed a lawsuit to prevent—the inability of prison officials to access his veins.

Broom filed his complaint well before his scheduled execution. He did not, and did not need to, seek a stay of his execution to litigate his case; the state did not even set an execution date until two years after Broom filed his lawsuit. Thus, none of the concerns that

187. See Reginald Fields, *Ohio Changes the Procedure for Lethal Injection of Inmates*, PLAIN DEALER (Cleveland), Nov. 13, 2009, at A1 ("[W]holesale changes come on the heels of an embarrassing, botched attempt to execute [Broom] . . .").

188. Intervenor-Plaintiff's Proposed Complaint for Injunctive and Declaratory Relief, Attorney Fees, and Costs of Suit Pursuant to 42 U.S.C. § 1983, *supra* note 6, at 21.

189. *Id.* at 11.

190. *Id.*

191. See *Cooley v. Strickland (Cooley IV)*, No. 2:04-cv-1156, 2008 WL 4065809, at *7 (S.D. Ohio Aug. 25, 2008) ("*Cooley* is controlling precedent with a dispositive rationale that the undersigned must fully recognize, credit, and apply. . . . For the foregoing reasons, this Court [grants] Defendants' Motion to Dismiss."). In the meantime, Ohio officials had struggled to achieve venous access during another execution, that of Christopher Newton in May 2007. Newton's execution lasted so long—more than two hours—that he was given a bathroom break in the middle of it. Scott Conroy, *Bizarre Execution in Ohio*, CBSNEWS.COM, May 24, 2007, <http://www.cbsnews.com/stories/2007/05/24/national/main2848395.shtml>.

192. See Urbina, *supra* note 37 ("Ohio's decision came in response to the failed . . . execution of Romell Broom . . ."). As of this writing, Ohio has not made a second attempt to execute Broom.

animated AEDPA and that would be relevant to an equitable determination of dilatoriness were at issue. Broom was simply denied his day in court because he did not file his claim within two years of the state's adoption of lethal injection as a method of execution, a point in time that had nothing to do with his actual ability to file suit to enjoin the specific procedures Ohio intended to use to execute him.¹⁹³ Had Broom been able to litigate his case, perhaps he would have been able to prevent the constitutional violation before it occurred, which is exactly what his suit was designed to do.

As Broom's case demonstrates, the exception contained within the *Cooley* approach—that the statute-of-limitations clock starts over when the written protocol is substantially changed¹⁹⁴—is too narrow to be meaningful. The facts giving rise to Eighth Amendment challenges have far less to do with the written protocol than they do with the present ability of state officials to implement the written protocol in a reliable and humane manner.¹⁹⁵

One might argue that statutes of limitations will always preclude some meritorious claims, and one should not be concerned with plaintiffs who may suffer constitutional injury but do not initiate their lawsuits early enough. As the Supreme Court has said,

The theory [of statutes of limitations] is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.¹⁹⁶

Under the *Cooley* approach that was applied to Broom's case, however, Broom had to have filed a lawsuit in 2003, before Ohio's

193. As my colleague Elisabeth Semel has put it, the *Cooley* decision “effectively insulated Ohio from any accountability for its method of execution.” Semel, *supra* note 4, at 859.

194. See, e.g., *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008) (“We hold a method of execution claim accrues on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol.”).

195. One might suggest, then, that an answer to the accrual problem would be to simply expand the understanding of which circumstances would warrant resetting the statute-of-limitations clock. It is true that some of the unfairness inherent in setting the accrual date so early would be mitigated if the clock restarted whenever new facts came to light—such as a recently botched execution, or the unavailability of recently manufactured drugs. The practical results may even be quite similar to those under the no-accrual-date approach advocated in Part IV. The problem with this solution to the accrual-date problem, however, is that it still suffers from the doctrinal confusion between ripeness and accrual that pervades *Cooley* and its progeny. See *infra* Part IV.

196. *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944).

high-profile botched executions¹⁹⁷ and before the extent of the problems associated with Ohio's procedures were known to anyone. Nothing underlying the theory of statutes of limitations suggests courts should penalize plaintiffs who do not file lawsuits until they have adjudicable claims.

The early accrual approach of *Cooley* is not just ill-advised—because it threatens to subject death row inmates to torturous executions (or execution attempts) without affording them a meaningful opportunity to pursue their constitutional claims in court—the approach also has a number of practical flaws that render it unworkable and unsustainable in the long run.

1. *Forcing Unripe Claims.* The practical ability of death row inmates to challenge their method of execution years in advance is quite circumscribed. When inmates have attempted to file lethal-injection challenges many years before their scheduled executions, those lawsuits typically have been dismissed as unripe on the theory that the state's procedures may change before the execution or that the inmate might not be executed at all if his appeals succeed.¹⁹⁸

The Supreme Court has explained that the basic rationale of the ripeness doctrine is to avoid “entangling [courts] in abstract disagreements over administrative policies [and to] protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”¹⁹⁹ Forcing death row inmates to challenge their states' lethal-injection procedures years in advance, or risk not being able to challenge them at all, creates just the kind of abstract entanglement that the ripeness doctrine is designed to prevent. Or, as Judge Gilman put it in his dissent in *Cooley*, “To require a petitioner to file a § 1983 action three to five years before his or her execution in order to obtain legal review of the lethal-injection protocol strikes me as counterintuitive, unduly harsh, and just plain wrong.”²⁰⁰

197. See *supra* text accompanying notes 183–87.

198. See Berger, *supra* note 10, at 294 (“Plaintiffs thus confront a catch-22: early claims can be dismissed as unripe, later claims as dilatory.”).

199. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); see also Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 161 (1987) (referring to *Abbott Laboratories* as containing the “leading discussion” of the ripeness doctrine).

200. *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 429 (6th Cir. 2007) (Gilman, J., dissenting). *Cooley* and its progeny also seem not to have considered whether a plaintiff challenging an execution protocol years in advance would even have standing to do so under

As discussed in Part I, the lethal-injection challenges currently being litigated do not simply challenge the protocols as written.²⁰¹ After the Supreme Court approved of Kentucky's lethal-injection procedures in *Baze v. Rees*,²⁰² many states have simply adopted that protocol on the theory that if it passed muster in *Baze*, it will pass muster in their courts as well. But as several courts and commentators have noted, what is written within the four corners of the protocol does not end the constitutional inquiry.²⁰³ As Professor Eric Berger has written, "Two execution procedures . . . can hardly be deemed 'substantially similar' merely because they use the same drugs. As litigation has demonstrated, the procedure's safety hinges on *how* the drugs are administered."²⁰⁴ Put another way, "The factual grounding of *Baze*, and its specific review of Kentucky's particular death-penalty program, caution against applying unquestioningly its result to any other case in which an inmate challenges a death-penalty protocol that uses the same three drugs that Kentucky utilizes."²⁰⁵

Instead, the key questions relate to how the state presently intends to administer the protocol. Who are the executioners? What is their background and experience? How updated is the equipment that will be used? How often have the executioners been trained? Were the execution drugs obtained properly? Has the expiration date on the drugs passed? A lethal-injection challenge is ripe when some or all of these questions can be answered. But it makes little sense to

City of Los Angeles v. Lyons, 461 U.S. 95 (1983), which requires the plaintiff to demonstrate that the threat of future injury to him is "real and immediate." *Id.* at 102. See generally Linda E. Fisher, *Caging Lyons: The Availability of Injunctive Relief in Section 1983 Actions*, 18 LOY. U. CHI. L.J. 1085 (1987) (discussing the implications of *Lyons* on cases seeking injunctive relief).

201. See *supra* text accompanying notes 42–46.

202. *Baze v. Rees*, 128 S. Ct. 1520 (2008) (plurality opinion).

203. See, e.g., *Jackson v. Danberg*, 594 F.3d 210, 224 (3d Cir. 2010) (evaluating the "extra-protocol elements" of Delaware's execution protocol, which is, on paper, "identical" to the Kentucky protocol reviewed in *Baze*); *Thorson v. Epps*, No. 4:08CV129-WAP-DAS, 2009 WL 1766806, at *1 (N.D. Miss. June 22, 2009) (asserting that an acknowledgement of the fact that Mississippi's protocol is "substantially similar" to Kentucky's does not end the constitutional inquiry under *Baze*); see also Berger, *supra* note 10, at 277 ("Given that the safety of a method of execution depends not just on the four corners of the written protocol but on the details of administration, a state's procedure could not be deemed 'substantially similar' to Kentucky's without discovery into that state's actual practices—the training and qualifications of its execution team, the suitability of the equipment, the architecture of the execution facilities, and so on.").

204. Berger, *supra* note 10, at 277 (footnote omitted). Berger also notes that another reading of the "substantially similar" language in *Baze* is that it refers only to the standard needed to obtain a stay. See *id.* at 276 n.86.

205. *Chester v. Beard*, 657 F. Supp. 2d 534, 543 (M.D. Pa. 2009).

even attempt to answer these questions several years before the plaintiff will actually be executed.²⁰⁶

2. *Judicial Inefficiency.* In addition to providing repose for defendants, statutes of limitations are also said to be grounded in solicitude for judicial economy.²⁰⁷ It is “awkward and wasteful for judicial resources to be used to decide stale claims on stale evidence.”²⁰⁸ Although the *Cooley* approach ostensibly seeks to avoid delay and unnecessary judicial wrangling, setting the statute-of-limitations accrual date so early actually works against judicial efficiency.

Even under the *Cooley* standard, if a state significantly changes its written procedures between the initial lethal-injection challenge and a plaintiff’s execution date, then the same plaintiff may be able to file a second suit.²⁰⁹ In other words, the fact that lethal injection was in place when an inmate lost on direct appeal ten years ago is irrelevant, because the same lethal-injection procedure may not be used now. This scenario is not merely hypothetical. For example, after the botched execution attempt of Romell Broom, Ohio dramatically changed its protocol—this time by eliminating two of the drugs in the three-drug sequence and creating a backup plan, in the event of IV access failure, that had never before been proposed for use in executions.²¹⁰ As Judge Gilman pointed out in *Cooley*, “No statutory

206. See, e.g., *McNair v. Allen*, 515 F.3d 1168, 1179 (11th Cir. 2008) (Wilson, J., dissenting) (“I . . . cannot accept the majority’s conclusion that [plaintiff’s] cause of action began to accrue five years before his execution date was set, during which time Alabama could, and in fact did, amend its lethal injection protocol.”); *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 429 (6th Cir. 2007) (Gilman, J., dissenting) (“To require a petitioner to file a § 1983 action three to five years before his or her execution in order to obtain legal review of the lethal-injection protocol strikes me as counterintuitive, unduly harsh, and just plain wrong.”); *Jones v. Allen*, 483 F. Supp. 2d 1142, 1149 (M.D. Ala. 2007) (“[B]ecause the execution itself is the event [the plaintiff] claims would violate his constitutional rights, it defies logic, and is contrary to the common law of torts, to conclude that the statute of limitations has already run on a suit to prevent an unconstitutional act that has not yet occurred.”).

207. See, e.g., *Resolution Trust Corp. v. Farmer*, 865 F. Supp. 1143, 1152 (E.D. Pa. 1994) (“[One] policy [underlying statutes of limitations] is grounded in judicial economy . . .”).

208. *Id.* (quoting *Anthony v. Koppers Co.*, 425 A.2d 428, 441 (Pa. Super. Ct. 1980)).

209. See, e.g., *McNair*, 515 F.3d at 1174 (holding that the statute of limitations begins running on “the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol”).

210. See *Fields*, *supra* note 187 (“In the backup procedure, workers will inject the lethal drugs directly into a muscle—another practice that is not done anywhere else in the country . . .”); *Urbina*, *supra* note 37 (“Ohio [said] it would switch to a single drug, rather than a three-drug cocktail, in its death penalty procedure.”).

framework determines when or how such changes may occur.”²¹¹ Yet presumably such drastic changes in procedures would restart the statute-of-limitations clock for all death row inmates in Ohio, regardless of whether they had already filed suit and had their challenges dismissed for failure to comply with the statute of limitations.²¹²

It is also concerning that the *Cooley* approach requires death row inmates to file method-of-execution challenges so early in the appellate and postconviction process. It is true that the prudent prisoner today might, under some circumstances, file a lethal-injection challenge during, rather than at the completion of, his federal habeas proceedings, to avoid dismissal of his lawsuit on equitable grounds.²¹³ Under *Cooley*, however, the challenge must be filed within approximately two years of the completion of direct review,²¹⁴ when most death row inmates are at the very beginning of their state postconviction proceedings and potentially decades away from execution. Given the high rate of reversals in both state and federal postconviction proceedings,²¹⁵ it is likely that an inmate could file a § 1983 action challenging lethal injection, win relief and a new trial in state postconviction proceedings, get sentenced to death again in a retrial, and then have to file another § 1983 challenge at the conclusion of his second direct appeal process. In the meantime, the lethal-injection procedures and personnel in the jurisdiction would likely have changed in constitutionally meaningful ways.

211. *Cooley II*, 479 F.3d at 427 (Gilman, J., dissenting).

212. It is important to note, however, that although major changes to the written protocol—such as the substitution of a three-drug protocol for a one-drug protocol—would likely restart the statute-of-limitations clock under *Cooley*, courts have thus far interpreted narrowly the exception in *Cooley* for changed procedures. In *Cooley* itself, the Sixth Circuit rejected the notion that the 2006 changes made to the Ohio protocol following the botched execution of Joseph Clark were sufficient to restart the clock, even though they addressed many fundamental aspects of the execution procedures. *Id.* at 424. Subsequent district courts in Ohio have thus been constrained, if somewhat reluctantly, to hold that the 2006 changes were not sufficiently significant. *See, e.g., Reynolds v. Strickland*, No. 2:08-cv-442, 2008 WL 4115836, at *1 (S.D. Ohio Aug. 28, 2008) (noting that the court might be inclined to agree with the petitioner that the statute of limitations should be restarted based on the 2006 changes but that “[i]t is not the province of this Court to reject” the Sixth Circuit’s “notably sweeping conclusion” to the contrary); *see also Wilson v. Rees*, No. 09-6306, 2010 WL 3450078, at *2 (6th Cir. Sept. 3, 2010) (rejecting a Kentucky death row inmate’s claim that changes to the lethal-injection protocol in that state restarted the statute-of-limitations clock under *Cooley*).

213. *See supra* text accompanying notes 165–67.

214. *See supra* Part I.A.

215. *See supra* text accompanying note 148.

It was with an eye toward avoiding this wasteful and inefficient litigation that the Supreme Court held in *Stewart v. Martinez-Villareal*²¹⁶ that a death row inmate's claim of incompetency to be executed is not ripe until his execution is imminent.²¹⁷ There are other parallels with *Martinez-Villareal* as well. Just as an inmate's competence can wax, wane, and deteriorate significantly during the years between sentencing and execution, the administration of an execution protocol can change substantially during the many years from direct appeal to execution. Just as there can be times when the condemned inmate is competent and times when he is not, there could be periods when an execution process is constitutional and periods when it is not.²¹⁸

In *Panetti v. Quarterman*,²¹⁹ the Supreme Court elaborated on the havoc it would wreak if death row inmates were required to raise incompetency-to-be-executed claims well before their scheduled executions:

“[T]he implications . . . would be far reaching and seemingly perverse.” A prisoner would be faced with two options: forgo the opportunity to raise a[n incompetency] claim in federal court; or raise the claim in a first federal habeas application . . . even though it is premature. . . . All prisoners are at risk of deteriorations in their mental state. As a result, conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) [incompetency] claims in each and every [habeas] application. This counterintuitive approach would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any.²²⁰

Although the precise procedural considerations are somewhat different in the method-of-execution context, the Court's apprehensions in *Panetti* are directly analogous. Given the concerns one sees, particularly in the death penalty context, about judicial

216. *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

217. *Id.* at 643.

218. For example, if a state is using recently expired drugs, or has obtained execution drugs from an unauthorized source, its plan to implement the written protocol may be constitutionally infirm. *See supra* text accompanying notes 47–53. This is not to say that it is impossible to conceive of a lethal-injection challenge that is ripe several years prior to the scheduled execution date. But again, the ripeness of the claim does not, and should not, dictate when it accrues. *See infra* Part IV.

219. *Panetti v. Quarterman*, 551 U.S. 930 (2007).

220. *Id.* at 943 (quoting *Martinez-Villareal*, 523 U.S. at 644).

economy and discouraging frivolous litigation,²²¹ it is counterintuitive to set a rule that gives plaintiffs the incentive—and perhaps even the mandate—to file method-of-execution challenges so early.

3. *Fostering Uncertainty and Confusion.* Another purpose of a statute of limitations is the certainty it fosters, particularly for defendants.²²² The *Cooley* approach has the illusion of certainty, but only that. It is true that the date upon which the inmate's direct review is completed is easily identifiable. Yet the *Cooley* approach generally contains an exception for plaintiffs who did not have facts about the state's written protocol that were necessary to litigate their claims.²²³ This could be a narrow loophole or an enormous one, depending on how realistically courts view the nature of a lethal-injection challenge. Courts have thus far interpreted this loophole quite narrowly, and, even on its face, it applies only to changes in the written protocol.²²⁴ For the most part, courts have held that the state's choice of lethal injection as a method of execution (or perhaps the release of the protocol) is sufficient to start the statute-of-limitations clock running.²²⁵ But the reality is that protocols are ever-changing in the current litigation climate, and it is likely that the same inmates' accrual date will start over depending on how significantly a state changes its lethal-injection protocol.

A challenge to lethal injection in Pennsylvania illustrates how difficult it can be to determine when the statute of limitations should accrue in situations in which it is unclear when the plaintiffs had access to the information about the protocol needed to file a § 1983 lawsuit. In *Chester v. Beard*,²²⁶ the court agreed with the state that the statute of limitations applied but concluded that there was no

221. See *supra* text accompanying note 83.

222. See Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 498 (2004) (“[I]t is . . . ‘unfair’ to disregard the principle of repose, which provides defendants certainty that potential claims—whose adjudication may be materially hampered by the passage of time—will expire on a date certain.”).

223. See *supra* text accompanying note 79.

224. See *supra* text accompanying notes 209–12.

225. See, e.g., *Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008) (“[Section] 1983 method-of-execution actions . . . necessarily accrue on the later of two dates: the date direct review of an individual case is complete or the date on which the challenged protocol was adopted.”); *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 422 (6th Cir. 2007) (“Ohio did not adopt lethal injection until 1993, or make it the exclusive method of execution until 2001, so the accrual date must be adjusted because *Cooley* obviously could not have discovered the ‘injury’ until one of those two dates.”).

226. *Chester v. Beard*, 657 F. Supp. 2d 534 (M.D. Pa. 2009).

immediately apparent accrual date that should serve to bar the action.²²⁷ In that case, the state alleged that the plaintiffs had sufficient information about the lethal-injection procedures as a result of a letter that the state's counsel had sent to counsel for the public defender's office some years earlier.²²⁸ The court held, however, that it was impossible to determine which of the plaintiffs had seen the letter, when they may have seen it, or whether the information in the letter was sufficient to put them on notice of the potential constitutional problems with the administration of the protocol.²²⁹ Making matters worse, state officials "candidly acknowledged that they carefully guard against public dissemination of information regarding the Commonwealth's death-penalty protocol, and this fact makes it further difficult to determine an accrual date."²³⁰

Chester raises familiar and likely recurring problems in this context. What if the protocol is made available to some inmates under seal, but is not available at all to other inmates?²³¹ What if the protocol is adopted but kept a secret? What if the protocol is released publicly, but the details—such as the qualifications of the personnel tasked with administering the protocol—are not?²³² These questions demonstrate that there is nothing certain about the *Cooley* approach to an accrual date. This uncertainty undermines the central principle of repose, a principle "which provides defendants certainty that potential claims—whose adjudication may be materially hampered by the passage of time—will expire on a date certain."²³³

227. *Id.* at 540–41.

228. *Id.* at 538–39.

229. *Id.* at 540–41 n.4.

230. *Id.* at 541.

231. It is not uncommon for the details of a state's lethal-injection protocol to be made available only to counsel for death row inmates who are parties to pending litigation. *See, e.g.*, Pamela Manson, *Killer to Get Info on Execution Means*, SALT LAKE TRIB., Apr. 6, 2010, at B1 (noting a court's decision to allow counsel for Utah death row inmate Ronnie Lee Gardner access to information about Utah's execution methods on the condition that counsel would not "show the documents to [Gardner] or other inmates"). In some cases, such as litigation currently pending regarding the federal government's lethal-injection procedures, all of the relevant documents are under seal, and only six federal death row inmates are party to the litigation and therefore privy to the information.

232. *See Berger, supra* note 10, at 277 (noting "states' efforts to conceal the details" of their lethal-injection procedures). It has been a battle for death row inmates in many states to learn the qualifications of the execution team members who will be implementing the written protocol. *See, e.g.*, Emergency Motion for Stay of Execution Under Circuit Rule 27-3, *Brown v. Vail*, No. 10-35771 (9th Cir. Sept. 2, 2010) (describing the efforts of petitioner's counsel to obtain information about the qualifications of execution team members in Washington).

233. *Bain & Colella, supra* note 222, at 498.

* * *

Parts II and III of this Article have demonstrated that, when equitable concerns are conflated with statute-of-limitations concerns, the result is an arbitrary and unfair rule that does not achieve its intended purpose. The question remains: is there a better way? Where should the accrual date be set if not at some point along the appellate timeline? Part IV suggests that the question itself wrongly assumes a predicate that may not exist; specifically, when the constitutional injury has not yet occurred, there ought not be any accrual date prior to the execution itself.

IV. NO FUNCTIONAL ACCRUAL DATE

There is a reason why any attempt to choose an accrual date prior to the execution has an air of arbitrariness to it. Courts that do so are trying to fix a date at which point a tort has been committed, when the injury has not yet—and, indeed, may never—occur. This is why the best approach is the one Judge Thompson proposed in *Jones*: the accrual date, if it ever occurs, occurs on the date of the unconstitutional execution.²³⁴ Because the execution results in the prospective plaintiff's death, there is no functional accrual date under this approach.

Citing the *Restatement (Second) of Torts*,²³⁵ Judge Thompson pointed out that “the statute [of limitations] does not usually begin to run until the tort is complete.”²³⁶ In method-of-execution challenges, the tort is not complete until the plaintiff is executed. Thus, the statute-of-limitations clock should not start until the execution has occurred. Moreover, as discussed previously, the historical and policy reasons behind the statute-of-limitations defense, if anything, support an accrual date that coincides with the execution itself. In general, “the farther away in time from the tortious act, the staler the claim and the greater the defendants’ interest in a statute of limitations barring it.”²³⁷ It thus defies common sense, as Judge Thompson

234. *Jones v. Allen*, 483 F. Supp. 2d 1142, 1148 (M.D. Ala. 2007). Judge Thompson is not the only one to suggest this approach. The district court judge in *Cooley* did so as well. See *Cooley v. Strickland (Cooley I)*, No. 2:04 CV 1156, 2005 WL 5253337, at *5 (S.D. Ohio Mar. 28, 2005).

235. RESTATEMENT (SECOND) OF TORTS (1965).

236. *Jones*, 483 F. Supp. 2d at 1148 (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 899 cmt. c) (internal quotation marks omitted).

237. *Id.* at 1150.

explained, to urge that “the statute of limitations take effect as we move *closer* in time to the complained-of act.”²³⁸

Consider, for example, a § 1983 lawsuit filed by the family of an executed prisoner for the pain and suffering he experienced as a result of a botched execution. The natural accrual date for such an action would be the date of the botched execution, and not a moment before. Indeed, when the family of Joseph Clark initiated such an action in Ohio soon after Clark’s botched execution, the statute of limitations was never even raised as a defense by the lawyers in the Ohio Attorney General’s Office who defended against the suit.²³⁹

Yet in the lethal-injection context, states’ lawyers now routinely cite the adoption by *Cooley* and its progeny of an approach that bars claims long before the violation even occurs, let alone grows stale. The primary justification for the circuit courts’ rejection of Judge Thompson’s approach is that the Supreme Court’s recent decision in *Wallace v. Kato*²⁴⁰ precludes a no-accrual-date standard.²⁴¹

In *Wallace*, the petitioner had filed a § 1983 lawsuit against the City of Chicago and several Chicago police officers seeking damages for an unlawful arrest and false imprisonment that had led to his wrongful conviction and sentence for first-degree murder.²⁴² The question for the Court was when the § 1983 statute of limitations accrued.²⁴³ The Court noted that, typically, accrual occurs when the plaintiff has “a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.”²⁴⁴ When the tort at issue is false imprisonment, however, the Court noted that there has to be some accommodation for the fact that the “victim may not be able to sue while he is still imprisoned.”²⁴⁵ Thus, the Court pinned the accrual date to the date upon which the false imprisonment ended—that is, when legal process was initiated.²⁴⁶

Cooley and its progeny rely to a great extent on *Wallace* to rule out an accrual date that coincides with the execution. These courts

238. *Id.*

239. *See, e.g.*, Clark v. Voorhies, No. 1:07-cv-00510 (S.D. Ohio Jan. 28, 2010).

240. *Wallace v. Kato*, 549 U.S. 384 (2007).

241. *See, e.g.*, *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 416 (6th Cir. 2007) (discussing accrual under principles “the Supreme Court recently made clear” in *Wallace*).

242. *Wallace*, 549 U.S. at 386–87.

243. *Id.* at 387.

244. *Id.* at 388 (citation omitted) (internal quotation marks omitted).

245. *Id.* at 389.

246. *Id.* at 390.

point to the language in *Wallace* to the effect that accrual occurs when the plaintiff “can file suit and obtain relief.”²⁴⁷ As the Eleventh Circuit put it in *McNair*, “it is difficult to reconcile *Wallace* with the [lower court’s] holding that the limitations period would not begin to run until after the litigant has died.”²⁴⁸ The theory of these courts is that, pursuant to the language of *Wallace*, a death row inmate could file suit (as several have) and obtain relief prior to the execution itself. So, it cannot be that the claim has not yet accrued.

But *Wallace* does not inexorably lead to the conclusion in *Cooey*. As Judge Thompson explained in *Jones*, *Wallace* was, in many ways, a typical § 1983 suit in which the plaintiff filed suit *after* the tort had occurred.²⁴⁹ Because the method-of-execution challenge seeks to prevent an allegedly unconstitutional act from occurring in the future, the language in *Wallace* that *Cooey* and its progeny rely upon is of limited significance.²⁵⁰ Judge Thompson went on to say, however, that *Wallace* should not be ignored. In fact, *Wallace* teaches that “[a]spects of § 1983 [that] are not governed by reference to state law are governed by federal rules conforming in general to common-law tort principles,” and that those principles provide that the statute of limitations does not begin to run until the tort is “complete.”²⁵¹

Judge Thompson was right. But *Wallace* supports the no-accrual-date approach even more than he acknowledges. First, *Wallace* discusses the “standard rule” for determining the accrual date but explicitly states that there is a “refinement to be considered” when the tort at issue is “distinctive.”²⁵² In other words, the general approach cited talismanically by the *Cooey* line of cases—that accrual occurs when the plaintiff can “file suit and obtain relief”—is just that: a general rule, subject to refinement and exception when the tort involved is not a typical tort.

Even more importantly, *Wallace* also demonstrates that nothing prevents a plaintiff from suing before a claim accrues for statute-of-limitations purposes. Such an event struck both the Sixth and Eleventh Circuits as an impossibility, and this was the basis for their

247. See, e.g., *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008) (quoting *Wallace*, 549 U.S. at 388); *Cooey v. Strickland (Cooey II)*, 479 F.3d 412, 416 (6th Cir. 2007) (same); *Roane v. Holder*, 607 F. Supp. 2d 216, 221 (D.D.C. 2009) (same).

248. *McNair*, 515 F.3d at 1174.

249. *Jones v. Allen*, 483 F. Supp. 2d 1142, 1147 (M.D. Ala. 2007).

250. *Id.* at 1147–48.

251. *Id.* at 1148.

252. *Wallace*, 549 U.S. at 388.

objection to the no-accrual-date approach. In *McNair*, the Eleventh Circuit indicated that it believed that setting the accrual date at the completion of direct review precluded a lawsuit from being filed earlier.²⁵³ In *Cooley*, the Sixth Circuit rejected the suggestion to set the accrual date at the point where actual harm is inflicted “because the death-sentenced inmate’s claim would not accrue until he was executed, at which time it would also be simultaneously moot.”²⁵⁴ These courts are confusing ripeness with accrual. As *Wallace* actually clarifies, a claim can be ripe without having accrued. *Wallace* explicitly recognized that the plaintiff in that case could have sued before his statute of limitations accrued.²⁵⁵

The distinction between ripeness and accrual is important not only because it calls into question the fundamental underpinning of the *Cooley* court’s discomfort with the no-accrual-date approach, but also because it highlights the fallacy of any accrual date that is tied to an inmate’s appeal or postconviction proceedings. Even the approach favored by the dissenters, which would set the accrual date at the completion of federal habeas proceedings, betrays a misunderstanding of the distinction between ripeness and accrual. After all, it may be risky for any death row inmate to wait until the completion of federal habeas proceedings to file a claim, even if the governing law in his jurisdiction stated that his claim did not accrue until that point in time.²⁵⁶ Yet the approach of the dissenters implies that inmates *must* wait until federal habeas proceedings are over before filing suit.

A method-of-execution challenge is ripe when the prospective plaintiff has all of the facts necessary to file a claim. That is, when the plaintiff *can* file suit.²⁵⁷ The selection of an accrual date should address the purposes of statutes of limitations. That is, when the plaintiff *must* file suit. Method-of-execution challenges are analogous to “continuing violation” cases in which an unlawful practice continues

253. *McNair*, 515 F.3d at 1176; see also *Roane v. Holder*, 607 F. Supp. 2d 216, 221–22 (D.D.C. 2009) (implying that a challenge cannot be filed prior to the accrual date set by the court).

254. *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 418 (6th Cir. 2007).

255. *Wallace*, 549 U.S. at 390 n.3 (“This is not to say, of course, that petitioner could not have filed suit immediately upon his false arrest.”).

256. See *supra* text accompanying notes 165–67.

257. See, e.g., David Floren, Comment, *Pre-Enforcement Ripeness Doctrine: The Fitness of Hardship*, 80 OR. L. REV. 1107, 1109 (2001) (“For issues raised in the controversy to be fit for resolution by the court, they should be largely legal in nature and should not require further factual development.”).

into the limitations period.²⁵⁸ In those cases, the Supreme Court has said, “the staleness concern disappears,” and the statute of limitations begins running only when the “last asserted occurrence” of the allegedly illegal practice takes place.²⁵⁹ In a method-of-execution challenge, the “last asserted occurrence” of the continuing violation is the execution itself. The *Cooley* approach is wrong not only because the analogy to AEDPA is faulty, but also because any attempt to tie accrual to what is essentially an unrelated proceeding—the appeals and postconviction process—divorces the inquiry from the principles that underlie statutes of limitations.

The no-accrual-date approach is not perfect. For example, because it allows method-of-execution challenges to be brought whenever new relevant facts come to light, it does not guarantee the certainty that is one of the purposes of statutes of limitations. The response to this concern is twofold. First, the *Cooley* approach also fosters little certainty, and it may be that so long as method-of-execution claims are cognizable under the Eighth Amendment, it is impossible to draw clear, bright lines with respect to when claims can and cannot be brought.²⁶⁰ Second, there should be little worry that the no-accrual-date approach will open the doors to a flood of last-minute method-of-execution claims, or that such an approach will stifle innovation in the development of execution procedures. After all, prior to the Sixth Circuit’s ruling in *Cooley* in 2007, the statute of limitations was never an issue in these cases, and the courts proved themselves quite capable of distinguishing meritorious and timely filed claims from frivolous and dilatory ones.

Another potential argument against the no-accrual-date approach, not yet articulated by any court, is that the tort being committed is not the execution itself, but the imposition of the *risk* that the tort will be committed. In *Baze*, the Supreme Court acknowledged that “[o]ur cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment.”²⁶¹ *Helling v. McKinney*²⁶²

258. See *supra* text accompanying note 155.

259. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81 (1981). Method-of-execution challenges may also be loosely analogized to the tort claim of medical monitoring, which has also raised vexing procedural issues, including ones related to statute-of-limitations accrual. Pankaj Venugopal, Note, *The Class Certification of Medical Monitoring Claims*, 102 COLUM. L. REV. 1659, 1675–76 (2002).

260. See discussion *supra* Part II.B.3.

261. *Baze v. Rees*, 128 S. Ct. 1520, 1530 (2008) (plurality opinion).

and *Farmer v. Brennan*²⁶³ explain what level of risk qualifies to establish an Eighth Amendment violation, but neither case addressed the question of when a lawsuit filed under the Eighth Amendment would accrue for statute-of-limitations purposes.²⁶⁴ One might argue, however, that if the risk is the constitutional violation, why not set the accrual date at the point where the risk rises to the level of a constitutional violation?

The answer is that, although *Helling* and *Farmer* explain that an Eighth Amendment violation can be proven by establishing the level of risk, it is not the risk itself that constitutes the tort—only the torturous execution can actually inflict constitutional injury upon the plaintiff. Judge Thompson wrote in *Jones* that “[k]nowledge of a needless risk of a painful death at the hands of the State does not itself violate the Constitution; only the execution itself would.”²⁶⁵ Can that language be squared with the language in *Baze* suggesting that subjecting individuals to the risk of pain “can qualify as cruel and unusual punishment”?²⁶⁶ Yes, if one understands that the showing of risk in these contexts is necessary because the case involves a future harm;²⁶⁷ the litigation aims to prevent the harm from happening, so the risk is a stand-in for the actual injury. In other words, the claim is ripe when the plaintiff can show the substantial risk, but it does not accrue until the harm is actually inflicted.²⁶⁸

Moreover, an approach to accrual that started the statute-of-limitations clock at the point at which the risk became “substantial” would lead to a hopelessly confusing and inefficient set of considerations. Courts would have to engage in bizarre mental gymnastics to determine not whether the state’s procedures violated

262. *Helling v. McKinney*, 509 U.S. 25 (1993).

263. *Farmer v. Brennan*, 511 U.S. 825 (1994).

264. In a footnote, the *Farmer* Court stated, “At what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it.” *Id.* at 834 n.3.

265. *Jones v. Allen*, 483 F. Supp. 2d 1142, 1149 (M.D. Ala. 2007).

266. *Baze*, 128 S. Ct. at 1530.

267. See *Helling*, 509 U.S. at 33 (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition.”).

268. It is also important to point out that the statute of limitations was not before the Court in *Baze*. In fact, the Court’s language was intended to deal with a very different problem: the ability of a death row inmate to sue prior to the infliction of the harm. In other words, the Court was implicitly addressing the ripeness issue, assuring plaintiffs that its precedent did not preclude a civil lawsuit to enjoin a future harm. Nothing in the *Baze* decision can otherwise be read to suggest that the Court believed a method-of-execution claim accrued at the moment the harm became substantial enough to justify a constitutional intervention.

the *Baze* standard, but, as a threshold matter, when exactly (to the day) the risk of harm crossed the line into “substantial” territory such that the statute of limitations began running. The impossibility of such a task may explain why no court has suggested such an approach.

Because the event the litigation seeks to avoid—the torturous execution—is an event with a fixed time, it is easier and more sensible to attach accrual there. This approach is the best answer doctrinally and also avoids the arbitrary and confusing line drawing of *Cooley*. It is also more faithful to the principles of statutes of limitations than is the approach championed by the *Cooley* dissenters. It provides a realistic opportunity for a day in court for death row inmates with meritorious claims, and, more than any other approach, it takes into account the realities of most method-of-execution challenges filed in today’s capital punishment regime.

CONCLUSION

One does not have to guess at the motivations behind *Cooley* and its progeny. The Eleventh Circuit in *McNair* worried about giving death row inmates “veto power” over the state’s ability to enforce its judgments.²⁶⁹ The Sixth Circuit in *Cooley* was concerned about weakening the states’ ability to “exercise [their] sovereign power and to finalize [their] judgments.”²⁷⁰ It is a familiar concern: that death row inmates and their attorneys are forever cooking up novel challenges to delay the inevitable.²⁷¹ But what makes the *Cooley* approach truly puzzling is that it is simply not necessary in order to address the stated concern about dilatory lawsuits, and the havoc the *Cooley* approach wreaks on the doctrine is not insubstantial.

As this Article demonstrates, courts’ equitable power to determine whether a stay is appropriate is more than sufficient to weed out method-of-execution lawsuits that are deemed to be dilatory. Whatever one thinks of the appropriate accrual date in this context, the use of the statute of limitations to punish death row inmates for filing late § 1983 lawsuits has spawned a rule that has no upside. It does not provide certainty, it does not provide access to the courts to those who are legitimately entitled, and it bears little

269. See discussion *supra* Part III.A.

270. *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 419 (6th Cir. 2007).

271. See *supra* note 83.

resemblance to the historical justifications for statutes of limitations. Yet it is currently the law of the land in the most active death penalty states.

In *McNair*, the Eleventh Circuit listed three benefits of using AEDPA's statute of limitations in the method-of-execution context.²⁷² This Article has rejected the first two—to preclude claims from being filed too early²⁷³ or too late²⁷⁴—as plausible bases for adopting the AEDPA statute of limitations. The court suggested a third, additional benefit: that, by mirroring the AEDPA statute of limitations, the method-of-execution statute of limitations “thereby simplif[ies] the postconviction labyrinth of filing deadlines through which capital litigants must navigate.”²⁷⁵ This view is either naïve or deliberately disingenuous. Nothing about the *Cooey* approach simplifies filing deadlines for death row inmates.

To the contrary, the *Cooey* approach renders it virtually impossible for many death row inmates to pursue litigation challenging the method of execution. As one Sixth Circuit judge noted, “Determining when the statute of limitations begins to run for a death-sentenced prisoner who wishes to challenge a state’s method of execution under 42 U.S.C. § 1983 is tantamount to determining whether the prisoner will be able to challenge the method of execution at all.”²⁷⁶

Recent challenges to lethal-injection procedures have exposed grave problems with the administration of that particular method of execution in many states.²⁷⁷ This litigation has delayed a number of executions, but it has also resulted in more humane executions in some states²⁷⁸ and at least a continued judicial vigilance in many others.²⁷⁹ The no-accrual-date approach advocated here acknowledges

272. *McNair v. Allen*, 515 F.3d 1168, 1176–77 (11th Cir. 2008).

273. *See supra* Part III.B.1.

274. *See supra* text accompanying notes 160–80.

275. *McNair*, 515 F.3d at 1177.

276. *Getsy v. Strickland (Getsy II)*, 577 F.3d 320, 321 (6th Cir. 2009) (Moore, J., dissenting from denial of rehearing en banc).

277. *See Denno, supra* note 31, at 107–15 (discussing recent lethal-injection procedure challenges in California, Missouri, North Carolina, Florida, and Tennessee).

278. *See Andrew Welsh-Huggins, Ohio: 1 Lethal Injection Drug Should End Lawsuit*, SEATTLE TIMES, Nov. 14, 2009, http://seattletimes.nwsourc.com/html/nationworld/2010275931_apusdeathpenaltyohio.html (“Opponents of the three-drug system [are] . . . applauding Ohio for taking a step that other states have considered but not undertaken.”).

279. *See Dieter, supra* note 25, at 806–08 (describing recent lethal-injection procedure challenges and the resulting vigilance of courts).

that the injury is a torturous execution, and that if the statute of limitations should run at all in such a case, it should run from the day the harm is inflicted. Successful inmates will file their lawsuits long before that moment, when their claims ripen. Inmates like Romell Broom in Ohio will be able to get their day in court and prevent the infliction of serious constitutional injury before it occurs.

Cooley and its progeny represent a series of court decisions that distort settled doctrine to solve a problem that does not exist. It is not immediately clear what that phenomenon tells us about courts and their treatment of issues that are at the intersection of criminal and civil law. What is clear is that courts wrestling with the proper accrual date for a method-of-execution challenge would do well to reconsider the *Cooley* approach in favor of one that is more faithful to the purposes of statutes of limitations, more practical, and no less consistent with a desire to preclude dilatory lawsuits.