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Accrual and Unusual? Calibrating the Statute of Limitations on Section 1983 Method-of-Execution Challenges

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ACCRUAL AND UNUSUAL? CALIBRATING THE STATUTE OF LIMITATIONS ON SECTION 1983 METHOD-OF-EXECUTION CHALLENGES

ABSTRACT

Death-row prisoners have long challenged the methods by which states intend to execute them. Recently, prisoners have begun to challenge revisions made by states to their execution procedures, arguing the revisions violate the Eighth Amendment ban on cruel and unusual punishment. But reviewing courts—almost without exception—bar these challenges on statute of limitations grounds. Courts rule that the prisoner’s claim accrues shortly after conviction and that the statute of limitations expires shortly thereafter, no matter when the challenged revision was actually made. Method-of-execution challenges are routinely dismissed in this fashion without full consideration of their underlying constitutional merits. This result essentially grants immunity to states and prevents meaningful challenge to revised execution procedures.

This Comment proposes that courts should adopt a broader and more prisoner-friendly statute of limitations in the method-of-execution context. The statute of limitations on method-of-execution claims should reset when a state changes its execution procedure in any way that creates a cognizable claim of cruel and unusual punishment or other constitutional violation. This change is warranted in light of the gravity of the issues at stake and the need to synchronize with related areas of law. It would better serve the purposes motivating statutes of limitations; it would work hand in hand with the equitable doctrine of laches; it would mirror tort law’s discovery rule; it would align with courts’ interpretation of the Antiterrorism and Effective Death Penalty Act; and it would honor the Supreme Court’s “death is different” jurisprudence. For all these reasons, this Comment argues that a broad, flexible, and prisoner-friendly statute of limitations on method-of-execution claims is appropriate and just.

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INTRODUCTION

Andrew Grant DeYoung was executed in Georgia on July 21, 2011.¹ Executions in the State of Georgia occur regularly,² and while an execution is always noteworthy, DeYoung's was particularly significant for two reasons.

First, DeYoung's was only the second execution carried out under a revised Georgia execution procedure using pentobarbital rather than sodium thiopental as the first drug in the so-called three-drug cocktail.³ Second, his execution was the only lethal injection ever videotaped, and the first videotaped execution of any kind in the United States in nearly twenty years.⁴ While these two reasons may seem distinct, they are inextricably linked.

The videotaping of DeYoung's execution was ordered in connection with an appeal by another Georgia death-row inmate, Gregory Walker.⁵ Walker claimed, as part of his case in a Georgia superior court, that the State's revised execution procedure violated his Eighth Amendment right to be free from cruel and unusual punishment.⁶ Georgia had recently changed its execution procedure: it substituted pentobarbital for sodium thiopental as the first drug in the three-drug cocktail.⁷ Walker claimed that pentobarbital, unlike sodium thiopental, would not sufficiently anesthetize him.⁸ This type of challenge to a revised execution procedure, known as a "method-of-execution" claim, is increasingly common among death-row inmates.⁹

¹ See Rhonda Cook, *Georgia's Death Row; Family Murderer DeYoung Executed*, ATLANTA J. CONST., July 22, 2011, at 1B.

² Georgia has executed more prisoners since 1976 than all but six states in the union. *Facts About the Death Penalty*, DEATH PENALTY INFO. CENTER 1, 3 (Aug. 15, 2012), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

³ Cook, *supra* note 1.

⁴ See *id.* California's execution of Robert Alton Harris by gas chamber in 1992 is considered the only other videotaped execution. *Videotape of a California Execution is Destroyed*, N.Y. TIMES, Feb. 13, 1994, § 1, at 35.

⁵ Cook, *supra* note 1.

⁶ *Id.*; Rhonda Cook & Bill Rankin, *Court Allows Execution's Taping*, ATLANTA J. CONST., July 21, 2011, at 2B (describing Walker's attorney's argument that the previous execution of Roy Blankenship subjected him "to unnecessary pain and suffering"). The Eighth Amendment protects individuals from the infliction of cruel and unusual punishment. U.S. CONST. amend. VIII.

⁷ See Cook, *supra* note 1 (describing the recent change from sodium thiopental to pentobarbital).

⁸ Shannon McCaffrey, *Judge OKs Video Recording of Execution; for Use by Inmate in Lethal-Injection Suit; Georgia Man Put to Death for 1993 Slayings of Parents, Sister*, CHARLESTON GAZETTE (W. Va.), July 22, 2011, at 3C.

⁹ See, e.g., *Walker v. Epps*, 550 F.3d 407 (5th Cir. 2008); *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008); *Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007). These challenges often claim the revised execution procedure violates the Eighth Amendment's prohibition on cruel and unusual punishment. E.g., *Walker*, 550

The superior court ordered DeYoung's execution to be taped so the judge could watch DeYoung's execution to determine whether the use of pentobarbital caused "the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual"¹⁰ and is prohibited by the Eighth Amendment.¹¹

One might assume that if the DeYoung tape showed affirmative evidence of harm caused by the revised execution procedure, Walker's Eighth Amendment challenge would have been successful. However, this Comment shows that under current law, challenges to revised execution procedures are often unsuccessful notwithstanding their underlying merits.

This lack of success stems from numerous rulings that bar such challenges on statute-of-limitations grounds.¹² Courts have held that the limitations period on method-of-execution claims accrues shortly after conviction,¹³ expires a short time thereafter,¹⁴ and only resets if the state makes a substantial change to its execution procedure.¹⁵ Importantly, courts have interpreted *substantial change* very narrowly: only wholesale, transformative changes in the execution procedure will reset the limitations period.¹⁶

Prisoners who seek to challenge a revised execution procedure are often barred from doing so because courts find the challenged revision is not

F.3d at 409; *McNair*, 515 F.3d at 1171. However, some prisoners have claimed other constitutional violations, including Fourteenth Amendment equal protection and due process. *See, e.g.*, *DeYoung v. Owens*, 646 F.3d 1319, 1323 (11th Cir. 2011) (equal protection); *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011) (per curiam) (due process), *cert. denied*, 131 S. Ct. 3018 (2011). This Comment does not take a position on the underlying merits of these claims, under either amendment. For the purpose of clarity, this Comment generally refers to Eighth Amendment cruel and unusual punishment challenges. It should be remembered, however, that this Comment's position applies to all method-of-execution challenges, whether brought under the Eighth, Fourteenth, or any other Amendment.

¹⁰ *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion) (announcing the Eighth Amendment cruel and unusual standard in death penalty cases).

¹¹ *Id.* at 50 (announcing the Eighth Amendment cruel and unusual standard in death penalty cases); *Cook & Rankin*, *supra* note 6, at 2B.

¹² *See, e.g.*, *McNair*, 515 F.3d at 1174. *See generally infra* Part I.B (discussing rulings relating to accrual dates).

¹³ The default rule, absent a change in the execution procedure, is that a method-of-execution claim accrues after a prisoner's state appeal (as opposed to federal habeas review) is completed. *See McNair*, 515 F.3d at 1174.

¹⁴ The statute of limitations on modern method-of-execution claims is two years. *See infra* note 35 and accompanying text.

¹⁵ *See McNair*, 515 F.3d at 1174.

¹⁶ *See, e.g.*, *Powell v. Thomas*, 643 F.3d 1300, 1304 (11th Cir. 2011) (per curiam) (stating that change from sodium thiopental to pentobarbital is not a substantial change), *cert. denied*, 131 S. Ct. 3018 (2011); *see also infra* Part I.B.3.

substantial.¹⁷ This finding leads to the conclusion that the limitations period has run, sometimes even before the challenged revision occurred.¹⁸ This procedural hurdle bars method-of-execution challenges without full consideration of their underlying merits.¹⁹ This Comment takes issue with this result and proposes a conceptual shift to avoid that unjust and seemingly absurd outcome.

The proposed conceptual shift involves instituting a more flexible and prisoner-friendly statute-of-limitations framework. Specifically, this Comment argues that while the existing accrual framework outlined above—and discussed in more detail below²⁰—is appropriate, courts should expansively define *substantial change* as any change that creates a cognizable claim of cruel and unusual punishment or other constitutional violation.

This proposed framework would give prisoners a full and fair hearing on the merits of their method-of-execution challenges and prevent states from repeatedly defeating those challenges on procedural grounds alone. This result is not only just and desirable, but also in line with reasoning from related areas of law.²¹

This Comment's three Parts each lend support to its proposal. Part I presents a brief background of relevant principles and supporting caselaw, including the statutes of limitations on method-of-execution claims and accrual of those statutes of limitations. Part II examines the policies and principles motivating statutes of limitations in general and asks whether the current procedural framework governing method-of-execution claims properly serves those policies. Ultimately concluding that it does not, Part II considers several alternatives and concludes that only an expansive definition of *substantial change* properly serves the policies and principles motivating statutes of limitations. Part II also addresses a potential counterargument to this Comment's proposal—that relaxing the statute-of-limitations framework would encourage frivolous, last-minute challenges by prisoners merely to delay their execution. Part III draws from related areas of law to find support for the proposal, including: the tort law concept of discoverability, also known

¹⁷ See, e.g., *Powell*, 643 F.3d at 1304.

¹⁸ See, e.g., *id.* at 1302 (holding the prisoner's claim expired in July 2004, nearly seven years before the state changed its execution procedure in April 2011).

¹⁹ See, e.g., *id.* (dismissing summarily the merits of the prisoner's underlying Eighth Amendment challenge).

²⁰ See generally *infra* Part I.B (describing the § 1983 method-of-execution accrual date framework).

²¹ See generally *infra* Part III (discussing related areas of law).

as the discovery rule; habeas law and the application of the Antiterrorism and Effective Death Penalty Act (AEDPA), a related federal statute; and the Supreme Court's "death is different" line of jurisprudence.

I. BACKGROUND

This Comment proposes that courts facing statute-of-limitations questions in the method-of-execution context should broaden the definition of *substantial change*. This would create a broad and prisoner-friendly conception of the types of changes to an execution procedure that reset the limitations period on method-of-execution claims. A brief discussion of relevant background principles is necessary to set the stage for such a proposal.

Death-row prisoners have challenged their impending executions on Eighth Amendment grounds for decades.²² These method-of-execution challenges were traditionally brought as writs of habeas corpus.²³ But with a pair of cases—one in 2004²⁴ and one in 2006²⁵—the Supreme Court declared that 42 U.S.C. § 1983, not habeas corpus, was the proper vehicle for method-of-execution challenges. Section 1983, passed as part of the Civil Rights Act of 1871, provides a private right of action against state actors who violate constitutional rights, such as the Eighth Amendment prohibition on cruel and unusual punishment.²⁶ After the Supreme Court identified § 1983 as the only proper vehicle for method-of-execution claims,²⁷ the number of such claims increased dramatically.²⁸ In response, states raised their statutes of limitations as a defense to such challenges, placing the issue squarely before courts across the country.²⁹ Section 1983 and its statute of limitations are described in Part I.A.

²² See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 333–39 (1997) (recounting the early history of method-of-execution challenges).

²³ 28 U.S.C. § 2254 (2006); see Ty Alper, *Blind Dates: When Should the Statute of Limitations Begin to Run on a Method-of-Execution Challenge?*, 60 DUKE L.J. 865, 873 n.32 (2011) (citing Liam J. Montgomery, Note, *The Unrealized Promise of Section 1983 Method-of-Execution Challenges*, 94 VA. L. REV. 1987, 1995–96 (2008)).

²⁴ *Nelson v. Campbell*, 541 U.S. 637, 639–40 (2004).

²⁵ *Hill v. McDonough*, 547 U.S. 573, 580–81 (2006).

²⁶ 42 U.S.C. § 1983 (2006). For an example of such a private right of action, see *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008), which ruled on a prisoner's method-of-execution challenge on Eighth Amendment grounds.

²⁷ See *Hill*, 547 U.S. at 580–81; *Nelson*, 541 U.S. at 639–40.

²⁸ See Alper, *supra* note 23, at 873 n.30 (describing several academic articles discussing the increase).

²⁹ See, e.g., *McNair*, 515 F.3d 1168; *Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007); Alper, *supra* note 23, at 873 n.30 (collecting sources).

Because the limitations period on all § 1983 claims has been a settled point of law for over twenty-five years,³⁰ the current issue that has emerged is the *accrual date*—the date on which the limitations period begins to run. The question of the proper accrual date is at the heart of this Comment, and the body of law that has developed to answer that question in the § 1983 method-of-execution context is analyzed in Part I.B.

A. *Section 1983 Generally & Its Statute of Limitations*

Section 1983 does not contain a statute of limitations.³¹ As is the case with many federal causes of action,³² when no statutory limitations period is provided, courts adopt the statute of limitations from ““the most analogous”” state-law cause of action.³³ Because the Supreme Court has declared that personal injury actions are most analogous to § 1983, the personal injury statute of limitations applies to every § 1983 claim.³⁴ In most states, that statute of limitations is two years.³⁵ The statute of limitations on § 1983 claims is thus relatively straightforward, but the question addressed by this Comment—the proper *accrual date*—is a more difficult one to answer. That question is discussed immediately below.

B. *The Section 1983 Method-of-Execution Accrual Date Framework*

The Supreme Court has ruled that while the § 1983 statute of limitations is to be determined by examining state tort law for the recovery of damages for personal injuries,³⁶ “the *accrual date* of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law.”³⁷ This question was first answered obliquely by the Court in 2007: accrual occurs “when the

³⁰ See *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (holding the statute of limitations on § 1983 claims mirrors the statute of limitations for state personal injury actions).

³¹ 42 U.S.C. § 1983.

³² See, e.g., *Wilson*, 471 U.S. at 266.

³³ *Id.* at 268 (quoting *Bd. of Regents v. Tomanio*, 446 U.S. 478, 488 (1980)). However, this applies only to federal causes of action created before 1990. Federal causes of action created after 1990 are subject to 28 U.S.C. § 1658, which provides a four-year statute of limitations.

³⁴ *Id.* at 276.

³⁵ See, e.g., ALA. CODE § 6-2-38(a) (2005) (two-year statute of limitations); CAL. CIV. PROC. CODE § 335.1 (West 2006) (two-year statute of limitations); GA. CODE ANN. § 9-3-33 (2012) (two-year statute of limitations); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 2002) (two-year statute of limitations).

³⁶ *Wilson*, 471 U.S. at 276.

³⁷ *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (first emphasis added). The Court reached this conclusion in *Wallace* because the accrual date is an aspect of § 1983 that is not explicitly “governed by reference to state law,” and such aspects are “governed by federal rules conforming in general to common-law tort principles.” *Id.*

[prisoner] has a complete and present cause of action, that is, when the [prisoner] can file suit and obtain relief.”³⁸

This answer is tautological. The accrual date is, by definition, the date on which the prisoner can first bring suit; thus it is unhelpful to say accrual occurs when the prisoner has a “complete and present cause of action.”³⁹ It simply begs the question: when does a prisoner have a complete and present cause of action? In the usual § 1983 case—not a method-of-execution case, but one involving, say, civil rights violations by police—the claim accrues when the conduct that allegedly violates a constitutional right *actually occurs*.⁴⁰ This is, for instance, the moment the police conduct an illegal search,⁴¹ or the point at which a government authority violates the plaintiff’s First Amendment free speech rights.⁴²

In the method-of-execution context, the moment at which the prisoner “has a complete and present cause of action”⁴³ is a murky proposition. The body of cases addressing this issue is shallow. Only a handful of courts have answered the question, and they have done so in a mostly uniform manner.⁴⁴ This line of jurisprudence is discussed in the following three subsections.

I. Cooley v. Strickland: The First Word on Accrual

The Sixth Circuit Court of Appeals was the first circuit to seriously address⁴⁵ the accrual date issue in the § 1983 method-of-execution context.⁴⁶

³⁸ *Id.* (citations omitted) (internal quotation marks omitted).

³⁹ *Id.* (internal quotation marks omitted).

⁴⁰ *See, e.g., Johnson v. Johnson Cnty. Comm’n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) (“Claims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are presumed to have accrued when the actions actually occur.”); *Spencer v. Connecticut*, 560 F. Supp. 2d 153, 159 (D. Conn. 2008) (“[S]o long as the plaintiff knows or has reason to know of the search, a [§ 1983] claim for an illegal search accrues, and a plaintiff has a complete and present cause of action, when the act of searching the property is complete.”).

⁴¹ *See, e.g., Spencer*, 560 F. Supp. 2d at 159 (“[A] claim for an illegal search accrues, and a plaintiff has a complete and present cause of action, when the act of searching the property is complete.”).

⁴² *See generally Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504–05 (1969).

⁴³ *Wallace*, 549 U.S. at 388 (internal quotation marks omitted).

⁴⁴ *Compare McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008), *with Powell v. Thomas*, 643 F.3d 1300 (11th Cir. 2011) (per curiam), *cert. denied*, 131 S. Ct. 3018 (2011), *and Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007). Each case used the same two-prong test developed in *McNair* and discussed in detail in Part I.B.1–3.

⁴⁵ The Fifth Circuit faced the question a year earlier than the Sixth Circuit, but resolved it in a cursory, four-paragraph per curiam opinion that did not analyze in detail the accrual date question. *See Neville v. Johnson*, 440 F.3d 221 (5th Cir. 2006) (per curiam). The *Neville* court relied on another 2005 Fifth Circuit opinion. *See id.* That case, *White v. Johnson* (also a per curiam decision and equally cursory), denied a death-

The prisoner in the Sixth Circuit case, Richard Cooley, was sentenced to death in 1986.⁴⁷ His state appeal was exhausted in 1991 after review in the United States Supreme Court.⁴⁸ The State of Ohio instituted lethal injection as one method of execution in 1993 and as the sole method of execution in 2001.⁴⁹ In December 2004, Cooley filed his § 1983 method-of-execution challenge.⁵⁰ The district court denied the State's argument that Cooley's § 1983 claim was time-barred, and the Sixth Circuit addressed that issue as an interlocutory appeal.⁵¹

The court reasoned from the basic principles described above: the statute of limitations on a § 1983 action is determined with reference to state personal injury law,⁵² but the proper accrual date is a question of federal law.⁵³ The accrual date is fixed when the prisoner “has [a] complete and present cause of action.”⁵⁴ A “complete and present cause of action”⁵⁵ exists when the prisoner “can file suit and obtain relief.”⁵⁶ This unhelpful definition simply begs the question. The court finally moved toward a workable accrual date framework: “the event that should have alerted the typical lay person to protect his or her rights” marks the moment when a § 1983 action accrues.⁵⁷ The court recognized that, in general, a person should be alerted to protect his rights at the “point when the actual harm is inflicted.”⁵⁸ In the method-of-execution context, this point would be the actual execution.⁵⁹ The court refused

row inmate's request for a permanent injunction without deciding the procedural question. 429 F.3d 572, 574 (5th Cir. 2005) (per curiam).

⁴⁶ *Cooley*, 479 F.3d at 413–14. The history of the *Cooley* case is a tangled web of appeals, remands, and rehearings between the Southern District of Ohio and the Sixth Circuit, plus certiorari petitions to and denials from the Supreme Court. *See id.* at 414. This convoluted procedural history—not uncommon in § 1983 method-of-execution actions—is unimportant for the purposes of this Comment, so references in the text to any case in the series will be simply to “*Cooley*.”

⁴⁷ *Id.*

⁴⁸ *See id.* Cooley's federal habeas appeal was denied by the district court in 1997. *Id.* The United States Supreme Court denied certiorari to review his habeas appeal in 2003. *See id.*

⁴⁹ *Id.* at 416.

⁵⁰ *Id.* at 414–15.

⁵¹ *Id.* at 415.

⁵² *Id.* at 416 (citing *Wilson v. Garcia*, 471 U.S. 261, 275–76 (1985)).

⁵³ *Id.* (citing *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).

⁵⁴ *Id.* (quoting *Wallace*, 549 U.S. at 388).

⁵⁵ *Id.* (quoting *Wallace*, 549 U.S. at 388).

⁵⁶ *Id.* (quoting *Wallace*, 549 U.S. at 388).

⁵⁷ *Id.* (quoting *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 856 (6th Cir. 2003)).

⁵⁸ *Id.* at 418.

⁵⁹ *Id.*

to set the date of execution as the accrual date because if the claim accrued upon execution, “it would also be simultaneously moot[ed].”⁶⁰

Having dispensed with the execution as a possible accrual date, the court looked backward in time.⁶¹ The court formulated a rule that applies generally to § 1983 method-of-execution claims: the claim accrues “upon conclusion of direct review in the state court or the expiration of time for seeking such review.”⁶² This rule was attractive to the court because it both “marks the point at which the state has rendered its criminal judgment final and . . . the point at which the state sets the execution date.”⁶³

Of course, it would have been impossible for Cooney to challenge the lethal injection procedure within two years of the conclusion of his state review.⁶⁴ His conviction and sentence were finalized on state review in 1991, but lethal injection was not used in Ohio until 1993 and did not become mandatory (i.e., certain to be applied to Cooney) until 2001.⁶⁵ There must be some exception to the above-announced rule when an execution method is applied to a prisoner after his state review is complete. Indeed, the court announced such an exception in *Cooney*, but failed to define it precisely. The accrual date must be “adjusted” in a scenario where the plaintiff could not “discover[] the ‘injury’” until after his state review was complete because a new execution procedure was implemented after that time.⁶⁶ The court declined to precisely define the “adjusted” accrual date when there is a change in the execution procedure

⁶⁰ *Id.* One commentator has argued there should be no statute of limitations on a § 1983 method-of-execution challenge because the injury does not occur until the prisoner is executed. *See* Alper, *supra* note 23, at 897. This proposal, while admirable because it necessarily affords capital litigants a hearing on the merits, has at least one main problem. It overlooks the purpose motivating statutes of limitations: to provide repose to defendants. *See generally infra* Part II.A (discussing general statute-of-limitations principles).

⁶¹ *See Cooney*, 479 F.3d at 418–19.

⁶² *Id.* at 422 (noting this accrual date framework “mirror[s] that found in the [Antiterrorism and Effective Death Penalty Act]”).

⁶³ *Id.* at 419. Note the court’s deference to state judgments, which it justified as adherence to the AEDPA: “The [AEDPA] reflects Congress’s desire to restore and maintain the proper *balance* between state criminal adjudications and federal collateral proceedings,” such as § 1983 challenges. *Id.* at 420 (emphasis added).

⁶⁴ *See id.* at 422.

⁶⁵ *See id.* at 416.

⁶⁶ *Id.* at 422. The *Cooney* court’s aversion to deeming a claim accrued before the prisoner could have “discovered” the injury giving rise to the claim evokes the discovery rule. *See id.* That rule, grounded in tort law, provides additional support for this Comment’s position. *See generally infra* Part III.A (discussing tort law’s discovery rule).

because, whether it fixed the accrual date in 1993 or in 2001, Coeey's claim, brought in 2004, would have been beyond the two-year statute of limitations.⁶⁷

Coeey thus acts as an early analytical stepping-stone to the current rule. The default rule that it established—that § 1983 method-of-execution claims accrue at the end of state review—is good law today.⁶⁸ But later cases addressing a changed execution procedure refine *Coeey*'s rule.⁶⁹ The *Coeey* court was not forced to address head-on the question of whether the limitations period should reset upon a change in a state's execution procedure. Even if the *Coeey* court had reset the limitations period, Coeey's claim would still have been time-barred because the change occurred more than two years before he brought his action.⁷⁰ To fully grasp the current framework, we must look to cases when a prisoner challenged a revised procedure within two years of the revision.

2. *McNair v. Allen: The Eleventh Circuit Follows Suit*

The next major guidepost is *McNair v. Allen*, an Eleventh Circuit case decided in 2008.⁷¹ In *McNair*, the prisoner, Callahan,⁷² was sentenced to death in Alabama in 1987.⁷³ His state appeal was exhausted in 1990.⁷⁴ At the time of Callahan's conviction, Alabama used electrocution to execute its death-row prisoners.⁷⁵ In 2002, the State instituted lethal injection as its preferred method of execution.⁷⁶ On October 11, 2006, Callahan filed a § 1983 action requesting a stay of execution and alleging the lethal injection procedure violated his

⁶⁷ *Coeey*, 479 F.3d at 422.

⁶⁸ See, e.g., *id.*

⁶⁹ See, e.g., *Powell v. Thomas*, 643 F.3d 1300, 1303 (11th Cir. 2011) (per curiam) (describing the rule that a method-of-execution claim accrues on the date on which state review is complete, barring a subsequent change in the execution procedure), *cert. denied*, 131 S. Ct. 3018 (2011).

⁷⁰ See *Coeey*, 479 F.3d at 422.

⁷¹ 515 F.3d 1168 (11th Cir. 2008).

⁷² The prisoner arguing before the Eleventh Circuit was James Callahan, whose § 1983 action was consolidated at the district court level with an action brought by Willie McNair, a similarly situated prisoner (hence the disparity between the active party and the case name). See *McNair v. Allen*, Nos. 2:06-cv-00695-WKW, 2:06-cv-00919-WKW, 2007 WL 4106483, at *2 (M.D. Ala. Nov. 16, 2007).

⁷³ *Ex parte Callahan*, 557 So. 2d 1311 (Ala. 1989). Callahan was first convicted in 1982, but that conviction was reversed on an unrelated basis. See *McNair*, 515 F.3d at 1171. Callahan was retried, reconvicted, and resentenced in 1987. See *id.* The capital sentence imposed in 1987 is the one at issue in *McNair*. See *id.*

⁷⁴ *Callahan v. Alabama*, 498 U.S. 881 (1990); see also *McNair*, 515 F.3d at 1171.

⁷⁵ *McNair*, 515 F.3d at 1171.

⁷⁶ *Id.* (explaining that on July 1, 2002, Alabama provided death-row inmates thirty days to "opt out" of the new lethal injection procedure and elect to die by electrocution). Callahan did not opt out and so became subject to the lethal injection method of execution as of July 31, 2002. *Id.*

Eighth Amendment right to be free from cruel and unusual punishment.⁷⁷ The State, as defendant, moved for summary judgment, arguing that under *Cooley*,⁷⁸ Callahan's § 1983 claim was time-barred by the statute of limitations.⁷⁹ The district court denied the State's motion for summary judgment by specifically disavowing the *Cooley* court's reasoning; the district court wrote that the statute of limitations could not bar the claim because it "cannot attach to an act that has yet to occur."⁸⁰ After entering summary judgment for the prisoner, the district court also entered a stay of execution.⁸¹ The Eleventh Circuit vacated the stay.⁸² It tracked the reasoning and holding of *Cooley* and held that the statute of limitations had expired and that Callahan's claim was barred.⁸³

To reach this conclusion, the court examined four possible dates on which the statute of limitations could accrue: (1) the date of actual execution;⁸⁴ (2) the date the prisoner's federal habeas challenge was finally denied;⁸⁵ (3) the date the prisoner's death sentence became final upon the completion of state review;⁸⁶ and (4) the date the execution method in question became applicable to the prisoner.⁸⁷

⁷⁷ *Id.*; *McNair*, 2007 WL 4106483, at *2.

⁷⁸ *McNair*, 2007 WL 4106483, at *4 ("[D]efendants relied on the reasoning of the Sixth Circuit Court of Appeals in *Cooley* . . .").

⁷⁹ *See McNair*, 515 F.3d at 1171.

⁸⁰ *McNair*, 2007 WL 4106483, at *4. The court adopted this reasoning from an earlier Middle District of Alabama opinion. *See id.* There, Judge Myron Thompson persuasively argued the statute of limitations should not "bar injunctive relief from an injury that has not yet occurred." *Jones v. Allen*, 483 F. Supp. 2d 1142, 1153 (M.D. Ala.), *aff'd*, 485 F.3d 635 (11th Cir. 2007).

⁸¹ *McNair v. Allen*, Nos. 2:06-cv-00695-WKW, 2:06-cv-00919-WKW, 2007 WL 4463489, at *1 (M.D. Ala. Dec. 14, 2007), *vacated*, 515 F.3d 1168 (11th Cir. 2008).

⁸² *McNair*, 515 F.3d at 1178.

⁸³ *See id.* at 1174. The procedural history of Callahan's § 1983 challenge giving rise to the Eleventh Circuit's *McNair* opinion is—like *Cooley* and many other § 1983 death penalty challenges—quite convoluted. The November 16, 2007 opinion from the Middle District of Alabama denied the State's motion for summary judgment based on the statute of limitations. *McNair*, 2007 WL 4106483, at *4. Shortly before that opinion was filed, on October 31, 2007, the State set Callahan's execution date for January 2008. *See McNair*, 515 F.3d at 1172. The setting of his execution date precipitated his filing of a motion for a stay of execution, which was granted by the district court on December 14, 2007. *McNair*, 2007 WL 4463489, at *1. That decision—granting the stay of execution—was appealed to the Eleventh Circuit and gave rise to the *McNair* opinion discussed here, which established for the first time the two-prong § 1983 method-of-execution accrual framework. *McNair*, 515 F.3d at 1174. This procedural history is inconsequential for the purposes of this Comment, except to note that the Eleventh Circuit in *McNair* was reviewing a stay of execution by the district court (granted December 14, 2007), but the district court's analysis of the accrual issue—the dispositive question—was actually articulated in a separate opinion (issued November 16, 2007).

⁸⁴ *McNair*, 515 F.3d at 1174.

⁸⁵ *Id.* at 1175.

⁸⁶ *Id.* at 1176.

⁸⁷ *Id.* at 1177.

The court quickly dispensed with the first two options. It first determined that, despite the district court's reasoning, the date of execution was unworkable as the point of accrual for two reasons.⁸⁸ First, such a rule is incompatible with the Supreme Court's pronouncement in *Wallace v. Kato* that "accrual under the statute of limitations 'occurs when the [prisoner] has a complete and present cause of action, that is, when the [prisoner] can file suit and obtain relief.'"⁸⁹ The *McNair* court explained that a prisoner may seek relief long before he is executed,⁹⁰ so accruing the action on the date of execution is both incompatible with *Wallace* and practically problematic.⁹¹ Second, the court explained that § 1983 litigants in other contexts are allowed to seek "prospective relief" when the complained-of action has yet to take place.⁹² It would be anomalous to treat prisoners bringing method-of-execution claims differently than all other § 1983 litigants by holding that method-of-execution claims necessarily cannot accrue until the date of the actual injury (i.e., execution).⁹³

The court next eliminated the completion of federal habeas review from the list of possible dates of accrual.⁹⁴ The court reasoned that accruing the § 1983 claim only after federal habeas review would "fail to show proper respect for principles of federalism," because it would unduly delay states' ability to exercise their penal authority.⁹⁵ The court looked to principles from the Antiterrorism and Effective Death Penalty Act (AEDPA)⁹⁶ to justify this deference to federalism.⁹⁷ Echoing *Nelson v. Campbell*, the court reasoned that because "method-of-execution challenges brought under § 1983 . . . 'fall at the margins of habeas,'" they implicate the same "comity concerns" embodied in

⁸⁸ *Id.* at 1174–75.

⁸⁹ *Id.* at 1174 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).

⁹⁰ The court explained that the general rule that plaintiffs cannot seek § 1983 relief until the injury occurs is inapplicable in cases "where the ultimate injury is reasonably likely and wholly foreseeable." *Id.*

⁹¹ *Id.* (citing *Cooley v. Strickland*, 479 F.3d 412, 418 (6th Cir. 2007)) (looking to *Cooley* for its discussion of the "problems with selecting date of execution as date of accrual").

⁹² *Id.* (explaining that § 1983 parole eligibility claims can be brought before the disputed parole hearing takes place).

⁹³ *Id.*

⁹⁴ *Id.* at 1175.

⁹⁵ *Id.* at 1175–76 (discussing the importance of the interests of both the State and the victims in the "timely enforcement of [the] sentence" (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006))).

⁹⁶ 28 U.S.C. § 2254 (2006).

⁹⁷ See *McNair*, 515 F.3d at 1175 (explaining the court was "mindful of the [AEDPA], which Congress passed ' . . . to further the principles of comity, finality, and federalism'" (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003))).

the AEDPA.⁹⁸ These comity concerns counsel against setting the accrual date for § 1983 method-of-execution claims after the completion of federal habeas review because doing so “would provide capital [prisoners] with a means of delaying execution even after their sentences have been found lawful by both state and federal courts.”⁹⁹

Having dismissed two of the four possible options, the court analyzed a potential baseline rule: a capital prisoner’s § 1983 method-of-execution claim accrues on the “day on which [his] death sentence becomes final following direct [i.e., state] appeal.”¹⁰⁰ In Callahan’s case, however, an exception to this general rule should have applied.¹⁰¹ The method of execution Callahan eventually challenged in *McNair*—lethal injection—was not applied to him until twelve years after his state review was complete.¹⁰² The court wisely understood that this baseline rule would have absurdly required Callahan to challenge lethal injection a full ten years *before* it was instituted.

To make room for this circumstance, the court finally adopted the modern hybrid rule that blended the remaining two options for the date of accrual.¹⁰³ The rule has two prongs. A § 1983 method-of-execution claim accrues on the later of: (1) “the date on which state review is complete,” or (2) “the date on which the [prisoner] becomes subject to a new or substantially changed execution [procedure].”¹⁰⁴ This framework mirrors the *Cooley* court’s decision, but it directly addresses the question the *Cooley* court avoided: what happens if the state changes the execution procedure more than two years after the prisoner’s state review is complete?¹⁰⁵

⁹⁸ *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 646 (2004)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1176. The court identified three reasons for choosing this date as the general date of accrual: (1) preventing premature claims brought before state review, which might eventually overturn the conviction; (2) reaching a balance between giving § 1983 litigants a hearing on the merits and avoiding interference with state penal objectives; and (3) establishing symmetry between § 1983 accrual and habeas accrual, which also occurs once state review is final. *See id.* at 1176–77.

¹⁰¹ *See id.* at 1177 (holding the statute of limitations could not have accrued upon completion of state review “because, at that time, Alabama had not yet adopted lethal injection as a form of execution”).

¹⁰² *See id.* (noting state review was completed in 1990 but lethal injection was not applicable to Callahan until 2002).

¹⁰³ *See id.* at 1174.

¹⁰⁴ *Id.*

¹⁰⁵ *Compare id.* (establishing accrual on the later of completion of state review or substantial change in execution procedure), with *Cooley v. Strickland*, 479 F.3d 412, 422 (6th Cir. 2007) (holding that when there is a change the accrual date must be adjusted beyond the end of state review, but declining to “pinpoint the accrual date” because *Cooley*’s claim was late by either measure).

Application of this rule to Callahan's case is straightforward.¹⁰⁶ His state review was completed in 1990, but a new execution procedure was applied to him in 2002.¹⁰⁷ His § 1983 method-of-execution claim thus accrued on the later date of 1990 or 2002.¹⁰⁸ Because Callahan's action was filed in 2006, four years after the claim accrued, it was time-barred.¹⁰⁹

Although application of this rule to Callahan's case was simple, in other cases application is more difficult. This difficulty is created by the vagueness of the key phrase that makes up the second prong of the two-prong framework: "new or substantially changed execution [procedure]."¹¹⁰ While a *new* execution procedure should be easy to spot, what qualifies as a substantially changed execution procedure? The *McNair* court declined to add meat to the bones of this key phrase.¹¹¹

Certainly the execution procedure as applied to Callahan was substantially changed; he went from facing electrocution to facing lethal injection.¹¹² The change had no consequence in *McNair* because the suit was brought more than two years after the change was made.¹¹³ But what about a closer case, when the change in execution procedure faced by a prisoner is less dramatic? The court in *McNair* provided no guidance as to how broadly or narrowly the "new or substantially changed execution [procedure]" prong should be interpreted.¹¹⁴

¹⁰⁶ See *McNair*, 515 F.3d at 1177.

¹⁰⁷ *Id.* at 1171.

¹⁰⁸ See *id.* at 1174, 1177.

¹⁰⁹ *Id.* at 1177.

¹¹⁰ *Id.* at 1174.

¹¹¹ See *id.* at 1177.

¹¹² *Id.* at 1171. It is worth noting that the State of Alabama revised its lethal injection procedure on October 26, 2007. *Id.* at 1172. Callahan argued that his claim was timely because it was brought less than two years from that date. See *id.* The court dismissed out of hand this argument, noting without explanation that no "significant change in the state's execution [procedure] . . . occur[red] in this case." See *id.* at 1177. Neither the court of appeals opinion nor the two district court orders described the October 2007 change. See *id.* at 1172; *McNair v. Allen*, Nos. 2:06-cv-00695-WKW, 2:06-cv-00919-WKW, 2007 WL 4463489, at *1 (M.D. Ala. Dec. 14, 2007) (explaining only that "[o]n October 26, 2007, the defendants filed a revised lethal injection [procedure]"); *McNair v. Allen*, Nos. 2:06-cv-00695-WKW, 2:06-cv-00919-WKW, 2007 WL 4106483, at *3 n.6 (M.D. Ala. Nov. 16, 2007) (noting without explication the "apparently minor nature of the change"). News outlets reported that the change made by the State of Alabama to its execution procedure in October 2007 was to add a "consciousness check" after administration of the first drug (the barbiturate) to ensure the prisoner is unconscious before injection of the remaining drugs, which can otherwise cause extreme pain. Stan Diel, *State's New Execution Procedure Detailed*, BIRMINGHAM NEWS (Oct. 26, 2007, 6:48 AM), http://blog.al.com/spotnews/2007/10/states_new_execution_procedure.html.

¹¹³ See *supra* text accompanying notes 106–09.

¹¹⁴ *McNair*, 515 F.3d at 1174.

We must look to cases following *McNair* to see how the Eleventh Circuit and other courts have *applied* this rule, and how they might apply it more sensibly.

3. Powell v. Thomas: *The Current Limited-Access Framework*

Eddie Powell was sentenced to death in Alabama in 1998 and his state appeal was exhausted in 2001.¹¹⁵ In *Powell v. Thomas*, he brought a § 1983 method-of-execution challenge to the State's revised execution procedure.¹¹⁶ Approximately two months before Powell's scheduled execution, the Alabama Department of Corrections (ADOC) announced it would use pentobarbital as the first drug in the three-drug lethal injection cocktail.¹¹⁷ Since 2002, when the State switched its method of execution from electrocution to lethal injection, it had used sodium thiopental—not pentobarbital—in each execution.¹¹⁸ Powell alleged the State's imminent use of pentobarbital in his execution violated his Eighth Amendment right to be free from cruel and unusual punishment.¹¹⁹ His § 1983 method-of-execution action was brought in the district court less than three weeks after ADOC changed its execution procedure and just over one month before his scheduled execution.¹²⁰

The Eleventh Circuit used the two-prong *McNair* test to determine that Powell's challenge was untimely.¹²¹ The court reasoned that the statute of limitations accrued in 2002 when the method of execution was changed from electrocution to lethal injection, expired two years later in 2004, and did not reset when ADOC changed the drug used in the three-drug cocktail.¹²² The court held that the State's "replacement of sodium thiopental with

¹¹⁵ *Powell v. Allen*, 602 F.3d 1263, 1267 (11th Cir. 2010) (per curiam).

¹¹⁶ *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir.) (per curiam), *cert. denied*, 131 S. Ct. 3018 (2011). The *Powell* line of cases is convoluted. It includes four cases, two each from Alabama district courts and the Eleventh Circuit Court of Appeals. *See id.* (dealing with prisoner Williams); *Powell v. Thomas*, 792 F. Supp. 2d 1285 (M.D. Ala.) (also dealing with prisoner Williams), *aff'd*, 643 F.3d 1300 (11th Cir.), *cert. denied*, 131 S. Ct. 3018 (2011); *Powell*, 602 F.3d 1300 (dealing with prisoner Powell); *Powell v. Allen*, No. 7:06-cv-00375-IPJ-HGD (N.D. Ala. Sept. 29, 2008) (also dealing with prisoner Powell). This twisted path is confused further by the fact that in two of the cases a second prisoner, Williams, intervened in Powell's case. The issues, both at the trial and appellate levels, are nearly identical in both the *Powell (Williams)* and *Powell (Powell)* lines of cases. In the interest of clarity, this Comment discusses only the Eleventh Circuit Court of Appeals opinion that deals with prisoner Powell.

¹¹⁷ *Powell*, 643 F.3d at 1302.

¹¹⁸ *Id.*

¹¹⁹ *Id.* Powell also brought a Fourteenth Amendment challenge to the State's revision of its execution procedure. *See id.* at 1305.

¹²⁰ *Id.* at 1302.

¹²¹ *Id.* at 1304; *see also McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008).

¹²² *Powell*, 643 F.3d at 1304.

pentobarbital *does not constitute a significant alteration*” in the execution procedure.¹²³ According to the court, Powell’s ability to challenge the use of pentobarbital in his execution expired in 2004, two years after the State made lethal injection its method of execution.¹²⁴ This firm statement obscures the fact that the State did not announce its intention to use pentobarbital until nearly seven years after Powell’s claim expired.¹²⁵

The *Powell* case is a prime example of the problem identified by this Comment. A state revises its execution procedure, and a death-row prisoner seeks to challenge that revision.¹²⁶ The reviewing court rules that his challenge is untimely and that it would have been timely only if brought several years before the revision was made.¹²⁷ Courts have essentially made challenging a change in an execution procedure impossible unless it rises to the level of wholesale change (e.g., from electrocution to lethal injection).¹²⁸ More moderate changes are wholly insulated from judicial review.

Courts have in some cases addressed in cursory fashion the underlying merits of a § 1983 method-of-execution claim even when it is procedurally barred.¹²⁹ Some might argue that this sort of analysis is sufficient and shows courts are willing to consider the underlying merits of a claim brought beyond the limitations period. But courts should allow the merits to be fully heard and adjudged. The current procedural framework prevents even the most meritorious claims from being heard if brought beyond the statute of limitations, but for a court’s potential willingness to overlook the procedural bar.¹³⁰ Prisoners should not be at the mercy of a court’s willingness to bend or break the rules to hear meritorious claims; the rules should be changed.

¹²³ *Id.* (quoting *Powell v. Thomas*, 641 F.3d 1255, 1258 (11th Cir.) (per curiam), *cert. denied*, 131 S. Ct. 2487 (2011)).

¹²⁴ *Id.* at 1302.

¹²⁵ *Id.* at 1302, 1304 (holding the prisoner’s claim accrued in July 2002 and thus expired in July 2004, nearly seven years before ADOC publicly announced its substitution of pentobarbital for sodium thiopental in April 2011).

¹²⁶ *Id.* at 1301–02.

¹²⁷ *See id.* at 1302, 1304.

¹²⁸ *See, e.g., id.* at 1303–04 (holding the prisoner’s claim accrued when the State changed its execution procedure from electrocution to lethal injection and declining to reset the limitations period after a change in the lethal injection procedure).

¹²⁹ *See, e.g., Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir.) (per curiam) (“We are unable to determine that the district court abused its discretion by crediting the expert report submitted by the State and concluding that Williams has not demonstrated a substantial likelihood of success on the merits of this Eighth Amendment claim.”), *cert. denied*, 131 S. Ct. 2487 (2011).

¹³⁰ *See, e.g., Alper, supra* note 23, at 902–03.

This Comment proposes a solution: expand the definition of *substantial change* to include any change that may create a cognizable claim of cruel and unusual punishment or other constitutional violation. Courts should, at the very least, permit prisoners to present evidence showing a change is unconstitutional and address the merits independently of the procedural questions. A broader conception of what changes are substantial enough to reset the limitations period is justified for several reasons, including fairness and doctrinal consistency. The following Parts of this Comment draw from various sources of law to support this Comment's argument that the procedural bar for § 1983 method-of-execution claims should be lowered.

II. THESIS & EXAMINATION OF STATUTE-OF-LIMITATIONS PRINCIPLES

Having discussed the necessary background information, this Part presents in more detail this Comment's proposal. Part II.A examines the general principles and policies motivating statutes of limitations. After describing these generalities, this section applies them to the § 1983 method-of-execution context. This Comment argues that the current § 1983 method-of-execution accrual framework does not serve the principles motivating statutes of limitations. This Comment then examines whether any possible alternatives would better serve statute-of-limitations principles. Ultimately, this Comment concludes that a broad, prisoner-friendly accrual framework best serves the principles and policies motivating statutes of limitations. Part II.B addresses a potential counterargument to this conclusion.

A. *General Statute-of-Limitations Principles*

The general principles and policy considerations motivating statutes of limitations provide guidance as to how statutes of limitations should operate in the § 1983 method-of-execution context. By examining the ends served by statutes of limitations in general, we can effectively judge whether the current statute-of-limitations framework governing § 1983 method-of-execution claims serves those ends and, if not, how an alternative framework might better do so.

The overarching goals of statutes of limitations were described by the United States Supreme Court in 1944: "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have

disappeared.”¹³¹ Embedded in this description are two related but distinct rationales.¹³² First, providing repose for litigants: “preventing surprise[.]” suggests that at some point parties should be relieved of worry that they may be haled into court to account for some long-ago conduct.¹³³ Second, prohibiting litigation that requires the use of stale evidence: the Court lists concerns about lost evidence, faded memories, and missing witnesses.¹³⁴ The countervailing principle is, of course, ensuring sufficient access to courts to redress claims of injury. The proper statute-of-limitations framework will strike a balance between these two principles: on the one hand, allowing fresh claims to be heard without procedural bars and, on the other hand, ensuring repose and avoiding litigation based on stale evidence. This section outlines several possible statute-of-limitations frameworks and examines the balance struck by each.

There are four possible statute-of-limitations frameworks that could be imposed on § 1983 method-of-execution claims—the one that is in place today and three plausible alternatives. First, the one that is in place today: a § 1983 method-of-execution action accrues on the later of (1) the date on which state review is complete or (2) when the prisoner becomes subject to a substantially changed execution procedure.¹³⁵ In this framework the definition of *substantially changed* is quite narrow¹³⁶: a substantial change has been found only when the entire execution procedure is changed (e.g., from electrocution to lethal injection).¹³⁷ This narrow reading does not serve either principle motivating statutes of limitations.

¹³¹ Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944).

¹³² This Comment limits its discussion of the principles and purposes behind statutes of limitations to statutes limiting *civil* claims. Although § 1983 method-of-execution claims skirt the line between civil and criminal claims because they are bound up with the enforcement of a criminal sanction, § 1983 is inherently a civil cause of action. Furthermore, the rationales motivating statutes of limitations on criminal prosecutions are quite different from the rationales behind civil statutes of limitations because they focus on societal welfare and retribution rather than solely on the interests of the litigants. See, e.g., Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 99–100 (2002) (explaining that criminal statutes of limitations, unlike civil statutes of limitations, must “balance society’s need to punish a criminal” with the criminal’s right to repose and concerns about stale evidence).

¹³³ R.R. Telegraphers, 321 U.S. at 348.

¹³⁴ *Id.* at 349.

¹³⁵ See *supra* text accompanying note 104.

¹³⁶ See generally *supra* Part I.B.2–3 (discussing courts’ interpretation of the substantial change requirement).

¹³⁷ See, e.g., Powell v. Thomas, 643 F.3d 1300, 1303–04 (11th Cir.) (per curiam) (holding the prisoner’s claim accrued when the State changed its execution procedure from electrocution to lethal injection and declining to reset the limitations period after a change in the lethal injection procedure), *cert. denied*, 131 S. Ct. 3018 (2011).

Consider the *Powell* case discussed above.¹³⁸ Just two months before Powell's execution, the State of Alabama changed a drug it would use in his execution.¹³⁹ Powell brought his challenge within three weeks of the announced change.¹⁴⁰ Because the change was made so close to the execution date, and since Powell's challenge was made shortly after the change, none of the primary problems that statutes of limitations are meant to address were present.¹⁴¹ There was no risk that Powell's suit, arising from conduct undertaken only three weeks before its filing, would "surprise" the State.¹⁴² Moreover, there was no risk that within three weeks evidence would have been lost, memories would have faded, or witnesses would have disappeared.¹⁴³ Hence, the current statute-of-limitations framework is too stringent; it bars the courthouse door in an effort to ensure repose and prevent reliance on stale evidence when neither of those concerns is implicated.

There are three possible alternatives to the current statute-of-limitations framework. First, the statute of limitations on § 1983 method-of-execution claims could be eliminated entirely.¹⁴⁴ Second, § 1983 method-of-execution claims could be given a longer limitations period than other § 1983 claims. Third, the framework that is in use today could remain, but with an expanded definition of the sort of *substantial change* that resets the limitations period. Each of these three alternatives is discussed below. This Comment concludes that only the last alternative strikes the appropriate balance between ensuring access for method-of-execution claims on the one hand, and providing repose to defendants and preventing litigation based on stale evidence on the other.

The first alternative—eliminating the statute of limitations on § 1983 method-of-execution claims—neglects both interests that statutes of limitations are meant to serve.¹⁴⁵ If prisoners could bring method-of-execution claims many years after a revision to a state's execution procedure, both interests protected by statutes of limitations would be implicated: State defendants

¹³⁸ See *supra* Part I.B.3.

¹³⁹ See *supra* text accompanying note 120.

¹⁴⁰ See *supra* text accompanying note 120.

¹⁴¹ See *supra* text accompanying notes 132–34.

¹⁴² See *supra* text accompanying note 133.

¹⁴³ See *supra* text accompanying note 134.

¹⁴⁴ See Alper, *supra* note 23, at 869–70.

¹⁴⁵ See *supra* text accompanying notes 132–34.

could be surprised by long-delayed suits and the ensuing litigation would likely rely on stale evidence.¹⁴⁶

The second alternative—lengthening the limitations period for method-of-execution claims beyond the normal period for § 1983 claims—better serves the prisoner’s interest in access to the courts by expanding the period in which the prisoner can seek relief, but it is arbitrary and lacks any concrete justification.¹⁴⁷ Lengthening the limitations period on method-of-execution claims alone is unworkable because doing so would contradict the Supreme Court’s ruling affirmatively tying the § 1983 limitations period to the state’s personal injury limitations period.¹⁴⁸ Further, arbitrarily extending the period for method-of-execution claims runs the risk of trampling states’ right to eventually be in repose.

Finally, the alternative proposed by this Comment: a § 1983 method-of-execution claim should accrue on the later of two dates: (1) when the prisoner’s state review is complete; or (2) when the state substantially changes the execution procedure to which the prisoner is subject in a way that creates a cognizable claim of cruel and unusual punishment or other constitutional violation.

While the first prong of this framework is identical to the rule announced in *McNair*,¹⁴⁹ this Comment argues that courts should expand the second prong by adopting a broad definition of *substantial change*. A substantial change should not be limited to only those changes that are significant in light of the entire execution procedure (e.g., switching from electrocution to lethal injection). The substantial change prong should also encompass any change that creates a cognizable claim of cruel and unusual punishment or other constitutional violation. Defining *substantial change* with reference to the effect of the change on the prisoner—whether the change has the potential to inflict cruel and unusual punishment, for example—is preferable to the current formulation, which defines *substantial change* with reference to the size of the

¹⁴⁶ The doctrine of laches may permit reviewing courts to throw out dilatory § 1983 method-of-execution claims on equitable grounds. *See generally infra* Part II.B (discussing in depth the doctrine of laches). But efficiency considerations counsel for at least some definite statute of limitations. States should be able to order their affairs with the knowledge that method-of-execution claims will be absolutely barred after some definite period.

¹⁴⁷ So far as this Comment’s author can tell, no courts or academic commentators have proposed an arbitrary lengthening of method-of-execution claims beyond the statute of limitations used for other § 1983 actions. For a lengthier discussion of this alternative, see *infra* Part III.C.

¹⁴⁸ *See supra* note 34 and accompanying text.

¹⁴⁹ *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008); *see also supra* Part I.B.2.

change in comparison with the overall execution procedure.¹⁵⁰ That is, a substantial change should be one that arguably creates a claim of cruel and unusual punishment or other constitutional violation, regardless of whether the change transforms the overall execution procedure.

This framework strikes the appropriate balance between protecting the interests of the prisoner—by ensuring access to the courts to bring legitimate constitutional claims—and protecting the interests of the state—by preventing “surprise[]” and barring litigation that relies on stale evidence.¹⁵¹ Maintaining the *McNair* two-part framework but expanding the definition of *substantial change* is the best way to serve the rationales behind statutes of limitations while ensuring full and proper access to redress in the courts for § 1983 method-of-execution prisoners.

B. *The Laches Backstop*

Opponents of this Comment’s position may argue that expanding the definition of *substantial change* would allow death-row prisoners to bring frivolous suits on the eve of execution for the sole purpose of delaying enforcement of the state’s judgment.¹⁵² This argument may be appealing on its face, but it overlooks a core principle of § 1983 law: laches.

The doctrine of laches allows courts to exercise their equitable power to bar claims brought after an unreasonable delay.¹⁵³ In the § 1983 method-of-execution context, a court reviewing a § 1983 claim can dismiss the case notwithstanding any statute of limitations if the prisoner has not exercised due diligence in bringing his claim and if the delay prejudices the opposing party.¹⁵⁴

¹⁵⁰ See, e.g., *Powell v. Thomas*, 643 F.3d 1300, 1304 (11th Cir.) (per curiam) (finding a change from electrocution to lethal injection reset the limitations period but a change in the drugs used in the lethal injection procedure did not), *cert. denied*, 131 S. Ct. 3018 (2011).

¹⁵¹ See *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944).

¹⁵² Because the family of cases barring § 1983 method-of-execution claims on statute-of-limitations grounds is relatively new, no such argument has been made by academic commentators or death penalty litigants. However, there is language in the Supreme Court’s foundational opinions that sets the groundwork for such an argument. See *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004) (“[B]efore granting a stay [of execution], a district court must consider . . . the extent to which the inmate has delayed unnecessarily in bringing the claim.”); see also *Hill v. McDonough*, 547 U.S. 573, 584–85 (2006) (quoting *Nelson* and noting that courts dismiss requests for stays of execution that are dilatory to “protect States”).

¹⁵³ See BLACK’S LAW DICTIONARY 953 (9th ed. 2009).

¹⁵⁴ See 3 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 9:36 (4th ed. 2011); see also *Grayson v. Allen*, 499 F. Supp. 2d 1228, 1236 (M.D. Ala.) (explaining that the party seeking dismissal on laches grounds must make three showings: (1) the opposing party delayed

Both district and circuit courts reviewing § 1983 method-of-execution challenges have invoked the doctrine of laches to dismiss dilatory claims.¹⁵⁵ One court explained that when a death-row prisoner purposefully delays filing a § 1983 method-of-execution claim until execution is imminent, dismissal of the claim on laches grounds is appropriate.¹⁵⁶ Such dilatory claims should be dismissed because they unduly prejudice the state in two ways: (1) by “not leav[ing] sufficient time for full adjudication on the merits”; and (2) by interfering with the state’s strong interest in enforcing criminal judgments, especially once all appeals have been exhausted.¹⁵⁷

The doctrine of laches thus provides an equitable backstop that allows reviewing courts to dismiss dilatory § 1983 method-of-execution claims. If the proposal of this Comment is adopted and the statute of limitations is expanded to allow greater access for prisoners bringing § 1983 claims, courts would still have the authority to invoke laches to dismiss dilatory claims that are brought only to delay execution. Recognizing the availability of laches should allay the concerns of those who might suggest that expanding the statute of limitations would provide death penalty prisoners with a method to unjustifiably delay enforcement of the state’s judgment.¹⁵⁸

III. LESSONS TO BE LEARNED FROM RELATED AREAS OF LAW

Part III looks to related areas of law to support the central claim of this Comment: that an expansive definition of *substantial change* best serves the varied interests implicated in § 1983 method-of-execution litigation. This Part examines analogous principles from tort law, and in particular its discovery

in bringing his claim; (2) the delay was unjustified; and (3) the delay caused undue prejudice to the defendant), *aff’d*, 491 F.3d 1318 (11th Cir. 2007).

¹⁵⁵ See, e.g., *Williams v. Allen*, 496 F.3d 1210, 1215 (11th Cir. 2007); *Hallford v. Allen*, 634 F. Supp. 2d 1267, 1275–76 (S.D. Ala. 2007), *aff’d*, 576 F.3d 1221 (11th Cir. 2009).

¹⁵⁶ *Grayson v. Allen*, 491 F.3d 1318, 1326 (11th Cir. 2007).

¹⁵⁷ *Id.* at 1325–26 (approving of the district court’s reasoning in dismissing the case on laches grounds).

¹⁵⁸ The average time between sentencing and execution has increased significantly in the past thirty years and represents a significant delay in the states’ ability to effectively mete out punishments. See TRACY L. SNELL, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2009—STATISTICAL TABLES 14 tbl.12 (2010) (noting that the average time between sentencing and execution in 2009 was 169 months). The concern for expediting enforcement of states’ judgments has animated discussions on this topic in the courts and in the legislature. See, e.g., *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (“Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.” (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998))); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (noting that Congress’s purpose in enacting the AEDPA was “to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases”).

rule; courts' interpretation of the AEDPA, a related federal statute; and the Supreme Court's "death is different" jurisprudence. Each of these related areas of law lends support to this Comment's position that the § 1983 method-of-execution accrual framework should be expanded.

A. *Tort Law's Discovery Rule*

Tort law provides fertile ground from which to draw comparisons with § 1983 because it is fundamentally a "species of tort liability."¹⁵⁹ Because the statute establishes a cause of action in tort, it is natural to examine tort principles when answering questions about the proper application of § 1983.¹⁶⁰ There is a background principle of tort law that supports this Comment's position: discoverability, or the "discovery rule" as it is sometimes called.¹⁶¹

The "overriding discovery rule principle" is straightforward: the rule delays accrual of a tort claim until "a person of reasonable diligence discovers or should have discovered facts that would show she has a reasonable claim, or facts that would lead a reasonable person to investigate further."¹⁶² The discovery rule applies to federal and state torts. For example, the Supreme Court has held that a Federal Tort Claims Act claim cannot accrue until "a plaintiff is aware of his injury and its cause."¹⁶³ No § 1983 method-of-execution case has directly discussed the discovery rule, but traces of the rule can be seen in courts' general formulations of the § 1983 method-of-execution accrual framework described above.¹⁶⁴

¹⁵⁹ Heck v. Humphrey, 512 U.S. 477, 483 (1994) (quoting Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986)) (internal quotation marks omitted).

¹⁶⁰ *Id.*

¹⁶¹ See generally 1 DAN B. DOBBS ET AL., THE LAW OF TORTS § 243, at 877–84 (2d ed. 2011) (discussing the discovery rule). Because tort law is overwhelmingly state law—with certain federal exceptions such as § 1983—the nuances of the discovery rule can and do vary from jurisdiction to jurisdiction. See *id.* (discussing various permutations of the discovery rule). In some states, the limitations period begins to run as soon as the plaintiff knows the fact of his injury and its cause; in others, it will not run until he "discover[s] . . . facts suggesting the defendant's fault." *Id.* at 879. The Supreme Court adopted the former rule in Federal Tort Claims Act cases. See *infra* note 163.

¹⁶² DOBBS ET AL., *supra* note 161, at 878 (citing to state supreme court decisions articulating this rule).

¹⁶³ United States v. Kubrick, 444 U.S. 111, 121 (1979). The *Kubrick* majority announced a fine distinction between a plaintiff's ignorance as to the very fact of his injury and its cause on the one hand and ignorance as to the perpetrator's legal culpability for the injury on the other. In the former case, the claim does not accrue; in the latter, it does. *Id.* at 119–22; see also DOBBS ET AL., *supra* note 161, at 877–84 (discussing various permutations of the discovery rule).

¹⁶⁴ Part I.B describes courts' general formulations of the § 1983 method-of-execution accrual framework.

For example, in *Cooley* the prisoner challenged the State's revision of its execution procedure from electrocution to lethal injection.¹⁶⁵ The State made the revision ten years after Cooley's state review was completed.¹⁶⁶ Normally, Cooley's claim would have accrued upon completion of his state review and expired two years later.¹⁶⁷ This would mean his claim to challenge the revision expired eight years before the challenged revision was actually made.¹⁶⁸ The court reset accrual, reasoning that Cooley "could not have *discovered*" his claim until the challenged revision was actually made.¹⁶⁹ The language used by the *Cooley* court in crafting this exception evoked the discovery rule.¹⁷⁰ Puzzlingly, the *Cooley* court cited an earlier opinion from the same circuit that discussed the discovery rule, but the citation played little role in the opinion and was merely a side discussion explaining the purpose of statutes of limitations in general.¹⁷¹

The Eleventh Circuit in *McNair* formulated a rule that § 1983 method-of-execution claims accrue on the later of two dates: the completion of state review or the date when the prisoner becomes subject to a "new or substantially changed" execution procedure.¹⁷² The court reached this rule by applying a broad principle to the case before it, and that broad principle was a species of the discovery rule.¹⁷³ The court reasoned that a § 1983 action should accrue when "facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights."¹⁷⁴

¹⁶⁵ *Cooley v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007). For a detailed discussion of *Cooley*, see *supra* Part I.B.1.

¹⁶⁶ *Cooley*, 479 F.3d at 416.

¹⁶⁷ *See id.* at 418.

¹⁶⁸ *See id.*

¹⁶⁹ *Id.* at 422 (emphasis added).

¹⁷⁰ *See id.*; *supra* note 66 and accompanying text.

¹⁷¹ *Cooley*, 479 F.3d at 419. The court cited an earlier Sixth Circuit case, with a parenthetical explaining that the earlier opinion "not[ed] that the discovery rule 'has been applied to prevent unjust results when a plaintiff would otherwise be denied a reasonable opportunity to bring suit due to the latent nature of the injury or the inability to discover the causal connection between the injury and the defendant's action.'" *Id.* (quoting *John Hancock Fin. Servs., Inc. v. Old Kent Bank*, 346 F.3d 727, 734 (6th Cir. 2003)). This is a fine description of the discovery rule's purpose; unfortunately, the rule never again appeared in the opinion except tangentially. *See supra* text accompanying note 169.

¹⁷² *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008).

¹⁷³ *Id.* at 1173.

¹⁷⁴ *Id.* (internal quotation marks omitted). This is similar to the dictionary definition of the discovery rule: "a limitations period does not begin to run until the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim." BLACK'S LAW DICTIONARY 533 (9th ed. 2009).

As the foregoing examples show, courts presiding over § 1983 method-of-execution cases are not ignorant of the discovery rule. They may not explicitly invoke it when answering the accrual date question in the § 1983 method-of-execution context, but they appear to be aware of the rule, at least as an informative background principle. For instance, the *Cooley* court explicitly defined the rule and seemed to adhere to it by rejecting accrual when the defendant “could not have discovered” his injury.¹⁷⁵ The *McNair* court reasoned from the predicate that a § 1983 claim cannot accrue until the prisoner has knowledge (actual or constructive) of the facts supporting his action.¹⁷⁶

Despite courts’ general acknowledgement of the discovery rule, they do not vigorously apply the rule in § 1983 method-of-execution cases. In recent years, for example, states have changed their execution procedures by substituting one drug for another, and prisoners have sued under § 1983, claiming the substitute drug will cause unnecessary pain and suffering.¹⁷⁷ Courts facing these claims have repeatedly disqualified them on statute of limitations grounds, reasoning that substituting one drug for another is not the type of substantial change that resets the limitations period.¹⁷⁸

This conclusion seems in direct opposition to the discovery rule. If a prisoner’s alleged injury is caused by the use of a new drug in his impending execution, the prisoner cannot possibly discover the facts of that injury until the change is implemented or at least announced. The discovery rule, if it is to have any force, must be applied in this situation and reset the limitations period. The *Cooley* court properly described the purpose of the discovery rule: it “prevent[s] unjust results when a [prisoner] would otherwise be denied a reasonable opportunity to bring suit due to . . . [his] inability to discover the causal connection between [his] injury and the [State’s] action.”¹⁷⁹ It is difficult to imagine a greater injustice than forcing a prisoner to bring an action before the events giving rise to that action have occurred. Indeed, the *Cooley* court reset the limitations period when the State changed its execution method

¹⁷⁵ *Cooley*, 479 F.3d at 422.

¹⁷⁶ *See McNair*, 515 F.3d at 1173.

¹⁷⁷ *See, e.g., supra* Part I.B.3 (discussing *Powell v. Thomas*, in which Alabama changed a drug in its three-drug cocktail); *see also* *DeYoung v. Owens*, 646 F.3d 1319 (11th Cir. 2011).

¹⁷⁸ *See, e.g., DeYoung*, 646 F.3d 1319; *Powell v. Thomas*, 643 F.3d 1300 (11th Cir.) (per curiam), *cert. denied*, 131 S. Ct. 3018 (2011).

¹⁷⁹ *Cooley*, 479 F.3d at 419 (quoting *John Hancock Fin. Servs., Inc. v. Old Kent Bank*, 346 F.3d 727, 734 (6th Cir. 2003)) (internal quotation marks omitted).

from electrocution to lethal injection.¹⁸⁰ It reasoned that the prisoner could not have brought a method-of-execution claim until the change was made.¹⁸¹ That scenario is nearly identical to recent cases where prisoners have brought suit after a change in the drug that will be used to execute them and courts have refused to reset the limitations period.¹⁸²

Courts addressing the substitute drug cases have refused to reset the limitations period because they do not consider substituting one drug for another a substantial change akin to switching from electrocution to lethal injection.¹⁸³ These courts reason that changing one drug is not sufficiently substantial in the scheme of an execution procedure to reset the limitations period.¹⁸⁴ But this is the wrong question. Instead of asking whether a change is substantial in relation to the overall execution procedure, courts should conduct a full hearing to determine whether a change is substantial enough to give the prisoner a fresh claim of cruel and unusual punishment or other constitutional violation.

In the electrocution-to-lethal-injection cases, courts have concluded that a prisoner may have a claim that lethal injection violates his constitutional rights, and he could not have discovered such a claim before lethal injection was instituted.¹⁸⁵ The result is a resetting of the limitations period and an opportunity for the prisoner to bring his claim.¹⁸⁶ The same answer should be reached when a state changes the particulars of its method of execution, including substituting a new drug: a prisoner could not reasonably be expected to discover that claim before the change is implemented or at least announced. The limitations period should be reset on discovery grounds, but courts thus far have resisted reaching that conclusion.¹⁸⁷

B. Flexible Application of the AEDPA's Statute of Limitations

Method-of-execution challenges were once brought almost exclusively as writs of habeas corpus.¹⁸⁸ This approach was countenanced by Supreme Court

¹⁸⁰ *Id.* at 422.

¹⁸¹ *Id.*

¹⁸² *See, e.g., DeYoung*, 646 F.3d 1319; *Powell*, 643 F.3d 1300.

¹⁸³ *See, e.g., Powell*, 643 F.3d at 1304–05.

¹⁸⁴ *See, e.g., DeYoung*, 646 F.3d at 1325; *Powell*, 643 F.3d at 1304–05.

¹⁸⁵ *See, e.g., Cooley*, 479 F.3d at 422.

¹⁸⁶ *See, e.g., id.*

¹⁸⁷ *See, e.g., DeYoung*, 646 F.3d at 1325; *Powell*, 643 F.3d at 1303.

¹⁸⁸ *See* 28 U.S.C. § 2254 (2006); Alper, *supra* note 23.

and courts of appeals rulings mandating such challenges be brought via habeas.¹⁸⁹ A consequence of shoehorning method-of-execution challenges into the habeas framework was to subject them to the strictures of the AEDPA after its passage in 1996.¹⁹⁰ Although this Comment addresses the current state of the law, which mandates that method-of-execution challenges be brought as § 1983 actions,¹⁹¹ a brief explanation of habeas corpus principles and the influence of the AEDPA is necessary because courts still borrow from habeas and the AEDPA when analyzing § 1983 method-of-execution claims.¹⁹² Courts justify doing so because habeas actions—which are governed by the AEDPA—are similar to § 1983 method-of-execution claims.¹⁹³ After a brief explanation, this section similarly looks to principles motivating passage of the AEDPA and courts' interpretations of the AEDPA to support this Comment's proposal.¹⁹⁴

Most importantly, the AEDPA imposed for the first time a statute of limitations on prisoners' petitions for writs of habeas corpus.¹⁹⁵ A lengthy

¹⁸⁹ See *In re Sapp*, 118 F.3d 460, 462 (6th Cir. 1997) (“[T]his challenge to the manner of execution is a challenge seeking to interfere with the sentence itself, and thus, is properly construed as a petition for habeas corpus.”), *abrogated by Cooney*, 479 F.3d 412; see also *Fugate v. Dep’t of Corr.*, 301 F.3d 1287, 1288 (11th Cir. 2002) (per curiam) (declaring that a method-of-execution challenge brought as a § 1983 action was improper because such a challenge “constitutes the functional equivalent of a . . . habeas petition” (internal quotation marks omitted)); cf. *Gomez v. U.S. Dist. Court*, 503 U.S. 653, 653 (1992) (per curiam) (bringing a § 1983 method-of-execution challenge was an “obvious attempt to avoid the application of” the rule barring successive habeas claims).

¹⁹⁰ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

¹⁹¹ The Supreme Court declared with a pair of cases (one in 2004 and one in 2006) that § 1983—and not habeas—is the proper vehicle for method-of-execution challenges. See *Hill v. McDonough*, 547 U.S. 573, 579 (2006); *Nelson v. Campbell*, 541 U.S. 637, 639 (2004).

¹⁹² See, e.g., *McNair v. Allen*, 515 F.3d 1168, 1175 (11th Cir. 2008); *Cooney*, 479 F.3d at 421–22.

¹⁹³ See *infra* note 199.

¹⁹⁴ At least one scholar has argued that § 1983 method-of-execution claims are so different from habeas actions that using AEDPA principles as guideposts for crafting § 1983 method-of-execution procedures is improper. See Alper, *supra* note 23, at 886–87. Professor Alper argued that because habeas actions invalidate the underlying sentence whereas § 1983 method-of-execution actions challenge only the *procedure* by which the sentence is to be carried out, the two doctrines are fundamentally different. *Id.* at 891. While this distinction is a valid one, Professor Alper’s argument rests on a marginalization of the core premise of the AEDPA. The AEDPA was enacted “to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases.” *McNair*, 515 F.3d at 1175 (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). Fundamentally, like habeas challenges, successful § 1983 method-of-execution challenges delay the execution of capital sentences. Because the AEDPA was enacted to reduce such delays, it is appropriate to look to the AEDPA for guidance on questions about § 1983. Both actions ultimately create the same real-world result: delay of capital sentences. The fact that one’s legal premise is different from the other should not cloud this commonsense reality.

¹⁹⁵ Antiterrorism and Effective Death Penalty Act §§ 101, 105 (imposing a one-year statute of limitations); see also Stephen B. Bright, Lecture, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas*

examination of the “concerns articulated” in the AEDPA, including detailed analysis of its text and legislative history, is beyond the scope of this Comment.¹⁹⁶ It suffices to say that one lawmaker described the ““root cause”” behind the AEDPA as ““problems of delay and abuse”” caused “by federal review of state sentences.”¹⁹⁷ This legislative history supports the Supreme Court’s articulation of the broad purpose motivating passage of the AEDPA: “reduc[ing] delays in the execution of state and federal criminal sentences, particularly in capital cases.”¹⁹⁸ The imposition of a statute of limitations on habeas claims effectuated this purpose.

Although method-of-execution claims are now brought as § 1983 actions—a statute to which the AEDPA does not apply—courts have considered the AEDPA a guidepost when defining the procedural aspects of § 1983 method-of-execution claims.¹⁹⁹ The Eleventh Circuit wrote in *McNair* that it was “mindful” of the purpose motivating passage of the AEDPA in formulating statute of limitations rules for § 1983 method-of-execution claims.²⁰⁰ The *McNair* court hewed to the purpose of the AEDPA by deciding the default accrual date for § 1983 method-of-execution claims should be completion of *state* review, rather than completion of *federal* habeas review or any other later date.²⁰¹

Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights, 54 WASH. & LEE L. REV. 1, 4 (1997) (“For the first time in the nation’s history, [the AEDPA] has imposed a statute of limitations on petitions for habeas corpus relief.”). The AEDPA also includes a “modified res judicata rule” prohibiting successive habeas corpus petitions except in very limited circumstances. *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

¹⁹⁶ *Cooley*, 479 F.3d at 421 (noting that the concerns articulated in the AEDPA apply in method-of-execution cases).

¹⁹⁷ See Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 400 (1996) (quoting 141 CONG. REC. 15,051 (1995) (statement of Sen. Trent Lott)).

¹⁹⁸ *Woodford*, 538 U.S. at 206.

¹⁹⁹ See, e.g., *McNair*, 515 F.3d at 1175 (“Although method-of-execution challenges brought under § 1983 are not governed by AEDPA, they . . . implicate many of the same comity concerns AEDPA was designed to address.”). Courts’ inclination to adopt AEDPA principles in the § 1983 context is derived from language in the Supreme Court’s opinion in *Nelson v. Campbell*, 541 U.S. 637, 646–47 (2004). The Court in that case definitively ruled that method-of-execution claims are properly brought via § 1983, but held that such actions “fall at the margins of habeas.” *Id.* at 646. The Sixth Circuit adopted this comparison in *Cooley v. Strickland*, 479 F.3d at 421 (explaining that because § 1983 method-of-execution challenges fall “at the margins of habeas,” the “concerns articulated . . . by Congress in the AEDPA” apply “with equal force” in § 1983 method-of-execution cases as they would in pure habeas cases (internal quotation marks omitted)).

²⁰⁰ *McNair*, 515 F.3d at 1175.

²⁰¹ *Id.* (“These concerns counsel away from setting the moment of accrual at the end of federal habeas review, since doing so would provide capital defendants with a means of delaying execution even after their sentences have been found lawful by both state and federal courts.”).

The limitations framework courts have formulated for § 1983 method-of-execution claims—accrual on the later date of completion of state review or a substantial change in the execution procedure—strikes a balance similar to the one created by the AEDPA in habeas proceedings. On the one hand, prisoners are permitted a timely challenge, but on the other hand, dilatory filings are barred. But the devil is in the details. This Comment shows the § 1983 balancing is weighted heavily in favor of barring claims and against permitting timely challenges.²⁰² This imbalance is created by the narrow definition of *substantial change* that courts have used to prevent many prisoners from bringing Eighth Amendment claims via § 1983.²⁰³

Courts have used their equitable authority to prevent this type of imbalance in AEDPA cases. The Supreme Court has liberally construed the AEDPA's statute of limitations, carving jurisprudential exceptions when fairness demands a bending of the limitations period.²⁰⁴ The Court has explicitly written that the AEDPA “does not set forth ‘an inflexible rule requiring dismissal whenever’ its [statute of limitations] ‘clock has run.’”²⁰⁵

This Comment proposes that a similar adjustment of the statute-of-limitations period should apply to § 1983 method-of-execution claims when fairness demands it. Take, for example, the *Powell* case discussed above.²⁰⁶ No matter the merit of Powell's underlying claim, the fact that the state action Powell challenged occurred nearly seven years after his claim expired shows the fundamental unfairness of a strict, state-friendly statute of limitations on § 1983 method-of-execution claims.²⁰⁷ Simple fairness demands that courts should not deem a prisoner's claim expired long before he could possibly bring it. Courts should adopt in the § 1983 method-of-execution context the same general flexibility they use in construing the AEDPA.²⁰⁸

²⁰² See generally *supra* Part I.B.2–3 (discussing two method-of-execution cases).

²⁰³ See generally *supra* Part I.B.2–3 (discussing courts' interpretation of the substantial change requirement).

²⁰⁴ See, e.g., *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (holding that the AEDPA “is subject to equitable tolling in appropriate cases”).

²⁰⁵ *Id.* (quoting *Day v. McDonough*, 547 U.S. 198, 208 (2006)).

²⁰⁶ See generally *supra* Part I.B.3 (*Powell* case).

²⁰⁷ See *supra* text accompanying note 125.

²⁰⁸ See *Holland*, 130 S. Ct. at 2560 (citing *Day*, 547 U.S. at 208).

C. *The Supreme Court's "Death is Different" Jurisprudence*

Finally, this section supports this Comment's position by examining a common theme present in many of the Supreme Court's modern capital punishment cases. This section briefly describes the Court's "death is different" jurisprudence²⁰⁹ and argues that the death-is-different rationale is uniquely relevant in the § 1983 method-of-execution context.

The Court has often used a pithy rationale to inform its holdings in capital cases: "death is different."²¹⁰ Reasoning that execution is a singular penalty,²¹¹ the Court has imposed both substantive and procedural protections that are unique to the capital punishment context. Substantively, the Court has held that the Eighth Amendment permits capital punishment only for a narrow segment of especially heinous crimes and especially culpable offenders.²¹² Procedurally, the Court mandates what one commentator has dubbed "super due process"²¹³: an array of procedural hurdles imposed at the trial and appellate levels in an attempt to ensure a fair outcome.²¹⁴ There are several procedural safeguards used only in capital cases: bifurcation into distinct guilt and sentencing phases;²¹⁵ sentencing by a jury—not a judge—only after

²⁰⁹ See generally *infra* note 215 and accompanying text.

²¹⁰ See *Graham v. Florida*, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting). Justice Stevens wrote that as of 1984 "every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment." *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part). Consensus on the point has evaporated with the changing composition of the Court since 1984. Justice Scalia has affirmatively denied the death-is-different reasoning: "[D]eath-is-different jurisprudence. . . . find[s] no support in the text or history of the Eighth Amendment" *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting). The dissolution of the death-is-different consensus is not the subject of this Comment, but it is worth noting the fractured state of this once unanimous proposition.

²¹¹ See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (noting the death penalty "differs from all other forms of criminal punishment, not in degree but in kind").

²¹² *Roper v. Simmons*, 543 U.S. 551, 568 (2005). The Court has variously held that the death penalty cannot be imposed in the following circumstances: where the crime committed is rape, *Coker v. Georgia*, 433 U.S. 584, 600 (1977); where the crime committed is felony murder and the defendant did not possess a culpable mens rea, *Enmund v. Florida*, 458 U.S. 782, 797 (1982); where the defendant is under the age of sixteen, *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion); and where the defendant is mentally retarded, *Atkins*, 536 U.S. at 321.

²¹³ Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143 (1980).

²¹⁴ See, e.g., *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring in the judgment) ("This Court has held that the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.").

²¹⁵ *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality opinion).

consideration of aggravating and mitigating factors;²¹⁶ presentation of all mitigating factors by the defendant;²¹⁷ and provision of appellate review of all cases in which the death penalty is imposed.²¹⁸

The Court has justified imposing these extra substantive and procedural burdens by reasoning in each instance that “death is different.”²¹⁹ Death is different because death is the most severe form of punishment in the criminal justice system.²²⁰ It differs qualitatively from all other forms of punishment, so prisoners facing death deserve more substantive and procedural protections.²²¹ If we take the Court’s reasoning seriously, we must apply it across the spectrum of capital litigation, including in § 1983 claims.

There are a number of safeguards that could be applied in § 1983 method-of-execution cases, but the one at the heart of this Comment is an expansion of the statute of limitations on § 1983 claims when the prisoner faces death at the hands of the State. All § 1983 actions are subject to a personal injury statute of limitations, which is generally two years.²²² As discussed above, § 1983 method-of-execution cases are often dismissed on statute-of-limitations grounds because courts fix the accrual date far in advance of the time when a prisoner could actually bring his claim.²²³ If death truly is different, as the Court suggests,²²⁴ and acknowledgement of this difference requires granting procedural leeway to capital litigants, the statute of limitations on § 1983 method-of-execution claims should be more prisoner-friendly than in other § 1983 actions.

²¹⁶ *Ring*, 536 U.S. at 609; *Gregg*, 428 U.S. at 193–95. In many jurisdictions an additional layer of procedural protection exists in capital cases because the jury’s sentencing finding is only a *recommendation* to the judge, which he may disregard under certain circumstances. *See, e.g.*, ALA. CODE § 13A-5-47 (2006); FLA. STAT. § 921.141 (2012).

²¹⁷ *See Lockett v. Ohio*, 438 U.S. 586, 606–08 (1978) (plurality opinion).

²¹⁸ *Gregg*, 428 U.S. at 195.

²¹⁹ *Ring*, 536 U.S. at 605–06 (“[T]here is no doubt that ‘[d]eath is different.’” (second alteration in original)); *Lockett*, 438 U.S. at 604 (“[T]he penalty of death is qualitatively different’ from any other sentence.” (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976))); *Gregg*, 428 U.S. at 188 (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”).

²²⁰ *See Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) (“[A] State’s deprivation of a person’s life is . . . qualitatively different from any lesser intrusion on liberty.”).

²²¹ *See id.* (“[B]ecause of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.”).

²²² *See supra* text accompanying notes 34–35.

²²³ *See, e.g., supra* Part I.B.3.

²²⁴ *See supra* note 210.

As discussed in Part II.A, there are three ways the statute of limitations in § 1983 method-of-execution cases could be changed to adhere to the death-is-different principle: (1) eliminating the statute of limitations; (2) lengthening the statute of limitations beyond the usual § 1983 period of two years; or (3) fixing the accrual date more flexibly in the way suggested above: by expanding the definition of the type of substantial change in an execution procedure that resets the limitations period.²²⁵

The third way is most desirable and most in line with the principles discussed herein. This Comment thus proposes an expansion of the definition of *substantial change* so the limitations period resets when a state changes its execution procedure in any way that creates a cognizable claim of cruel and unusual punishment or other constitutional violation.

CONCLUSION

This Comment argues the current accrual date and statute-of-limitations framework governing § 1983 method-of-execution claims is unfair, unworkable, and untenable. The current framework places an unnecessarily high procedural burden on method-of-execution claims. It prevents full adjudication of such claims on their merits and dismisses too many on procedural grounds alone. It does not strike a balance that properly serves the interests that statutes of limitations are meant to protect.

The current framework is also out of step with related areas of the law. It unreasonably asks prisoners to bring their claims before they could possibly discover the injury they are challenging—an impossible task and one inconsistent with the discovery rule. It works unbendingly to prevent many prisoners from bringing method-of-execution claims even where fairness demands a full hearing on the merits—inconsistent with how courts have liberally and flexibly construed the AEDPA's statute of limitations.²²⁶ And it treats method-of-execution challenges in which prisoners challenge the most severe punishment the state can impose like all other civil rights claims—inconsistent with the Supreme Court's death-is-different jurisprudence.²²⁷

In light of these problems with the current accrual and statute-of-limitations framework, this Comment proposes a solution: expand the accrual framework

²²⁵ See *supra* Part II.A.

²²⁶ See *supra* text accompanying notes 203–04.

²²⁷ See *generally supra* Part III.C (discussing the Supreme Court's death-is-different jurisprudence).

to allow prisoners to bring challenges after states revise their execution procedures. This Comment's solution would not require a wholesale reimagining of the statute-of-limitations framework. On the contrary, the two-prong standard defined in *McNair* is entirely appropriate.²²⁸ This Comment merely argues that the scope of the second prong should be broadened. Courts should expand their definition of *substantial change* to include all changes that create a cognizable claim of cruel and unusual punishment or other constitutional violation.

This Comment does admittedly propose a standard that is somewhat vague and lacks concrete delineation. But this proposed definition of *substantial change* is no more vague or indistinct than the wholly unstated definition courts have used thus far. Moreover, courts—not academic commentators—are in the best position to mold and craft a workable standard based on the overarching themes of this Comment. This Comment simply proposes that the definition be expanded so as to permit adjudication on the merits. How exactly the definition should expand is a question best suited for the courts, which regularly address the factual nuances of these cases.

Ultimately, the current framework is in need of serious revision. It lacks principled, reasoned support and is responsible for barring the courthouse door to far too many prisoners. It is time to open that door.

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²²⁸ See *supra* text accompanying note 102.

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