Finding Bickel Gold in a *Hill* of Beans

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Finding Bickel Gold in a *Hill* of Beans

*Douglas A. Berman**

''First, do no harm,'' is a common aphorism for the medical profession. If the Supreme Court was judged by this principle, its work in *Hill v. McDonough*[1] might lead some to urge revoking the justices' licenses. The Court's decision to consider Clarence Hill's challenge to Florida's lethal injection protocol resulted in widespread legal confusion and the disruption of executions nationwide. The Court's subsequent ruling in *Hill* raised more legal questions than it answered and ensured that death row defendants would continue to disrupt scheduled executions by pursuing litigation over lethal injections protocols.

But, though harmful to the orderly administration of capital punishment, the Supreme Court's work in *Hill* has its virtues. The Court's consideration of Hill's claims has brought greater (and long needed) scrutiny to the particulars of lethal injection protocols. And the narrow ruling in *Hill* presents a valuable opportunity for other institutions to grapple more fully with the difficult issues raised by any method of state killing.

Consequently, *Hill* might be lauded for reflecting Professor Alexander Bickel's wise insight that the Supreme Court ought sometimes seek to avoid resolution of certain constitutional claims. Professor Bickel suggested that the Supreme Court should, in some settings, avoid definitive resolution of certain constitutional questions to allow other (more democratic) branches of government to take a second look at important issues.[2] But, for the *Hill* decision to produce

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[1]126 S. Ct. 2096 (2006).

[2]See Alexander Bickel, The Least Dangerous Branch 111–98 (1962) (chapter discussing at length ''the passive virtues''); see also Guido Calabresi, A Common Law for the Age of Statutes 16–30 (1982) (discussing Bickel's visions of and suggestions for constitutional adjudication).

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a kind of Bickel gold, legislators and executive officials must take up the Supreme Court's invitation to start doing a better job regulating how the state kills.

I. The Long and Winding Road up to *Hill*

A. The Not-So-Modern Development of a Modern Execution Method

The historical evolution of execution methods in the United States is a fascinating story with many twists and turns.[3] But this dynamic story turned somewhat monotonous about twenty years ago: starting in the 1980s, nearly every capital jurisdiction began to move away from diverse execution techniques—ranging from hanging and firing squads to the electric chair and the gas chamber—and embraced lethal injection as a more ''humane'' method of execution.[4] Almost all of the more than 600 executions carried out over the last decade have been by lethal injection, and thirty-nine of the forty capital jurisdictions in the United States now rely on lethal injection as their primary or sole means of putting condemned defendants to death.[5]

The nearly uniform embrace of lethal injection might suggest that this method of execution has been developed and refined to ensure it is the soundest way to kill a condemned defendant. But, as colorfully detailed in a recent article in the *Austin American-Statesman*, the origins of lethal injection as an execution method is hardly inspiring:

> [Oklahoma] State Rep. Bill Wiseman, a Republican from Tulsa, suggested that there had to be a better way to execute

[3]Professor Deborah Denno has done the most thoughtful and thorough recent writings about the evolution of execution methods. See, e.g., Deborah W. Denno, Lethally Humane? The Evolution of Execution Methods in the United States, in America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction 693 (James R. Acker et al. eds., 2d ed. 2003); 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, 124 (2002).

[4]See Human Rights Watch, So Long as They Die: Lethal Injections in the United States 9–20 (Apr. 2006).

[5]See Denno, When Legislatures Delegate Death, *supra* note 3, at 84–85 and Appendix 1; see also John Gibeaut, It's All in the Execution: Prosecutors Fear Limitless Civil Rights Complaints Over Lethal Injection Procedures, ABA Journal, Aug. 2006, at 17, 18 (noting that of the ''38 states with the death penalty, 37 use lethal injection, as do the federal government and the military''). Nebraska is the one state that still relies exclusively on the electric chair as its execution method.

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> criminals than electrocution, a process that had fallen out of public favor because it was increasingly viewed as brutal and violent. Wiseman consulted doctors, who refused to help, citing their oath to save lives, not take them. He got the same response from scientists and other medical professionals. ''I muttered to colleagues that it looked as if I would need to find a veterinarian to tell me how to 'put down' condemned prisoners,'' Wiseman recalled in a 2001 article in The Christian Century magazine.
>
> Enter A. Jay Chapman, Oklahoma's state medical examiner, a doctor who had been responsible for pronouncing inmates dead after electrocutions in Colorado. Chapman had no pharmacological training, just an opinion and a willingness to help. During a meeting with Wiseman, he dictated what was to become the new national template: ''An intravenous saline drip shall be started in the prisoner's arm, into which shall be introduced a lethal injection consisting of an ultra-short-acting barbiturate in combination with a chemical paralytic agent.''. . . Chapman was quoted as saying in [a recent] report. ''I didn't do any research. . . . It's just common knowledge. Doctors know potassium chloride is lethal.''[6]

The widespread affinity for lethal injection appears even more troubling given how execution protocols have been adopted and implemented throughout the United States. A recent report from Human Rights Watch has this disturbing summary of the development and application of lethal injection procedures:

> The three-drug sequence was developed in 1977 by an Oklahoma medical examiner who had no expertise in pharmacology or anesthesia and who did no research to develop any expertise. Oklahoma's three-drug protocol was copied by Texas, which in 1982 was the first state to execute a man by lethal injection. Texas's sequence was subsequently copied by almost all other states that allow lethal injection executions. Drawing on its own research and that of others, Human Rights Watch has found no evidence that any state seriously investigated whether other drugs or administration methods would be ''more humane'' than the protocol it adopted.

[6]See Mike Ward, Death Penalty's Drug Cocktail Rooted in Texas: Other States Adopted Method Chosen with Little Scientific Basis, Austin American-Statesman, May 28, 2006, available at www.statesman.com/news/content/news/stories/local/05/28execute.html.

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> Corrections agencies continue to display a remarkable lack of due diligence with regard to ascertaining the most ''humane'' way to kill their prisoners. Even when permitted by statute to consider other drug options, they have not revised their choice of lethal drugs, despite new developments in and knowledge about anesthesia and lethal chemical agents. They continue to use medically unsound procedures to administer the drugs. They have not adopted procedures to make sure the prisoner is in fact deeply unconscious from the anesthesia before the paralyzing second and painful third drugs are administered.[7]

Writing in a similar vein, Professor Deborah Denno has spotlighted problems with execution procedures attributable to ''vague lethal injection statutes, uninformed prison personnel, and skeletal or inaccurate lethal injection protocols. When some state protocols provide details, such as the amount and type of chemicals that executioners inject, they often reveal striking errors, omissions, and ignorance about the procedure.''[8]

B. New Scrutiny of Lethal Injection Protocols and a Surprising Grant

As lethal injection became the prevailing method of execution, some commentators questioned the purported humaneness of the standard three-drug protocols,[9] and some death row defendants raised a variety of (unsuccessful) legal challenges to these protocols in state and federal courts.[10] But a 2005 article in the British medical journal *The Lancet* invigorated new public and constitutional scrutiny of lethal injection as a method of execution. *The Lancet* article, which reported the results of the postmortem analysis of executed prisoners, reached this conclusion:

[7]See Human Rights Watch, *supra* note 4, at 2.

[8]See Deborah Denno, Death Bed, 124 TriQuarterly J. 141, 144 (2006); see also Denno, When Legislatures Delegate Death, *supra* note 3, at 105–28 (arguing that lethal injection as a method of execution violates the Eighth Amendment's prohibition of cruel and unusual punishments).

[9]See Adam Liptak, Critics Say Execution Drug May Hide Suffering, N.Y. Times, Oct. 7, 2003, at A1; Amnesty International, Lethal Injection: The Medical Technology of Execution (Jan. 1998), at http://web.amnesty.org/library/Index/ENGACT500011998?open&of=ENG-TWN#LAB (last checked August 15, 2006).

[10]See Denno, When Legislatures Delegate Death, *supra* note 3, at 100–05 (details some of the unsuccessful challenges to lethal injection protocols up through 2002).

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> Failures in protocol design, implementation, monitoring and review might have led to the unnecessary suffering of at least some of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anesthesia cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injection is warranted.[11]

The Lancet article received considerable media attention and became the focal point for new court challenges by death row defendants. Defendants due to be executed by lethal injection asserted that *The Lancet* article provided new and compelling evidence that the standard three-drug lethal injection protocol violated the Eighth Amendment's prohibition of cruel and unusual punishment. Throughout 2005, however, lower state and federal courts continued to reject death row defendants' assertions of constitutional flaws in lethal injection protocols.[12]

As his execution date approached, Clarence Hill was just another death row prisoner having little success arguing that the standard lethal injection protocol was unconstitutional. Convicted and sentenced to die in the 1980s, Hill had challenged his death sentence on various grounds in state and federal court for over two decades. After a November 2005 death warrant finally scheduled his execution for January 24, 2006, Hill filed another state motion for post-conviction relief that, inter alia, cited *The Lancet* article and demanded public records concerning Florida's lethal injection procedures. On January 17, 2006, a week before Hill's scheduled execution date, Hill's state lawsuit was resolved when the Florida Supreme Court ruled that *The Lancet* study was insufficient to justify reconsidering its prior decision that Florida's lethal injection protocol was constitutionally sound.[13]

[11] G. K. Leonidas, et al., Inadequate Anesthesia in Lethal Injection for Execution, The Lancet, Vol. 365 (9468), April 16, 2005, at 1412.

[12] See, e.g., Bieghler v. State, 839 N.E.2d 691 (Ind. 2005); Abdur'Rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005); Baze v. Rees, No. 04-CI-01094 (Ky. Cir. Ct. July 8, 2005); Brown v. Crawford, 408 F.3d 1027 (8th Cir. 2005).

[13] Hill v. Florida, 921 So. 2d 579 (Fla. 2006) (relying heavily upon *Sims v. State*, 754 So. 2d 657 (Fla. 2000)). Notably, Justice Anstead authored a partial dissent in *Hill v. Florida* explaining why he believed *The Lancet* article justified providing Hill with an evidentiary hearing in the trial court to explore more fully the soundness of Florida's lethal injection procedures. *Id.* at 586–87 (Anstead, J., concurring in part and dissenting in part).

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After his lack of success in the state courts, and with his scheduled execution date only days away, Hill brought his claims to federal court by filing a civil rights action under 42 U.S.C. § 1983. The district court concluded that Hill's action was procedurally barred as a successive habeas petition, and the Eleventh Circuit affirmed that ruling in a decision rendered only hours before Hill was scheduled to be executed.[14] Significantly, both the district court and the Eleventh Circuit rejected Hill's attempt to bring his claim as a section 1983 action by relying heavily on a 2004 ruling by the Eleventh Circuit,[15] even though the Supreme Court had subsequently ruled in *Nelson v. Campbell*[16] that section 1983 actions could be used for challenging some aspects of lethal injection protocols.

Because Hill's arguments in lower courts had failed, and because the Supreme Court in the past had regularly denied review in cases challenging lethal injection protocols, Florida officials began the state's execution process soon after the Eleventh Circuit rejected Hill's appeal. At roughly 6 p.m. on January 24, 2006, Hill was strapped to a gurney and IV lines were run into his arms as the execution team awaited the expected denial of Hill's appeal to the Supreme Court. Hill was required to lay on the gurney for an hour anticipating his execution while everyone wondered why final word was slow to come from the Supreme Court.[17]

Finally, Justice Anthony Kennedy, acting on behalf of the Court, issued a stay to allow the Supreme Court more time to consider Hill's claims. Initial word about Hill's case hinted that the Court might be interested in the merits of his Eighth Amendment challenge to Florida's lethal injection protocol. But it subsequently became clear that the Court granted certiorari only to address the procedural question of whether Hill should have been permitted to pursue a section 1983 claim to challenge Florida's execution methods even after he had exhausted his habeas rights.[18]

[14] See Hill v. Crosby, 437 F.3d 1084 (11th Cir. 2006).

[15] See *id.* at 1084–85 (discussing reliance on *Robinson v. Crosby*, 358 F.3d 1281 (11th Cir. 2004)).

[16] 541 U.S. 637 (2004).

[17] See Tamara Lytle & John Kennedy, Top Court Halts Killer's Execution, Orlando Sentinel, Jan. 26, 2006, at A1.

[18] See Lyle Denniston, Court to Hear Florida Death Penalty Case, SCOTUSblog (Jan. 25, 2006), at http://www.scotusblog.com/movabletype/archives/2006/01/court_to_hear_f.html.

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C. Questions and Confusion Following the Grant in Hill

It was hard to understand why the Supreme Court granted certiorari and full argument in the *Hill* case on only the narrow question of whether a section 1983 action could be used to challenge the constitutionality of a method of execution. The Court's unanimous 2004 ruling in *Nelson v. Campbell*[19] seemed to clarify that a challenge to the constitutionality of an execution method could be brought as a section 1983 action. Of course, lower federal courts had rebuffed Hill's efforts to challenge Florida's execution protocol via a section 1983 action, but the Eleventh Circuit's ruling did not mention *Nelson* and relied heavily on a pre-*Nelson* circuit precedent. The Supreme Court certainly had reason to be troubled by the Eleventh Circuit's failure to address *Nelson*, but some form of summary reversal and remand, citing *Nelson*, would have been sufficient to ensure Hill's claim was considered on the merits below.

By choosing to grant certiorari and schedule argument in *Hill*, the Supreme Court created extraordinary uncertainty about the constitutionality of a standard execution method used by nearly every capital jurisdiction in the country. The unique attention given to Hill's seemingly routine case suggested that the justices, perhaps troubled by the article in *The Lancet* and accounts of botched executions, had concluded that standard lethal injection protocols were constitutionally problematic. After all, if Hill's substantive constitutional claim was sure to be unavailing on the merits—as lower courts nationwide had repeatedly concluded—why would the Supreme Court be unduly concerned that Hill's claim was rejected in the proper procedural posture? It was hard to understand why the Supreme Court, with its limited time and docket, would care about the procedural issues in *Hill* unless some justices saw merit in his substantive constitutional attack on Florida's lethal injection protocol.

Though the Supreme Court's approach to *Hill* may have been puzzling, the consequences of the certiorari grant quickly became clear. First, the Supreme Court's grant in *Hill*, together with a related stay entered in another Florida capital case, produced a de facto moratorium on executions in Florida: Governor Jeb Bush announced

[19] 541 U.S. 637 (2004).

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that the Court's actions would keep him from signing any more death warrants until these lethal injection challenges were resolved.[20]

Second, the Court's work in *Hill* had a profound nationwide ripple effect on lethal injection litigation and on state efforts to carry out scheduled executions. Richard Dieter, the executive director of the Death Penalty Information Center, observed after the Supreme Court granted certiorari in *Hill* that any lawyer representing a defendant on death row should be ''filing something just like Clarence Hill as we speak.''[21] And many lower courts around the nation responded quickly and dynamically to new filings from death row prisoners facing execution.[22] In February, the Eighth Circuit stayed a scheduled Missouri execution to allow more time for a lethal injection challenge.[23] In California, a federal district judge ordered revisions to the state's lethal injection process, and an execution had to be postponed indefinitely because California could not find doctors willing to assist with the execution.[24] In Ohio and Delaware, federal district

[20] See Alex Leary & Chris Tisch, Bush: Death Warrants on Hold, St. Petersburg Times, Feb. 2, 2006, at 5B.

[21] See Phil Long & Lesley Clark, Supreme Court Halts Execution, Agrees to Examine Civil Rights Claim, Knight Ridder Newspapers, Jan. 25, 2006, available at www.fadp.org/news/ts-20060125 (last checked August 15, 2006).

[22] A complete account of all the lethal injection litigation that followed the *Hill* grant could fill many volumes. The Death Penalty Information Center has chronicled most of the major highlights on a special section of its website. See Death Penalty Information Center, Special Webpage on Lethal Injections, at http://www.deathpenaltyinfo.org/article.php?did=1686&scid=64 (last visited Aug. 14, 2006) [hereinafter DPIC Lethal Injections Page]. In addition, the Death Penalty Clinic at the University of California Boalt Hall School of Law has maintained a web page entitled ''Resources Regarding Challenges to Lethal Injection'' at https://www.law.berkeley.edu/clinics/dpclinic/resources.html, which includes a state-by-state collection of materials relating to recent lethal injection litigation.

[23] See Taylor v. Crawford, 445 F.3d 1095, 1097–98 (8th Cir. 2006). The Missouri litigation has continued through and after the Supreme Court decided *Hill*, and the District Court for the Western District of Missouri recently ordered a halt to all executions in the state until the state significantly modified its execution procedures. See Mike Nixon, Execution Ruling Sets up Change in Missouri's Future, Daily Record (Kansas City, Mo.), July 11, 2006, available at http://findarticles.com/p/articles/mi_qn4181/is_20060711/ai_n16527562.

[24] Litigation over exactly how California needs to change its execution protocol is still on-going. See Order Reflecting Stipulation of Parties to Continue Hearing to September, in Morales v. Woodard, No. 5:06-cv-00219-JF (N.D. Cal. Apr. 27, 2006), available at https://www.law.berkeley.edu/clinics/dpclinic/Lethal%20Injection%20Documents/California/Morales/Morales%20Dist%20Ct/Order%20to%20Continue.pdf (last checked August 15, 2006).

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judges stayed executions scheduled for April and May based on challenges to the lethal injection process in these states.[25] Federal execution plans were also disrupted by the *Hill* litigation: a federal district judge barred the Federal Bureau of Prisons from executing three defendants scheduled to be executed in May as a result of their challenges to the federal system's lethal injection process.[26]

But while court actions delayed or fully blocked scheduled executions in many jurisdictions, other states moved forward with lethal injections while *Hill* was pending before the Supreme Court. In North Carolina, a federal judge ordered monitoring of the state's lethal injection process by medically trained personnel, and the state completed a scheduled execution in April after arranging for a doctor to monitor a machine indicating the defendant's degree of consciousness during the lethal injection process.[27] Similarly, legal challenges brought by many defendants did not block executions in the three states that have historically made the greatest use of the death penalty. Texas, Oklahoma, and Virginia collectively carried out more than a dozen executions using standard lethal injection protocols while *Hill* was pending before the Supreme Court.[28] Many defendants executed while *Hill* was pending appealed their cases to the Supreme Court, but the justices repeatedly refused to intervene without giving any explanation for granting or upholding stays in some cases and denying stays in others.

Judge Boyce Martin, commenting in one of many cases subject to last-minute litigation over lethal injection protocols while the *Hill* case was pending,[29] summarized the legal mess that *Hill* helped create:

[25] See DPIC Lethal Injections Page, *supra* note 22.

[26] *Id.*

[27] See Brown v. Beck, No. 5:06-CT-3018-H (E.D.N.C. Apr. 17, 2006); see also Patrick O'Neill, Execution As Science Experiment, The Independent (Raleigh, NC), Apr. 26, 2006, at www.indyweek.com/gyrobase/Archive?author=oid%3A13853 (last checked August 15, 2006).

[28] See DPIC Lethal Injections Page, *supra* note 22. Notably, in mid-May, the Texas Court of Criminal Appeals stayed one execution because of the defendant's challenge to the lethal injection process, but that stay was lifted only two days later. See Pamela A. MacLean, Lethal Injection Stays Inconsistent in U.S., The Legal Intelligencer, May 23, 2006, at 4.

[29] Alley v. Little, No. 3:06-0340, 2006 WL 1454740 (M.D. Tenn. May 11, 2006), vacated, 2006 WL 1313365 (6th Cir. May 12, 2006), reh'g en banc denied, 447 F.3d 976 (6th Cir. 2006).

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> [T]he dysfunctional patchwork of stays and executions going on in this country further undermines the various states' effectiveness and ability to properly carry out death sentences. We are currently operating under a system wherein condemned inmates are bringing nearly identical challenges to the lethal injection procedure. In some instances stays are granted, while in others they are not and the defendants are executed, with no principled distinction to justify such a result. This adds another arbitrary factor into the equation of death and thus far, there has been no logic behind the Supreme Court's decision as to who lives and who dies. . . .
>
> No doubt the march toward death is powerful. Currently, however, the march is anything but orderly. The current administration of the death penalty in light of the pending decision of *Hill* is more like a march in dozens of different directions. . . . The arbitrariness of death penalty administration is not ameliorated by the fact that *Hill* involves . . . ''a procedural matter.'' Rather, administration of the death penalty can only be made more arbitrary by the possibility that after *Hill*, some current death row inmates may be able to show in court that the practice of lethal injection violates the Eighth Amendment's prohibition of cruel and unusual punishment, while other currently similarly situated inmates will have already been put to death through a method deemed to violate the Constitution. . . .[30]

II. A Ruling Not Worth a *Hill* of Beans?

A. A Dynamic Oral Argument Followed by a Bland Ruling

The Supreme Court heard full argument in *Hill* in late April. The questions at oral argument suggested the justices were interested in exploring the basic soundness of standard lethal injection protocols. Questioning of counsel was not confined to the narrow procedural issue raised in the case; the justices asked broad questions about the Eighth Amendment and different execution methods.[31] For example, Justice Scalia asked Hill's counsel whether the Eighth Amendment

[30] Alley v. Little, 447 F.3d 976, 977–78 (6th Cir. 2006) (Martin, J., dissenting from the denial of rehearing en banc).

[31] See generally Transcript of Oral Argument, Hill v. McDonough, 126 S. Ct. 2096 (2006) (No. 05-8794), (Apr. 26, 2006), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-8794.pdf.

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requires a painless execution,[32] and Justice Stevens asked the state's counsel why Florida's legislature regulated how pets are euthanized but did not regulate lethal injection protocols.[33] In a summary of the *Hill* argument, reporter Linda Greenhouse made this astute observation:

> Although the question before the court was the procedural one of how a challenge to lethal injection can be raised by a death row inmate who has exhausted the normal course of appeals, the intense argument showed that it was not easy to separate procedure from substance, at least with phrases like ''excruciating pain'' hanging in the courtroom air.[34]

In short, oral argument raised the prospect that fundamental issues surrounding the constitutionality of standard lethal injections protocols might be addressed in *Hill*. But the Court's oral argument bark proved more compelling than its ruling's bite.

On June 12, 2006, the Supreme Court overruled the Eleventh Circuit Court of Appeals and allowed Hill to proceed with his civil rights challenge to Florida's lethal injection process.[35] Despite the ''intense'' oral argument covering lots of ground, Justice Kennedy's opinion for the unanimous Court disposed of the case as a straightforward application of prior precedent. The Court's milquetoast opinion starts by stating that ''Hill's suit . . . is comparable in its essentials to the action the Court allowed to proceed under § 1983 in *Nelson*.''[36] Then, after a laborious review of the procedural history in *Hill* and the Court's prior work in *Nelson*, the opinion simply reiterates that challenges to execution protocols can be brought as section 1983 actions: ''In the case before us we conclude that Hill's § 1983 action is controlled by the holding in *Nelson*. Here, as in *Nelson*, Hill's action if successful would not necessarily prevent the State from executing him by lethal injection.''[37]

[32] *Id.* at 13.

[33] *Id.* at 36–37.

[34] See Linda Greenhouse, Supreme Court Hears Case Involving Lethal Injection, N.Y. Times, Apr. 27, 2006, at A18.

[35] Hill v. McDonough, 126 S. Ct. 2096 (2006).

[36] *Id.* at 2100.

[37] *Id.* at 2102.

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After narrowly resolving the merits, the Court briefly addresses prosecutors' concern that lethal injection litigation brought through section 1983 actions could be used as a tactic to delay executions. Here is part of the Court's response to the practical problems raised by its ruling in *Hill*:

> Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. Both the State and the victims of crime have an important interest in the timely enforcement of a sentence. Our conclusions today do not diminish that interest, nor do they deprive federal courts of the means to protect it.
>
> We state again, as we did in *Nelson*, that a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. . . .
>
> After *Nelson* a number of federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late in the day. Although the particular determinations made in those cases are not before us, we recognize that the problem they address is significant. Repetitive or piecemeal litigation presumably would raise similar concerns. The federal courts can and should protect States from dilatory or speculative suits, but it is not necessary to reject *Nelson* to do so.
>
> The equities and the merits of Hill's underlying action are also not before us. We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.[38]

B. Questions and Continued Litigation

With due respect to the Supreme Court, its work in *Hill* is more likely to infuriate capital litigators than to illuminate future lethal injection litigation. *Hill* authorized any and every death row prisoner to challenge applicable execution protocols in federal court through section 1983 actions. But *Hill* provided no guidance whatsoever regarding how the merits of these actions should be examined. In

[38] *Id.* at 2104 (citations and quotations omitted).

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addition, the Court did not address the potentially complicated interplay of lethal injection challenges brought as section 1983 actions and those brought in state court or in federal habeas actions. As one report on *Hill* observed:

> The justices granted perhaps thousands of death row inmates a significant new avenue for collateral appeal considerably less restrictive than the usual petition for a writ of habeas corpus. . . . But the justices also left the lower courts with precious little guidance on how to determine which section 1983 cases to hear and which ones to send packing. . . . By extending the possibility of a civil rights suit to routine procedures, such as the one at issue in *Hill*, the court in effect invited nearly all the nation's 3,370 death row inmates to vie for another day in court.[39]

Though *Hill* briefly spoke to some practical concerns surrounding last-minute lethal injection claims, the Court's magniloquent discussion is somewhat maddening given the Court's own work in *Hill*. If, as the *Hill* Court says, ''[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence,'' why did the Supreme Court take nearly five months to issue an opinion that does little more than reaffirm a recent precedent? And if ''[r]epetitive or piecemeal litigation'' impacts this ''important interest,'' shouldn't the Supreme Court have just taken up the ''equities and the merits of Hill's underlying action''?

In short, *Hill* presents itself as a cautious opinion, but the Supreme Court's approach to *Hill* and other lethal injection litigation has displayed a kind of recklessness concerning how lower courts would have to decipher and respond to the Court's opaque work. By taking up *Hill*, the Court ensured that constitutional uncertainty would envelop standard lethal injection protocols; by delivering a narrow opinion, the Court provided little help for lower courts caught up in tumultuous litigation over these protocols. There are many confounding substantive and procedural issues on the other side of *Hill*; lower courts must sort through these critical issues:

(1) What are the appropriate standards for examining and adjudicating an Eighth Amendment claim lodged against a particular execution method?

[39] John Gibeaut, More Inmates Likely to Contest Lethal Injection, ABA Journal E-Report, June 16, 2006, at http://www.abanet.org/journal/ereport/jn16inject.html.

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(2) How should a section 1983 action challenging an execution method take account of prior challenges brought in state court or in a federal habeas action?

(3) Should a federal habeas court decline to consider challenges to standard execution methods now that such claims can be regularly brought as section 1983 actions?

(4) Is *The Lancet* article, which only suggests a *risk* of a painful death, sufficient evidence to make out an Eighth Amendment claim against standard lethal injection protocols?

(5) What obligations might a state have under the Eighth Amendment to improve its execution method or to investigate and utilize more humane methods of execution?

(6) When exactly can and should a death row defendant bring a section 1983 action against a lethal injection protocol, and what particular considerations should influence whether a stay is justified?

In light of these and other questions raised, but not resolved, by the Court's work in *Hill*, it is not surprising that litigation over lethal injection protocols has continued. And, as was true during *Hill*'s pendency, the results of this litigation vary state by state, case by case. A few weeks after *Hill* was decided, a federal judge in Arkansas granted a stay of execution and a preliminary injunction to allow further investigation into the constitutionality of the state's execution protocol.[40] But only days earlier, Oklahoma's highest criminal court unanimously declared that state's standard lethal injection protocol to be constitutionally sound.[41] Tellingly, *Hill* did not significantly impact these lethal injection cases, and *Hill* did not promote greater

[40] See DPIC Lethal Injections Page, *supra* note 22.

[41] Malicoat v. Oklahoma, 137 P.3d 1234 (Okla. 2006). In the final paragraph of a separate opinion, Judge Lumpkin in *Malicoat* expressed what might be a common sentiment concerning lethal injection challenges by death row defendants: ''I find Appellant's request to be spared the imposition of his legally imposed punishment because it might cause him to suffer or experience pain unpersuasive (and rather ironic) as his murderous acts have been the cause of the ultimate pain and suffering for the victim and her family.'' *Id.* at 1239–40 (Lumpkin, J., concurring in part and dissenting in part).

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order or consensus concerning how lethal injection claims were being brought and resolved nationwide.[42]

III. Finding Bickel Gold in a *Hill* of Beans?

As lethal injection litigation continues to roil state execution efforts and embroil federal courts, it is easy to be critical and cynical about the Court's work in *Hill*. The justices clearly recognized the broader issues at stake in *Hill*, but the Court's ruling revealed an eagerness to dodge the toughest questions raised by constitutional challenges to standard lethal injection protocols.[43] After *Hill*, lethal injection litigation remains chaotic, confused, and convoluted, and the Supreme Court arguably did more harm than good in *Hill*. Proponents of capital punishment have to be troubled that *Hill* initially inspired, and then did not help resolve, litigation-driven de facto moratoriums on executions now in place in numerous states. Opponents of capital punishment have to be troubled that *Hill* did not require Texas and some other active death penalty states to review their lethal injection protocols as they move forward with executions. Moreover, anyone genuinely interested in federalism, or sentencing consistency, or orderly government has to find the frantic, patchwork litigation still taking place nationwide after *Hill*—which necessarily involves the stressful and inefficient expenditure of the time and energies of lower courts and lots of lawyers—unseemly and counterproductive to the sound operation of criminal justice systems.

But Professor Debby Denno, a leading expert on lethal injection protocols and execution methods generally, has suggested reasons to be more positive about *Hill*:

> First, it's unanimous (and the oral arguments gave some suggestion that it wouldn't be unanimous if it was favorably

[42] See DPIC Lethal Injections Page, *supra* note 22; see also John Gibeaut, It's All in the Execution, *supra* note 5, ABA Journal, August 2006, at 17 (noting prosecutorial concerns that *Hill* fails to provide any ''significant guidance on how trial courts can stop litigation that could continue forever by allowing inmates to refocus their complaints every time a state changes its execution protocol'').

[43] In addition, while *Hill* was pending, the Supreme Court denied certiorari in a case coming from Tennessee, *Abdur'Rahman v. Bredesen*, which presented directly questions concerning the constitutionality of standard lethal injection protocols. See Warren Richey, At High Court, No Rush to Resolve Conflicts over Lethal Injection, Christian Science Monitor, May 22, 2006, at 2.

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> decided and even indicated that the case might not be affirmatively decided). Second, . . . section 1983 doesn't require inmates to jump through as many procedural hoops and has a potentially richer field of case law for them to draw upon in their arguments. Next, the issue raised in *Hill* is broader than that raised in *Nelson*. *Nelson* concerned a 1983 challenge of a cut down procedure based in part on Nelson's own deteriorating veins. Cut down procedures were rare in 2004 and they are even rarer now. But the use of chemicals prompting Hill's challenge is generic to every lethal injection in the country; in other words, every state uses the same three chemicals that Hill challenged and there was no mention of Hill's particular anatomical limitations (nor were they relevant). While the Court did not address head on the substantive aspects of lethal injection, it does mention the fact that Hill's challenge concerns ''a foreseeable risk of gratuitous and unnecessary pain.'' If the Court thought the issue were totally frivolous, the case wouldn't have garnered their attention.
>
> I think *Hill* validates the lethal injection issue and clarifies its importance both to attorneys and to courts. It sends a message that departments of corrections ([DOC]) are going to continue to be scrutinized and perhaps spotlighted more than in the past. Incrementally, the [DOC]'s are being pressured to alter their protocols or to switch to another method. While in the grand scheme of things this movement today may not seem like a big deal, I think it's useful to remember that the Court has directed more attention to lethal injection in the last two years than it has to any other method of execution in the last 110 years. Put in context, seemingly small steps are magnified.[44]

Though Professor Denno's initial points about *Hill* might only please death penalty opponents, her final insights spotlight the jurisprudential gold that might be found buried in *Hill*. As Professor Denno suggests, the Supreme Court's new attentiveness to execution methods sends a powerful message to all death penalty jurisdictions—namely that, through section 1983 actions, federal courts can and

[44] See Posting of Douglas A. Berman, Sentencing Law and Policy Blog, Insights on Hill from THE Expert (June 12, 2006), at http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/insights_on_hil.html (quoting e-mail from Deborah Denno).

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will be independently scrutinizing execution protocols and thereby shining light on death penalty procedures long shrouded in secrecy.

As detailed in Part I above, the development and administration of lethal injection protocols have often been haphazard and sloppy. Internal state reviews of standard lethal injection protocols have often been non-existent or perfunctory. Valuably, the Supreme Court's decision to hear the *Hill* case led to lethal injection protocols receiving much greater (and long needed) scrutiny not only from lower courts, but also from public policy groups and the media. And the *Hill* decision did confirm that challenges to standard lethal injection procedures could be brought through section 1983 actions, which essentially ensures that every capital jurisdiction's execution methods will continue to be put under the microscope.

Moreover, and perhaps even more valuably, the narrow ruling in *Hill* presents other institutions with an important new opportunity to confront directly the difficult issues raised by any execution method. The particulars of any process of state killing necessarily implicate complicated medical issues and intricate administrative concerns. Courts presented with constitutional challenges to particular execution methods—especially in last-minute litigation brought by prisoners with swiftly approaching execution dates—are not well suited to sorting through alternative execution technologies, debatable medical evidence, and the administrative issues that states face in carrying out scheduled executions. Though federal courts may effectively play a watch-dog role ensuring that unreasonable execution methods are not utilized, it is unwise and unseemly for individual federal district judges to be tasked with developing detailed regulations to govern state execution procedures. The Supreme Court's circumscribed work in *Hill* perhaps reveals that the justices felt that particular revisions and improvements to lethal injection protocols should be pioneered by other, more democratically responsive and accountable branches of government.

In short, a nugget of gold to be found in *Hill* flows from its effectuation of Professor Alexander Bickel's recommendation that the Supreme Court sometimes resist broad constitutional rulings. Bickel proposed that the Supreme Court sometimes avoid definitive resolution of contentious constitutional questions in order to allow other (more democratic) branches of government to take a second look at important issues. Bickel suggested that the Supreme Court,

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by utilizing various decision-avoiding techniques, could avoid premature resolutions of critical issues that would benefit from further exploration by the political branches of government and by the public at large.[45] Writing in a similar vein, Professor Cass Sunstein has more recently touted ''decisional minimalism''—judicial efforts to keep judgments ''shallow and narrow''—as a means to foster democratic processes.[46] Sunstein has suggested that minimalist adjudication by the Supreme Court is ''democracy-forcing'' and thus valuable as a means to ''leave open the most fundamental and difficult constitutional questions [and] also . . . promote democratic accountability and democratic deliberation.''[47]

As detailed above, the Court's narrow ruling in *Hill* has enabled and essentially invited other governmental branches to give more focused attention to the legal, policy, and practical issues surrounding lethal injection protocols. Rather than begin micromanaging execution protocols, the Supreme Court in *Hill* has encouraged other legal institutions to respond to identified problems in a way that might entirely eliminate the need for a contentious constitutional decision or should at least help frame the constitutional issue in more precise terms.

Encouragingly, corrections officials in a few states have started to rise to the challenge that remains on the other side of *Hill*. Only a few weeks after *Hill*, Ohio prison officials announced changes in the state's lethal injection process,[48] and corrections officials in other states have also responded to lethal injection litigation by proposing

[45] Professor Bickel's most famous first account of his vision of the ''passive virtues'' that the Supreme Court should utilize was in a 1961 article in the *Harvard Law Review.* See Alexander M. Bickel, The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40 (1960). Professor Bickel expanded his ideas into a book the following year. See Bickel, *supra* note 2.

[46] See Cass R. Sunstein, One Case At a Time: Judicial Minimalism on the Supreme Court 3–4 (1999); Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 6, 6–7 (1996).

[47] Sunstein, Leaving Things Undecided, *supra* note 46, at 6.

[48] See Alan Johnson, Ohio Changing Lethal Injection Process, Columbus Dispatch, June 28, 2006. Though on-going lethal injection litigation surely played a role in Ohio's changes to its lethal injection protocol, another contributing factor was the problems that delayed the May execution of a condemned prisoner for more than an hour as prison officials scrambled to find a suitable vein for completing the lethal injection process. See *id.*

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alterations in their lethal injection programs.[49] Though these changes may only be motivated by a desire to avoid or thwart constitutional litigation, they still represent a positive first step toward a sounder approach to the administration of capital punishment.

But, disconcertingly, a central institutional player in our nation's systems of government has not yet gotten involved. Despite headline-making lethal injection litigation raging in numerous states, not a single state legislature has even conducted hearings on standard lethal injection protocols to explore whether sounder execution methods might be developed. Legislatures could—and, in my view, should—at the very least hold public hearings to examine the range of medical and administrative issues raised by lethal injection protocols. Conflicting and evolving medical evidence about lethal injection protocols is being presented in federal district courts around the country, and individual federal judges are being asked to assess whether complicated procedures are medically and practically sound. In some instances, federal judges feel compelled to issue detailed regulations that a state must follow to proceed with executions. In a country committed to democratic rule, these life-and-death judgments ought to be carefully considered in the first instance by legislatures, not by individual judges.

As Justice Stevens noted during the *Hill* oral argument, many states have legislatively regulated how animals can be killed. It is odd and disconcerting that the killing of humans does not get at least an equal measure of legislative attention. The legislative inaction is especially disappointing because an improved execution process appears achievable. A recent *New York Times* article reports that ''medical experts say the current method of lethal injection could easily be changed to make suffering less likely.''[50] Yet, as that article further notes, even though ''[s]witching to an injection method with less potential to cause pain could undercut many of the lawsuits,

[49] See Tom McNichol, Why the Reputations of ''Humane'' Execution Methods Keep Dying Out, San Francisco Chronicle, June 18, 2006, available at www.sfgate.com/cgi-bin/article.cgi?file/chronicle/archive/2006/06/18/INGAUJDQMS1.DTL (noting that ''California has proposed altering its three-drug lethal injection protocol . . . to ensure [a condemned prisoner] isn't conscious when the paralyzing and heart-stopping drugs are injected'').

[50] Denise Grady, Doctors See Way to Cut Suffering in Executions, N.Y. Times, June 23, 2006, at A1.

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. . . so far, in this chapter of the nation's long and tangled history with the death penalty, no state has moved to alter its lethal injection protocol.''[51]

Though one can surely fault state legislatures for failing to investigate and better regulate execution protocols, the (non)actions of our nation's legislature also deserves criticism. The national significance of disrupted state capital justice is arguably of great moment. Especially if one credits evidence that the death penalty deters—and recall that President Bush and other death penalty supporters in Congress have long justified an affinity for capital punishment by claiming the death penalty ''saves lives''—a major disruption in the administration of the death penalty could put the innocent lives of potential murder victims at risk. Beyond deterrence concerns, uncertainty surrounding scheduled executions dramatically affects the personal fate of death row defendants and the emotional state of the family members of both murder victims and those scheduled to be executed.

But while many lives hang in the balance, Congress has not even begun to explore what it might be able to do to address the medical and legal issues surrounding lethal injection protocols. Whatever one's views on the death penalty, the haphazard litigation over lethal injection has to be considered a national disgrace. As spotlighted above, neither proponents nor opponents of the death penalty can be pleased with the frantic, patchwork, and discrepant lethal injection litigation playing out in courtrooms nationwide. And this litigation necessarily requires—and will continue to require—the stressful and inefficient expenditure of the time and energies of lower courts and hundreds of lawyers and will continue to be counter-productive to the sound operation of criminal justice systems.

Notably, in early 2005, members of Congress worked through a weekend to pass legislation to impact the litigation surrounding the possible removal of Terri Schiavo's feeding tube. Though the Schiavo law did not prevent removal of Terri Schiavo's feeding tube, the entire episode revealed that Congress and President Bush believe that the fate of a single citizen can be a matter of national importance and that swift legislative intervention may be appropriate when contentious life-and-death issues are unfolding in the states.

[51] *Id.*

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In the life-and-death setting of lethal injection protocols, Congress could, at the very least, hold hearings to explore the range of medical issues raised by *The Lancet* article and other recent research on execution methods. Congress could also, of course, weigh in on the merits by adopting a particular protocol for federal executions or by encouraging states to adopt a particular new lethal injection protocol. Though there are pros and cons to all possible congressional interventions, the essential question is whether Congress should continue to sit on the sidelines while life-and-death issues unfold in a haphazard way through litigation in various federal courts.

Legislative inaction in the wake of *Hill* is not only disappointing, but also telling. It has become common sport for politicians and commentators to assail justices and judges for intervening in significant policy debates that seem more the province for legislative action. In *Hill*, the Court was perhaps attentive to these concerns when it decided to dodge the most contentious issues presented by the ongoing lethal injection litigation. Other branches of government must now demonstrate that they can and will soundly govern in this controversial area now that the Supreme Court has indicated that, for the time being, it will stay out of the way. If other branches don't step up, not only will the model of constitutional adjudication suggested by Bickel and Sunstein suffer a blow, but complaints of judicial activism will ring even more hollow.

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