

**LEGAL INJECTION: THE SUPREME COURT ENTERS
THE LETHAL INJECTION DEBATE:
Hill v. McDonough, 126 S. Ct. 2096 (2006)**

The end of the 2005–2006 Supreme Court term brought a flurry of death penalty opinions.¹ The media lavished attention on the fiery concurring and dissenting opinions of Justices Scalia and Souter in *Kansas v. Marsh*; in addition to upholding Kansas' capital sentencing protocol, the *Marsh* court engaged in a rare theoretical and pragmatic debate over the death penalty.² In contrast, *Hill v. McDonough* was brushed aside by many as involving a mere "procedural issue."³ With the spotlight now focused on lethal injection challenges,⁴ however, it is the *Hill* decision that packs enough punch to drastically alter death penalty litigation.

In *Hill*, the Court held that condemned inmates can challenge a state's method of execution under 42 U.S.C. § 1983 in addition to seeking habeas corpus relief. Although the decision has been interpreted as a resolution to "a narrow procedural question,"⁵ some commentators have read *Hill* to signify that the Court is now ready to entertain arguments over the substantive merits of lethal injection,⁶ the country's most prevalent method of execution.⁷ The *Hill* decision, handed down in the midst of rising

1. *E.g.*, *Kansas v. Marsh*, 126 S. Ct. 2516 (2006) (decided June 26, 2006); *Hill v. McDonough*, 126 S. Ct. 2096 (2006) (decided June 12, 2006); *House v. Bell*, 126 S. Ct. 2064 (2006) (decided June 12, 2006).

2. *See, e.g.*, Joan Biskupic, *Justices Narrowly Uphold Kansas Death Penalty Law*, USA TODAY, June 27, 2006, at A2 ("The tone of the justices' writings in the case, however, exposed a deep ideological rift on the court."); Charles Lane, *Justices Clash Over Death Penalty Case*, WASH. POST, June 27, 2006, at A5 (calling the decisions "the most blunt acknowledgment to date that the justices have been affected by the wider debate over capital punishment").

3. *See, e.g.*, Charles Lane, *Court Weighs Procedural Issue in Death Row Lawsuit*, WASH. POST, Apr. 27, 2006, at A10.

4. *See, e.g.*, Abby Goodnough, *States Await Ruling on Use of Lethal Injection*, N.Y. TIMES, Sept. 19, 2006, at A16.

5. *Lenz v. Johnson*, 443 F. Supp. 2d 785, 792 (E.D. Va. 2006).

6. *See, e.g.*, Linda Greenhouse, *Prisoners Gain in Suit Attacking Lethal Injection*, N.Y. TIMES, June 13, 2006, at A1 ("The Supreme Court opened the door Monday for death-row inmates to challenge the way most states carry out executions by lethal injection.").

7. THOMAS P. BONCZAR & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2004 (2005), available at

national conflict over the use of lethal injection, not only reinvigorated the debate but also made the Court an active participant.

In doing so, the *Hill* decision has unnecessarily complicated Eighth Amendment lethal injection challenges by inviting a flood of litigation on a single, narrow issue. Even if the Court eventually resolves the issue, the constitutionality of lethal injections will remain uncertain until such a resolution. With multiple states and federal courts already deeply fractured over the lethal injection question, the Court's *Hill* decision makes it likely that the situation will worsen before it improves.

On October 19, 1982 in Mobile, Alabama, Clarence Hill and an accomplice, Cliff Jackson, stole a pistol and an automobile.⁸ That same day, Hill and Jackson drove to Pensacola, Florida, where they robbed a savings and loan association at gunpoint.⁹ During the robbery, Hill "demanded money and threatened that he would 'blow some brains out.'"¹⁰ Hill also kicked a bank teller and pulled him by the hair while he lay on the floor.¹¹ When the police arrived, they apprehended Jackson while Hill fled through a back door.¹² As the police attempted to handcuff Jackson, Hill approached the two police officers from behind and shot them both.¹³ One officer was killed and the other was wounded.¹⁴

In 1983, Hill was convicted of first-degree murder.¹⁵ The jury, by an 11-1 vote, recommended that Hill be sentenced to death.¹⁶ The judge, in imposing the death sentence, found five applicable aggravating factors and only one applicable mitigating factor.¹⁷ At the time that Hill's conviction and sentence be-

<http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf> [hereinafter CAPITAL PUNISHMENT].

8. *Hill v. State*, 515 So. 2d 176, 177 (Fla. 1987).

9. *Id.*

10. *Id.* at 178.

11. *Id.*

12. *See id.* at 177.

13. *See Hill*, 515 So. 2d at 177.

14. *See id.*

15. *See Hill v. McDonough*, 126 S. Ct. 2096, 2100 (2006).

16. *See Hill*, 515 So. 2d at 177.

17. *See id.* The judge found that the following aggravating factors applied: "(1) the defendant had previously been convicted of another capital offense or violent felony; (2) the defendant knowingly created a great risk of harm or death to many persons; (3) the murder was committed while the defendant was engaged in the commission of a robbery; (4) the murder was committed for the purpose of avoid-

came final, Florida law prescribed electrocution as the state's method of execution.¹⁸ When Florida amended its statute in 2000 to replace electrocution with lethal injection as the state's method of execution,¹⁹ Hill had already completed a full round of unsuccessful federal habeas corpus litigation.²⁰ Although Florida law specifies the method of execution, the implementation of lethal injection is under the purview of the Florida Department of Corrections, which had not established a specific protocol.²¹ On November 29, 2005, the Governor of Florida signed Hill's death warrant and set Hill's execution date for January 24, 2006.²² At this point, Hill requested information about Florida's lethal injection protocol, but the Department of Corrections did not provide him such information.²³

On December 15, 2005, less than six weeks before his scheduled execution, Hill for the first time challenged Florida's lethal injection procedure by filing a successive post-conviction petition in state court.²⁴ The trial court denied Hill's request for an evidentiary hearing, and the Florida Supreme Court affirmed.²⁵

On January 20, 2006, Hill brought an action in federal district court under 42 U.S.C. § 1983 to "[bar the State] from executing [Hill] in the manner they currently intend."²⁶ The district court held that Hill's § 1983 claim was the "functional equivalent" of a petition for writ of habeas corpus and denied the claim.²⁷ The Court of Appeals for the Eleventh Circuit affirmed, finding that

ing or preventing a lawful arrest or escaping from custody; and (5) the murder was cold, calculated, and premeditated. In mitigation, the judge found [Hill's] age as a possible factor. [Hill's] age at the time of the offense was twenty-three years." *Id.* On appeal, the Florida Supreme Court found the fifth aggravating factor (that the murder was "cold, calculated, and premeditated") unsupported by the evidence, but reaffirmed the sentence. *Id.* at 179.

18. *Hill*, 126 S. Ct. at 2100 (citing FLA. STAT. § 922.10 (1987)).

19. FLA. STAT. § 922.105(1) (2003) (providing that "[a] death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution").

20. *See Hill*, 126 S. Ct. at 2100.

21. *See Sims v. State*, 754 So. 2d 657 (Fla. 2000) (per curiam) (holding that implementation of lethal injection is the responsibility of the Florida Department of Correction).

22. *Hill*, 126 S. Ct. at 2100.

23. *See id.*

24. *See id.*

25. *See Hill v. State*, 921 So. 2d 579 (Fla. 2006).

26. *Hill*, 126 S. Ct. at 2100.

27. *Id.* at 2101.

Hill's § 1983 action was a successive petition barred by 28 U.S.C. § 2244(b)(3)(A).²⁸

The Supreme Court reversed and remanded.²⁹ Writing for a unanimous Court, Justice Kennedy held that inmates can challenge the constitutionality of a state's method of execution not only through a petition for a writ of habeas corpus but also under § 1983.³⁰ The Court first began with an overview of post-conviction appeals in capital cases. It observed that "[c]hallenges to the lawfulness of confinement or to particulars affecting its duration are the province of habeas corpus," while § 1983 suits allow inmates to challenge "the circumstances of his confinement."³¹

The Court then assessed the applicability of precedent. In *Nelson v. Campbell*, the Court first considered whether a challenge to a lethal injection procedure must proceed as a habeas corpus action.³² In *Nelson*, the inmate challenged only the constitutionality of one aspect of lethal injection: Alabama's "cut-down" procedure to access the condemned inmate's veins, which were severely compromised due to past drug use.³³ Although the Court held that Nelson's claim could proceed as a § 1983 action, the Court noted that it "[n]eed not reach here the difficult question of how to categorize method-of-execution claims generally."³⁴ Although the *Hill* Court found that *Nelson* "did not decide th[e] question" of whether an inmate's § 1983 action could proceed to challenge lethal injection as a method of execution in general, it nonetheless found *Nelson's* holding to be controlling.³⁵

Although *Nelson* involved the narrower issue of the cut-down procedure, the Court distinguished both challenges from earlier precedent that barred prisoners' § 1983 suits from proceeding when a judgment in the inmate's favor would invalidate the sentence; in those instances, challenges must be brought via habeas corpus.³⁶ Because Hill's challenge to Flor-

28. See *Hill v. Crosby*, 437 F.3d 1084, 1085 (11th Cir. 2006).

29. *Hill*, 126 S. Ct. at 2096.

30. See *id.* at 2101 (citing *Muhammad v. Close*, 540 U.S. 749, 750 (2004)).

31. *Id.* (internal citations omitted).

32. See *Nelson v. Campbell*, 541 U.S. 637, 643 (2004) ("[We] have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution . . . fall within the core of federal habeas corpus.").

33. See *id.* at 640–41.

34. *Id.* at 644.

35. *Hill*, 126 S. Ct. at 2102.

36. See *id.* at 2101.

ida's lethal injection protocol would not necessarily prevent the state from carrying out Hill's death sentence under a different protocol, the Court concluded that any potential success of Hill's § 1983 suit would not necessarily invalidate his death sentence.³⁷

Next, the Court dismissed two arguments advanced by *amici*. First, the United States argued that a capital litigant's § 1983 may proceed only if the prisoner identifies an alternative, authorized method of execution.³⁸ In addition, the state of Alabama argued that § 1983 relief is inappropriate if, as a practical matter, the suit would frustrate the execution.³⁹ In both *Hill* and *Nelson*, the inmates conceded that other methods of execution would be constitutional.⁴⁰ The *Hill* Court, however, refused to require such a concession; it held that inmates need not affirmatively identify a constitutional method of execution to advance a § 1983 challenge to the intended method.⁴¹ Nonetheless, the Court indicated that if the relief sought by an inmate would in fact foreclose execution, the Court might re-characterize the challenge as an action for habeas relief.⁴²

Finally, the Court iterated that filing a § 1983 suit does not entitle an inmate to a stay of execution as a "matter of course."⁴³ Rather, an inmate still must satisfy all requirements for a stay, which includes showing a significant possibility of success on the merits.⁴⁴ Although the Court declined to address the merits of Hill's underlying action, it affirmed that in granting equitable relief in the form of a stay of execution, the district court must be sensitive to the "State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."⁴⁵

Shortly after the Supreme Court remanded *Hill* for further consideration, the lower courts again refused to hear the merits of Hill's lethal injection challenge. Although the courts acknowledged that Hill's claim could proceed as a § 1983 suit, they held that the state's interest in proceeding with Hill's exe-

37. *See id.* at 2102.

38. *See id.* at 2103.

39. *See id.*

40. *See Hill*, 126 S. Ct. at 2102.

41. *See id.* at 2103.

42. *See id.*

43. *Id.* at 2104.

44. *See id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983)).

45. *Id.* (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)).

cution outweighed Hill's interest in staying the execution given Hill's failure to bring the § 1983 suit until mere days before his scheduled execution.⁴⁶ The Supreme Court declined to stay the execution,⁴⁷ and Hill's sentence was carried out on September 20, 2006.⁴⁸

In the brief time since the Supreme Court decided *Hill*, the case has received considerable attention from the federal courts,⁴⁹ but little of that judicial attention has centered on *Hill*'s substantive challenge to lethal injections. Although the Supreme Court did not entertain the merits of Hill's lethal injection challenge, the *Hill* decision spawned speculation that the Court was prepared to do so.⁵⁰ In the public arena, *Hill* fueled the fire of the already contentious lethal injection debates and put the issue at the forefront of the nation's capital punishment litigation.

Public debate over the use of lethal injection is not new. To supporters, lethal injection is a more tolerable method of execution than its predecessors such as hanging, electrocution, and firing squad. Whereas other methods involve at least the appearance of a violent death, lethal injection allows for a death that resembles a hospital procedure.⁵¹

46. See *Hill v. McDonough*, 464 F.3d 1256, 1259 (11th Cir. 2006) ("In light of Hill's actions in this case, which can only be described as dilatory, we join our sister circuits in declining to allow further litigation of a § 1983 case filed essentially on the eve of execution.").

47. See *Hill v. McDonough*, 127 S. Ct. 34, *cert. denied*, 127 S. Ct. 465 (2006).

48. See Florida Commission on Capital Cases, Pending Death Warrants: Clarence Hill, <http://www.floridacapitalcases.state.fl.us/index-hill.cfm> (last visited Oct. 23, 2006).

49. See, e.g., *Alley v. Little*, No. 06-5816, 2006 WL 1736345 (6th Cir. June 24, 2006); *Magallon v. Livingston*, 453 F.3d 268 (5th Cir. 2006); *Wiggs v. Asbury Park Mun. Ct.*, No. 05-5744, 2006 WL 2177708 (D.N.J. July 31, 2006); *King v. Burt*, No. 05-CV-73953-DT, 2006 WL 2042340 (E.D. Mich. June 16, 2006); *Sandoz Inc. v. Food & Drug Admin.*, No. 06-1134, 2006 WL 1897728 (D.D.C. July 12, 2006).

50. See, e.g., Greenhouse, *supra* note 6; Orin Kerr, Two New Death Penalty Decisions: *Hill v. McDonough* and *House v. Bell*, OrinKerr.com (June 12, 2006), <http://www.orinkerr.com/2006/06/12/two-new-death-penalty-decisions-hill-v-mcdonough-and-house-v-bell/#comments> ("In any event, I assume the effect of *Hill* will be to push the courts on to the merits of method-of-execution claims sooner rather than later."); cf. Douglas A. Berman, *A Hill of Beans*, Sentencing Law and Policy (June 12, 2006), http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/a_hill_of_beans.html ("As I feared, the Supreme Court's approach to its decision today in *Hill* . . . isn't really going to help sort out all the on-going lethal injection scummages. Not to be too harsh about the inconsequential reality of *Hill*, but I fear I might be libeling beans (and could get sued by some bean association) if I joke that *Hill* is even worth a hill of beans.").

51. See Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461, 469 (1995).

Perhaps ironically, lethal injection was originally opposed because of its resemblance to a medical procedure. Lethal injection was first rejected by a commission in New York as early as 1888, on the ground that the hypodermic needle was too closely “associated with the practice of medicine, and as a legitimate means of alleviating human suffering.”⁵² The issue did not come up again until 1977 when the first lethal injection legislation was passed in Oklahoma over objections that “using a needle to kill criminals would make little children afraid to go to the doctor.”⁵³

In a society where the goal of execution methodology is to carry out the sentence “as quickly, uneventfully, impersonally, and painlessly as Nature and Science permit,”⁵⁴ lethal injection is a far superior method to its predecessors. Designed to make the death penalty more humane, lethal injection quickly became the standard method of execution. From 1977 through 2004, 82% of all executions in the United States were carried out by lethal injection.⁵⁵ In 2004, lethal injection was used in a full 98% of executions.⁵⁶

Thus, it is unsurprising that opponents of the death penalty would actively attack the lethal injection method. Foreclosing the use of lethal injection would effectively stall executions at both the state and federal levels, if only for the present.⁵⁷ The current attack is grounded in the contention that, although lethal injections appear to be quick and painless, some evidence indicates that certain lethal injection protocols could cause pain to the inmate before death occurs.⁵⁸

52. *Id.* at 535.

53. William J. Wiseman, Jr., *Inventing Lethal Injection*, THE CHRISTIAN CENTURY, June 20–27, 2001, at 6, 7.

54. Madow, *supra* note 51, at 469.

55. CAPITAL PUNISHMENT, *supra* note 7, at 1.

56. *Id.*

57. To shed further light on the nature of these attacks, consider the failure of lethal injection opponents to offer any constructive suggestions for improvements to the protocol, as well as their failure to concede a single method they would accept as constitutional. *See, e.g.*, HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTION IN THE UNITED STATES 4 (2006) (“Because of our opposition to the death penalty, Human Rights Watch does not endorse any methods of lethal injection—either the current or proposed alternatives.”). Instead of offering alternatives, the publication encourages state legislatures and Congress to abolish the death penalty and makes the remarkably vague suggestion that corrections departments should adopt the method of execution that “causes the inmate the least possible pain and suffering.” *Id.* at 8.

58. *See* Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153, 174 (1996).

The common lethal injection process involves a drug sequence that first anesthetizes the inmate and then stops the heart. California's protocol, typical of other states, employs three drugs: sodium thiopental to induce unconsciousness, then pancuronium bromide to induce paralysis, and finally potassium chloride to induce cardiac arrest.⁵⁹ Although the protocol is designed to induce unconsciousness so that the inmate does not feel pain, critics contend that there is a risk of painful death.⁶⁰ Lethal injection opponents found encouragement in a study published in *The Lancet*, a British research journal, which asserted that flaws in the lethal injection protocol and execution "might have led to the unnecessary suffering of at least some of those executed."⁶¹

A related criticism of the current protocol is that, in most instances, doctors do not actually perform the injections. As discussed above, the lethal injection protocol was originally attacked for too closely resembling medical procedures. Since then, the medical community has taken a strict line against physician participation in lethal injections, insisting that there is simply no need for medical assistance and that participation would violate the Hippocratic Oath.⁶² Said Dr. H. Jack Geiger while serving as president of Physicians for Human Rights, "[i]t adds nothing to the process to hang a white cloak around the execution."⁶³ Although the American Medical Association (AMA) recognizes that "opinion on capital punishment is the personal moral decision of the individual," national AMA Code of Medical Ethics explicitly prohibits doctors from participating in executions.⁶⁴ The American Nursing Association is similarly "strongly opposed to nurse participation in capital

59. *Morales v. Hickman*, 438 F.3d 926, 928 (9th Cir. 2006).

60. One such concern is that the muscle-relaxing drug makes the inmate appear to be asleep but leaves him able to experience pain; the drug-induced paralysis may render the inmate incapable of communicating this pain. See Harding, *supra* note 58, at 174–75.

61. Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412, 1414 (2005) (emphasis added).

62. See, e.g., Lawrence K. Altman, *Focus on Doctors and Executions*, N.Y. TIMES, Mar. 20, 1994, at A31 (quoting Kirk Johnson, General Counsel of the American Medical Association, that "there is no medical or public policy need to have a physician actively involved in either the planning or the execution itself.").

63. *Id.*

64. Am. Med. Ass'n, Council on Ethical and Judicial Affairs, Code of Medical Ethics E-2.06 Capital Punishment (2006), available at <http://www.ama-assn.org/ama/pub/category/print/8419.html>.

punishment” and views participation as a “breach of the ethical traditions of nursing, and the *Code for Nurses*.”⁶⁵

Thus, two arguments dominate the contemporary opposition to lethal injection: that medical personnel should be present during an execution, and that more steps should be taken to ensure that inmates do not suffer. Because the Court has never ruled on the constitutionality of a particular method of execution,⁶⁶ and has instead relied on the broader constitutional requirement that “the punishment must not involve the unnecessary and wanton infliction of pain,”⁶⁷ recent lethal injection litigation has left the country with “a plethora of inconsistent outcomes predicated on the same basic facts.”⁶⁸ In addition to the troubling fact that federal judges are now performing their own ad hoc redrafting of state execution protocols, these same judges are now demanding that states either find doctors willing to violate national AMA policy and the established norms of the medical community or face a court-imposed moratorium on capital punishment. Perhaps the two states most familiar with these issues are California and Missouri, which stand at the forefront of the current battle over lethal injection.

In California, judicial concerns over the state’s lethal injection protocol led to an effective cessation of executions in February 2006 and an ongoing series of litigation.⁶⁹ Fresh off the heels of the much-publicized Stanley “Tookie” Williams execution⁷⁰ (and allegations that Williams’ lethal injection procedure was flawed), death row inmate Michael Morales challenged the

65. Am. Nursing Ass’n Ethics and Human Rights Position Statements: Nurses’ Participation in Capital Punishment, Dec. 8, 1994, available at <http://www.nursingworld.org/readroom/position/ethics/prtetcptl.htm>.

66. Cf. Kristopher Haines, *Lethally Injected: Devolving Standards of Decency in American Society*, 34 CAP. U.L. REV. 459, 469 (2005) (“The Court has rarely met head-on constitutional questions regarding the permissibility of particular methods of execution.”).

67. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

68. Respondent’s Brief on the Merits at 31 & n.27, *Hill v. McDonough*, 126 S. Ct. 2096 (2006) (No. 05-8794). See also the case of Willie Brown, whose lethal injection challenge was overcome by the state’s use of a bispectral index (BIS) monitor, a device that can monitor consciousness during the execution procedure. *Brown v. Beck*, 445 F.3d 752, 753–54 (4th Cir. 2006) (Michael, J., dissenting). The Fourth Circuit Court of Appeals rejected Brown’s challenge to the procedure, and Brown was executed on April 21, 2006. See Andrea Wiegl, *Brown Executed for 1983 Murder: The Execution Was to Be First to Use Monitor to Measure Inmate’s Level of Consciousness*, NEWS & OBSERVER, Apr. 21, 2006, at B1.

69. See Respondent’s Brief on the Merits, *supra* note 68, at 31–32 & n.27.

70. See Jennifer Warren & Maura Dolan, *Tookie Williams is Executed*, L.A. TIMES, Dec. 13, 2005, at A1.

constitutionality of the state's lethal injection protocol.⁷¹ In a *per curiam* opinion, the Ninth Circuit Court of Appeals affirmed a lower court opinion requiring California to either "(1) . . . 'use only sodium thiopental or another barbiturate or combination of barbiturates in [Morales'] execution,' thereby avoiding the concern that one of the other two drugs would cause Morales pain; [or] (2) . . . agree to allow an anesthesiologist to monitor and verify that Morales is and remains unconscious throughout the execution procedure."⁷² When California was unable to find an anesthesiologist willing to assist in the execution, Morales' death sentence was placed on hold indefinitely.⁷³

After *Hill*, in late September of 2006, U.S. District Judge Jeremy Fogel presided over an unprecedented four-day hearing on the constitutionality of California's lethal injection protocol.⁷⁴ Soon afterwards, Judge Fogel submitted a request for briefing to counsel, in which he asked detailed questions about medical procedures, drugs, and the expertise of medical professionals to aid his decision-making.⁷⁵ On December 15, Judge Fogel held that California's implementation of its lethal injection protocol presents to Morales an undue burden and unnecessary risk of an Eighth Amendment violation.⁷⁶ Nevertheless, Judge Fogel granted the California Department of Corrections thirty days to inform the court whether it intends to alter its lethal injection protocol to conform to the court's standards.⁷⁷ Thus, the *Morales* case, far from final, marks yet another stage in a long stream of California death penalty litigation.

71. See *Morales v. Hickman*, 438 F.3d 926 (9th Cir. 2006).

72. *Id.* at 927.

73. Stacy Finz, Bob Egelko & Kevin Fagan, *State Postpones Morales Execution*, S.F. GATE, Feb. 22, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/02/22/MNGSUHCJFB1.DTL>; see also Press Release, Cal. Dep't of Corr. and Rehab., *Morales Execution Delayed* (Feb. 21, 2006) (statement by Warden Steven Ornoski), available at <http://www.cya.ca.gov/communications/moralesexecutiondelay.html>.

74. See Claire Cooper, *Doctor at Execution Balked: Anesthesiologist's Refusal to Actively Participate Caused Halt to Morales Procedure*, SACRAMENTO BEE, Sept. 6, 2006, at A3. For a summary of the hearing, see Henry Weinstein & Maura Dolan, *Judge Concludes Hearings on Lethal Injection*, L.A. TIMES, Sept. 30, 2006, at B1.

75. See Request for Briefing, *Morales v. Tilton*, No. C 06 219 JF RS (N.D. Cal. Oct. 3, 2006), available at http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/2006_10_03_Fogel_questions.pdf.

76. See Memorandum of Intended Decision, Request for Response from Defendants, *Morales v. Tilton*, No. C 06 219 JF RS (N.D. Cal. Dec. 15, 2006), available at <http://www.latimes.com/media/acrobat/2006-12/26909037.pdf>.

77. See *id.*

Another state, Missouri, also draws national attention as it attempts to appease its courts and to show that its lethal injection protocol is constitutional.⁷⁸ In *Taylor v. Crawford*, an inmate has thus far successfully challenged Missouri's lethal injection protocol, which was not codified and appears to have been under the purview of a dyslexic doctor with a history of mixing up drugs.⁷⁹ After unsuccessfully attempting to enlist the assistance of almost 300 anesthesiologists, the state crafted a more realistic, revised lethal injection protocol and submitted it to the court for approval.⁸⁰ On July 25, the U.S. District Court for the Western District of Missouri found the state's suggested improvements insufficient:

Missouri's revised proposal is an improvement over the current procedure. However, there continue to be inadequacies with the personnel required to monitor and oversee the use of the anesthetic thiopental. While the use of a board certified anesthesiologist may not be possible, the alternative proposed by the State falls short of ensuring the protection required.

If the proposed three drug approach is to be used, it is crucial that someone with the appropriate training and experience in monitoring anesthetic depth must be present to ensure that Missouri's executions of its condemned inmates are carried out humanely.⁸¹

On August 9, however, the Eighth Circuit Court of Appeals held that the district court retained jurisdiction only to decide the constitutionality of Missouri's original lethal injection protocol and remanded the case to the district court for reconsideration of Missouri's proposed protocol.⁸² On September 11, the district court for a third time ruled that Missouri's proposed

78. See, e.g., Monica Davey, *Missouri Says It Can't Comply on Executions*, N.Y. TIMES, July 15, 2006, at A1; Henry Weinstein, *Anesthesiologists Advised to Avoid Executions*, L.A. TIMES, July 2, 2006, at A32; Henry Weinstein, *Missouri Says It Can't Find Execution Doctor*, L.A. TIMES, July 16, 2006, at A32.

79. See generally *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 U.S. Dist. LEXIS 42949 (W.D. Mo. June 26, 2006).

80. In its revised protocol, Missouri said it would use a larger dose of anesthetic, would have a medical worker (a physician, nurse, or pharmacist) positioned to observe the inmate to be sure of unconsciousness, and would keep an official chemical log for each execution. See Davey, *supra* note 78, at A11.

81. *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 U.S. Dist. LEXIS 51008, at *2-3 (W.D. Mo. July 25, 2006).

82. *Taylor v. Crawford*, 457 F.3d 902, 904 (8th Cir. 2006).

changes were insufficient.⁸³ On October 16, the district court refused the State's motion for reconsideration and the case is again before the Eighth Circuit, from which a decision is expected in early 2007.⁸⁴ As of today, it seems unlikely that the state will be able to succeed in finding an anesthesiologist or physician willing to participate. As a result, Missouri may soon, like California, face a court-ordered indefinite moratorium on capital punishment.

Although it is true that the Supreme Court declined to rule on the merits of Hill's challenge to Florida's lethal injection protocol, it is difficult to imagine that the *Hill* Court was unaware of the highly publicized lethal injection issues being raised throughout the country. In fact, during oral arguments, both the *Morales* case from California and *Brown v. Beck*,⁸⁵ a North Carolina case involving a lethal injection challenge, were explicitly discussed.⁸⁶ In addition, three justices referred to of the *Lancet* article.⁸⁷ Perhaps it is this national awareness that explains the shift in language from *Nelson*, decided in 2004, where the Court assured its "extremely limited" holding would not "open the floodgates to all manner of method-of-execution challenges."⁸⁸ Significantly, just two years later, after states began to grapple publicly with lethal injection protocol, the Court did not include any such reassuring language in *Hill*.

Even more striking is the Court's refusal to consider the merits of Hill's challenge when it returned to the Court shortly before his execution in September.⁸⁹ If the Court truly had no intention to hear the merits of Hill's challenge, it should have disposed of the case the first time around by holding that the last-minute nature of Hill's challenge foreclosed his appeal. Instead, the Court chose to open the judiciary to additional challenges from death row inmates and to plant itself in the center of the lethal injection debate. As a result, federal district court judges are now unilaterally crafting their own individualized protocol

83. *Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo. Sept. 12, 2006), available at <http://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/Missouri/Taylor/2006.09.12%20order.pdf>.

84. See *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 U.S. Dist. LEXIS 74896 (W.D. Mo. Oct. 16, 2006).

85. *Brown v. Beck*, 445 F.3d 752 (4th Cir. 2006).

86. See Transcript of Oral Argument at 7, 11-15, *Hill v. McDonough*, 126 S. Ct. 2096 (2006) (No. 05-8794).

87. See *id.* at 28, 48, 52.

88. *Nelson v. Campbell*, 541 U.S. 637, 649 (2004).

89. See *Hill v. McDonough*, 127 S. Ct. 465 (2006) (denying certiorari).

changes, sifting through conflicting medical testimony and leaving lethal injection standards across the country hopelessly fragmented.

With the blessing of death penalty opponents, the *Hill* decision is an open invitation for condemned inmates to challenge the constitutionality of the nation's most prevalent form of execution. Until the Court rules on the constitutionality of lethal injection, the lower federal courts should prepare themselves to bear the brunt of the swelling flood of litigation—the very flood the Court assured, just two years ago, it would not unleash.

Megan Greer