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Hope v. Pelzer: Increasing the Accountability of State Actors in Prison Systems - A Necessary Enterprise in Guaranteeing the Eight Amendment Rights of Prison Inmates

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HOPE V. PELZER: INCREASING THE ACCOUNTABILITY OF STATE ACTORS IN PRISON SYSTEMS—A NECESSARY ENTERPRISE IN GUARANTEEING THE EIGHTH AMENDMENT RIGHTS OF PRISON INMATES

Hope v. Pelzer, 536 U.S. 730 (2002)

I. INTRODUCTION

In 1996, Larry Hope, an Alabama prison inmate, was handcuffed to the restraining bar known as a "hitching post" in Alabama's prison system.[1] Not only was Hope left shirtless in the hot sun for seven hours, but guards denied him water and toilet breaks for most of the day, ridiculing his complaints of thirst.[2] Hope suffered pain to his wrists and arms, muscle aches, dehydration and sunburn.[3] The Supreme Court in *Hope v. Pelzer* held that: (1) Hope was subjected to cruel and unusual punishment in violation of the Eighth Amendment; (2) officials can be on notice that their conduct violates established law even in novel factual circumstances; and (3) the Alabama prison guards in this case were not entitled to qualified immunity because they had "fair notice" from: (a) binding Eleventh Circuit precedent, (b) the Alabama Department of Corrections ("ADOC") regulation on hitching posts, and (c) a Department of Justice ("DOJ") report informing the ADOC that its particular use of the hitching post was unconstitutional.[4]

This Note argues that *Hope* encourages judicial intervention through its monitoring of state prison management, which may, in some cases, be necessary to protect inmate rights. Part II will discuss prior Supreme Court rulings regarding inmates' claims of Eighth Amendment violations in relation to the Court's analysis of both the Eighth Amendment issues and

[1] Hope v. Pelzer, 536 U.S. 730, 734 (2002).
[2] *Id.* at 734-35.
[3] *Id.* at 735 n.2.
[4] *Id.* at 731-32.

42 U.S.C. § 1983. Subpart A will focus on the Eighth Amendment and will be split into two sections: the first will explain the evolution and application of the deliberate indifference standard; and the second will explain the evolution and application of the malice standard—a standard to detect an actor's malicious intent to cause harm. Subpart B will briefly explain § 1983, which can be used either by plaintiffs to impose individual liability on officers or by defendants to claim qualified immunity. Part III addresses the factual and procedural history of *Hope v. Pelzer* and includes an explanation of *Austin v. Hopper*[5] which heavily influenced the Supreme Court's decision. Part IV outlines the Majority and Dissenting opinions. Part V argues that the Court's application of the deliberate indifference standard narrowed the malice standard by more critically scrutinizing the point at which an emergency situation ends and an inquiry into a lower threshold of deliberate indifference begins. For example, by expanding the sources of "fair notice" to include federal warnings to the prison administration of unconstitutional punishments, *Hope* makes individual officers accountable for constitutional violations. This section also explores whether the Supreme Court intruded on the authority of the state's executive and legislative purview.

II. BACKGROUND

A. THE EIGHTH AMENDMENT

The Eighth Amendment of the Constitution declares that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[6] The Supreme Court has historically defined cruel and unusual punishment in broad terms. In *Trop v. Dulles*,[7] the Supreme Court first based its interpretation of cruel and unusual punishment on the vague principle that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[8] Most notably, however, the Court argued that its interpretation on the scope of the Eighth Amendment would draw its meaning from the "evolving standards of decency that marks the progress of a maturing society," a guideline that continually resurfaced in Eighth Amendment cases, particularly when addressing prison concerns.[9] Later, in *Gregg v. Georgia*,[10] the Court built

[5] 15 F. Supp. 2d 1210 (M.D. Ala. 1998).
[6] U.S. CONST. amend. VIII.
[7] 356 U.S. 86 (1958).
[8] *Id.* at 100.
[9] *Id.* at 101.
[10] 428 U.S. 153 (1976).

on *Trop's* constitutional interpretation by defining cruel and unusual punishment as any punishment "grossly disproportionate to the severity of the crime,"[11] any pain inflicted without penological justification, or as any "unnecessary and wanton infliction of pain."[12]

Over the last fifty years, several landmark cases have been brought by prison inmates claiming Eighth Amendment violations by state prison administrations or individual officers.[13] Through these cases, the Supreme Court not only refined its objective definition of "cruel and unusual punishment," but also developed separate subjective standards for determining Eighth Amendment violations. For example, when the Court determined that the alleged mistreatment of the inmate or inmates occurred because of prison conditions, the Court applied a "deliberate indifference" standard.[14] In contrast, when the Court dealt with incidents where pain was inflicted on an inmate because of an alleged need to maintain prison order or safety, or where excessive force was used, the Court applied a "malice" standard.[15] Meanwhile, various justices, including Justice Stevens, argued that cruel and unusual punishment existed objectively regardless of the actor's mental state.[16]

1. Subjective Standards of Eighth Amendment Analysis

It is important to address the two subjective standards used by the Supreme Court to analyze Eighth Amendment claims because they reflect the justices' disparate views regarding judicial intervention in prison systems. First, this sub-section will provide background on the Court's past scrutiny of prison conditions, including its application of the deliberate indifference standard. Second, it will explain the Court's use of the malice standard to determine Eighth Amendment violations in emergency situations where force may be required to maintain prison order and in other situations where force has been used.

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[11] *Id.* at 173.

[12] *Id.*

[13] *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994); Hudson v. McMillian, 503 U.S. 1 (1992); Wilson v. Seiter, 501 U.S. 294 (1991); Whitley v. Albers, 475 U.S. 312 (1986); Rhodes v. Chapman, 452 U.S. 337 (1981); Hutto v. Finney, 437 U.S. 678 (1978); Estelle v. Gamble, 429 U.S. 97 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Trop v. Dulles, 356 U.S. 86 (1958).

[14] *See Farmer*, 511 U.S. at 835; *Wilson*, 501 U.S. at 297; *Estelle*, 429 U.S. at 104.

[15] *See Hudson*, 503 U.S. at 6; *Whitley*, 475 U.S. at 320.

[16] *See Estelle*, 429 U.S. at 116 (Stevens, J., dissenting).

a. Eighth Amendment Application on Prison Conditions

Justice Marshall first spoke of the Court's institution of the "deliberate indifference" standard in *Estelle v. Gamble*,[17] where a plaintiff inmate claimed prison officials violated the Eighth Amendment by failing to provide him with adequate medical care.[18] The Court held that deliberate indifference by prison personnel to the serious medical needs of prisoners was "unnecessary and wanton infliction of pain," and thus cruel and unusual punishment, because it caused pain serving no penological purpose.[19] Moreover, Justice Marshall stated that basic Eighth Amendment principles established the government's duty to provide medical care to its inmates, since inmates depended on the administration to preserve their basic health.[20] However, the Court emphasized that the mere denial of adequate medical care without intent did not necessarily violate the Eighth Amendment.[21] In truth, this distinction may have been the Court's attempt to exempt prison staff from accountability for poor inmate treatment in case institutional failure was to blame.[22] Consequently, because the inmate could not prove the doctor's intent to deny him care, the *Estelle* Court ruled against the inmate's claim that the physician's failure to pursue all medical avenues violated his constitutional rights.[23]

In his dissent, Justice Stevens criticized the Court's consideration of the defendant's subjective motivations as a criterion for whether cruel and unusual punishment was inflicted.[24] To Stevens, the violation was objective. It existed in the character of the punishment, not the actor's intent.[25] At the same time, the state of prison conditions was universally poor across the nation.[26] Thus, a purely objective standard may have

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[17] 429 U.S. 97 (1976).

[18] *Id.* at 101.

[19] *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[20] *Id.* at 103.

[21] *Id.* at 105.

[22] Stevens noted in his dissent in *Estelle* that the substandard medical treatment of the plaintiff inmate could have been due to an "overworked, undermanned medical staff in a crowded prison" resulting in the "expedient course of routinely prescribing nothing more than pain killers when a thorough diagnosis would [have] disclose[d] an obvious need for remedial treatment." He also discussed studies of other state prisons, including those of Texas, Pennsylvania and California, showing parallels between the negligent care given to the *Estelle* plaintiff and to other prisoners of those states' systems who were subjected to poor medical care from possible failures in institutional administration. *Id.* at 110 (Stevens, J., dissenting).

[23] *Id.* at 107.

[24] *Id.* at 116 (Stevens, J., dissenting).

[25] *Id.* (Stevens, J., dissenting).

[26] *See* Arthur B. Berger, Wilson v. Seiter: *An Unsatisfying Attempt at Resolving the*

created too great an opportunity for inmates to find prison staff individually accountable for conditions caused by institutional failures of the state. Because the state legislature, not the judiciary, was traditionally seen as responsible for prison management, *Estelle*'s deliberate indifference standard restrained the federal courts' capacity to intervene in state administrative matters.

In 1981, *Rhodes v. Chapman*[27] reaffirmed that the judiciary was not to intervene in general matters of state prison management simply because the court subjectively believed the prison conditions were unreasonable.[28] The Court had no need to address the appropriateness of a deliberate indifference standard in *Rhodes* since it ruled that the conditions in question, the "double-celling" of inmates, were objectively inoffensive to Eighth Amendment principles.[29] *Rhodes* held that as long as prison conditions did not violate basic human needs,[30] such as essential food, medical care or sanitation, they did not violate the Eighth Amendment.[31] Beyond these requirements, decisions by a prison administration regarding its management of inmates were more "properly . . . weighed by the legislature and prison administration rather than a court."[32] Justice Powell, who delivered the majority opinion, emphasized that courts were ill-equipped to handle the urgent problems of prison reform[33] and that they should not assume that the legislative and executive branches were "insensitive" to constitutional parameters.[34] This statement drew heavy criticism from Justice Marshall, who stated in the dissent, that such "unfortunate dicta" could be interpreted by federal courts as a warning against judicial intervention in state prison operations.[35] Moreover, he complained that legislators and prison officials often disregarded Eighth

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Imbroglio of Eighth Amendment Prisoners' Rights Standards, 1992 UTAH L. REV. 565, 578 ("[B]y the mid-'60s and early '70s . . . under the Cruel and Unusual Punishments Clause[,] . . . many prisoners found the conditions of their confinement, as well as their treatment by prison officials, inhumane . . . . Over time . . . necessity dictated that federal courts intervene to correct the often brutish world in which prisoners were placed.").

[27] 452 U.S. 337 (1981).

[28] *Id.* at 346-49.

[29] *Id.* at 347.

[30] In defining such needs, the Court referred to *Hutto v. Finney*, 437 U.S. 678, 684 (1978), which had ruled that inmates' treatment in punitive isolation cells within the Arkansas prison system violated the Eighth Amendment due to the inmates' subjection to an unfit diet, rampant prison violence and barbaric overcrowding. *Rhodes*, 452 U.S. at 347.

[31] *Rhodes*, 452 U.S. at 347-48.

[32] *Id.* at 349.

[33] *Id.* at 351 n.16 (quoting Procunier v. Martinez, 416 U.S. 396, 404-05).

[34] *Id.* at 352.

[35] *Id.* at 375 (Marshall, J., dissenting).

Amendment principles, and thus federal intervention was necessary to protect inmate rights.[36] Similarly, Justice Brennan, joined by Justice Stevens in a concurrence, highlighted that past judicial intervention was an essential force in reforming inhumane prison conditions and encouraged litigation against entire prison systems for constitutional violations.[37] However, the *Rhodes* majority opinion seemed to signal a precedent for ensuring federalism when courts scrutinized state prison administration.

A decade after *Rhodes*, Justice Scalia wrote in the majority opinion for *Wilson v. Seiter*[38] that, despite an inmate's complaint of overcrowding, inadequate heating and cooling, and unsanitary dining facilities and restrooms, deliberate indifference would first have to be shown before determining such conditions violated the Eighth Amendment, in light of a lower court's ruling that such conditions had not deprived inmates of basic human needs.[39] In a concurring opinion, Justices White, Marshall, Blackmun and Stevens attempted to reiterate that the objective severity of a prison's conditions could alone determine whether the Eighth Amendment was violated.[40] Their concern was that applying the deliberate indifference test to prison conditions would insulate officials and state administrations from constitutional challenge as long as they exhibited concern about the inhumane conditions in the prisons they managed.[41]

Justice Souter again used the deliberate indifference standard in *Farmer v. Brennan*.[42] He stated that prison officials could have violated the Eighth Amendment if their refusal to segregate a transsexual inmate from the general prison population signaled a conscious disregard of a substantial risk of harm to the inmate—it was possible a fact-finder could conclude that an official had knowledge of a substantial risk by circumstantial evidence that the risk was obvious.[43] Although Justices Blackmun and Stevens agreed with the majority ruling in their concurrence, they again criticized the use of a subjective standard for determining cruel and unusual punishment reasoning that an objective standard would have increased accountability for prison officials.[44] In many cases, including *Farmer*, the justices' differences regarding the deliberate indifference standard—a

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[36] *Id.* at 376 (Marshall, J., dissenting).

[37] *Id.* at 354, 359 (Brennan, J., concurring).

[38] 501 U.S. 294 (1991).

[39] *Id.* at 304-06.

[40] *Id.* at 309 (White, J., concurring).

[41] *Id.* at 311 (White, J., concurring).

[42] 511 U.S. 825 (1994).

[43] *Id.* at 827.

[44] *Id.* at 854-57 (Blackmun, J., concurring).

subjective standard—reflected their differences on judicial intervention in state prison management.

b. Eighth Amendment Application on Emergency Situations and the Use of Excessive Force

The malice standard, a higher threshold than "deliberate indifference," has been applied to cases where the plaintiff inmate claimed an Eighth Amendment violation under circumstances of excessive force or of an emergency situation requiring force. The Court first implemented this standard in *Whitley v. Albers*,[45] where an inmate claimed he was subjected to cruel and unusual punishment when he was shot in the leg by a guard during an attempt to control a prison riot.[46] *Whitley* held that an infliction of pain resulting from a prison security measure would violate the Eighth Amendment only if done maliciously and sadistically for the purpose of causing harm.[47] Therefore, the guard did not violate the Eighth Amendment because he did not act "maliciously," but made a reasonably necessary decision in context.[48] The Court explained that in the face of a threat to prison order, unlike the context of general prison conditions, officials must consciously and quickly weigh the harm of one or more individuals against their competing duty of maintaining safety for the staff and other inmates.[49] Thus, because the deliberate indifference standard could not account for the complexity of an official's competing obligations nor the exigency under which she had to act in an emergency situation, the malice standard more ably determined whether or not any pain inflicted was excessive.[50] Justices Marshall, Brennan, Blackmun and Stevens dissented arguing that the use of force by the guard was not necessary to prevent imminent danger.[51] Moreover, they reasoned that a prison disturbance should not necessarily trigger the use of the subjective malice standard.[52] First, there may have been no real danger threatening the officer that justified inflicting pain, and second, the issue of whether a significant risk existed for the officer was a question for a jury.[53]

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[45] 475 U.S. 312 (1986).
[46] *Id.* at 316-17.
[47] *Id.* at 320-21.
[48] *Id.* at 313.
[49] *Id.* at 320.
[50] *Id.* at 320-21.
[51] *Id.* at 331 (Marshall, J., dissenting).
[52] *Id.* at 329 (Marshall, J., dissenting).
[53] *Id.* (Marshall, J., dissenting).

In *Hudson v. McMillian*,[54] the Court extended the malice standard to determine whether any use of force by prison officials was excessive.[55] In *Hudson*, when guards handcuffed and physically beat an inmate absent a prison riot, the Court held that their acts violated the Eighth Amendment because they were done maliciously to cause harm.[56] Therefore, the malice standard was to be applied to "lesser disruption[s]" as well as to prison riots, as occurred in *Whitley*.[57] Any use of force compelled the question of whether such action was necessary to maintain prison order or restore discipline.[58] In contrast, the lesser "deliberate indifference" standard would potentially conflict with the prison administration's policies—policies that, in the administration's judgment, preserved internal security and should be granted deference by the courts.[59] Justice Stevens again argued in concurrence that a subjective standard of malice was misplaced.[60] He stated that Eighth Amendment violations should objectively turn on whether there was any unnecessary and wanton infliction of pain.[61]

In sum, the Justices were continually divided on the appropriateness of subjective tests in Eighth Amendment analyses. This division reflected the broader disagreement within the Court on the extent to which prison administrations should be held accountable for inmate treatment and on whether to increase judicial intervention in state prison management.

B. 42 U.S.C. § 1983: CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Occasionally, when inmates claim that prison guards subjected them to cruel and unusual punishment that violated the Eighth Amendment, they also state a cause of action under 42 U.S.C. § 1983 ("Section 1983") to impose individual liability on the actor.[62] Section 1983 instructs the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

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[54] 503 U.S. 1 (1992).

[55] *Id.* at 6-7.

[56] *Id.* at 4-10.

[57] *Id.* at 6-7.

[58] *Id.*

[59] *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 321-22 (1986)).

[60] *Id.* at 12-13 (Stevens, J., concurring).

[61] *Id.* (Stevens, J., concurring).

[62] *See, e.g.*, Wilson v. Seiter, 501 U.S. 294 (1991); Whitley v. Albers, 475 U.S. 312 (1986); Estelle v. Gamble, 429 U.S. 97 (1976); Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991).

> in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[63]

III. FACTS AND PROCEDURAL HISTORY

A. DISTRICT COURT DECISION

In 1996, Plaintiff Larry Hope, a prison inmate at Alabama's Limestone Correction Facility ("LCF"), sued eight officers in the District Court for the Northern District of Alabama for violating his Eighth Amendment rights on two separate occasions.[64] He stated a claim under 42 U.S.C. § 1983 to find the guards individually liable.[65] Hope also alleged a Fourteenth Amendment due process violation which the court dismissed because there was no evidence of service of process or a signature on the complaint.[66] Thus, the heart of the case turned on Hope's Eighth Amendment claim that the guards subjected him to cruel and unusual punishment on the two following occasions: first, on May 11, 1995, when defendant Officer Gene McClaran handcuffed him to a restraining bar and second, on June 7, 1995, when several defendant officers used excessive force on him and placed him on the restraining bar a second time.[67]

Hope claimed that on May 11, he and another inmate had a verbal fight while out on the chain gang.[68] While McClaran alleged that Hope raised a tool towards the other inmate,[69] Hope asserted that McClaran misinterpreted this exchange as an attempt to assault the inmate.[70] However, both agreed that as a result, McClaran removed Hope and the other inmate from the work squad and transported them back to the prison, where they were then cuffed to the "hitching post," or restraining bar, for being "disruptive" to the work squad.[71] Hope alleged that because he was only slightly taller than the bar itself, his arms were raised high, which caused great pain to his wrists and discomfort to his arms from poor

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[63] 42 U.S.C. § 1983 (2000).

[64] Hope v. Pelzer, 240 F.3d 975, 977 (11th Cir. 2001).

[65] Joint Appendix at 14, Hope v. Pelzer, 536 U.S. 730 (2002) (No. 01-309).

[66] *Hope*, 240 F.3d at 977 n.3.

[67] *Id.*

[68] Joint Appendix at 9, *Hope* (No. 01-309).

[69] *Id.* at 16.

[70] *Id.* at 9.

[71] *Id.*

circulation.[72] He was on the bar for two hours, during which time he was offered bathroom and water breaks at fifteen-minute intervals as were required by the Alabama Department of Corrections' ("ADOC") regulation regarding use of the hitching post.[73]

Hope alleged another violation stemming from an incident on June 7, the primary focus of his suit, and described the following facts:[74] he had angered one of the officers because he was napping on the bus when it arrived at the inmate work site.[75] As a result, the guard began choking him.[76] In retaliation, he grabbed the officer's neck.[77] At that point, the other defendant officers attempted to subdue Hope, which led to another fight.[78] Ultimately, the officers subdued and handcuffed Hope.[79] Although at no time did he refuse to work, he was still placed in leg irons and transported back to the prison for his "disruptive" behavior on the work squad.[80] The medical staff examined him and noticed a few bruises.[81] Later, he was handcuffed to the hitching post by one of the defendant officers.[82] Hope then remained on the restraining bar for seven hours in the hot sun, during which time officers at the post made him remove his shirt so that one of them could clean the officer's van with it.[83] This additional exposure led him to suffer more intensely from sunburn.[84] He received water only once or twice while on the bar and at one point was not offered water for at least three hours during the hottest part of the day.[85] In addition, two guards taunted him when he requested water and brought prison dogs before him to drink from a cooler they later kicked over at his feet.[86] Throughout this entire episode, the handcuffs hurt his wrists and

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[72] Brief for Petitioner at 4, Hope v. Pelzer, 536 U.S. 730 (2002) (No. 01-309).

[73] Brief for Respondents at 4-5, Hope v. Pelzer, 536 U.S. 730 (2002) (No. 01-309).

[74] Joint Appendix at 49, *Hope* (No. 01-309).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 49-50.

[79] *Id.* at 16-17.

[80] *Id.* at 17.

[81] Brief for Respondents at 6-7, *Hope* (No. 01-309).

[82] Brief for Petitioner at 4, *Hope* (No. 01-309).

[83] *Id.*

[84] *Id.*

[85] Joint Appendix at 47-48, *Hope* (No. 01-309). The activity log, which was required by the ADOC to track the inmate's necessary fifteen-minute interval bathroom and water breaks, was also never filled in. *Id.*

[86] Brief for Petitioner at 4-5, *Hope* (No. 01-309).

impaired the circulation in his arms, and his wrists were swollen and bruised after he was released.[87]

Defendants argued that Hope stated no cause of action under the Eighth Amendment pursuant to 42 U.S.C. § 1983.[88] In answer to Hope's first claim of excessive force when he was subdued by officers on June 7, the defendants referred to *Whitley's* malice standard as it was applied in *Hudson*, where the question was whether force was applied in a good-faith effort to restore order or used maliciously and sadistically to cause harm, thus classifying it as excessive.[89] The officers argued that their actions were necessary to subdue Hope to maintain internal security and prison order.[90] The defendants also claimed qualified immunity under 42 U.S.C. § 1983.[91] Citing the Supreme Court's ruling in *Wilson*, the defendants argued that in order for a plaintiff to win an Eighth Amendment claim pursuant to § 1983, deliberate indifference must be shown before the plaintiff can find the actor individually liable.[92] However, Hope had not pled that any subjective intent existed.[93]

In answer to Hope's second claim that the officers' use of the "hitching post" was a violation of the Eighth Amendment, the defendants countered that such action was necessary to prevent any further disruptions to the work squad and to discourage other inmates from similar conduct.[94] They argued that because the placement of Hope on the post was necessary to maintain prison order, it was not an Eighth Amendment violation according to *Whitley*.[95] The District Court granted summary judgment for the defendant prison guards on grounds of qualified immunity under 42 U.S.C. § 1983, but did not rule on whether cuffing Hope to the hitching post violated the Eighth Amendment.[96]

Between the time Hope filed his suit in 1996 and the District Court's ruling in 2000, another district court in Alabama issued its 1998 ruling in *Austin v. Hopper*,[97] a separate class action case where Hope was a member.[98]

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[87] Joint Appendix at 50, *Hope* (No. 01-309).
[88] *Id.* at 15.
[89] *Id.* at 18-19 (citing Hudson v. McMillan, 503 U.S. 1, 6 (1992)).
[90] *Id.* at 18.
[91] *Id.* at 15.
[92] *Id.* at 19.
[93] *Id.*
[94] *Id.* at 21.
[95] *Id.*
[96] Hope v. Pelzer, 240 F.3d 975, 977 (11th Cir. 2001).
[97] 15 F. Supp. 2d 1210 (M.D. Ala. 1998).
[98] *Id.* at 1247-48.

1. Austin v. Hopper Decision

Austin held that the Alabama prison system's use of the hitching post as punishment was unconstitutional.[99] The court determined this under both subjective standards of Eighth Amendment analysis: deliberate indifference and malice.[100] It also ruled that the punishment was objectively cruel and unusual.[101]

First, there was evidence that inmates' hands were often cuffed at or above head level causing arm and wrist pain, that their awkward position at the bar caused severe discomfort, and that standing in the sun unprotected for extended periods burned their skin and dehydrated them.[102] Thus, there was the objective element of an infliction of pain. Second, according to ADOC regulation which governed the use of the hitching post, the purpose of the restraining bar was to discipline inmates for being disruptive to the work squad.[103] The regulation itemized actions that would trigger placement on the post: (1) refusal to work; (2) disruptive to work squad; (3) refusal to walk in a prescribed manner; or (4) refusal to carry a tool to job site and "other" unspecified reasons.[104] The Commissioner of the ADOC conceded in testimony that some of these reasons were not appropriate to trigger placement on the hitching post because they were not "emergency" situations where prison safety or order was threatened by the inmate's actions such as walking or carrying a tool improperly.[105] Additionally, if one refused to work while still at the prison instead of refusing while at work with other inmates, that was also not an emergency situation and did not justify placement on the bar.[106] Therefore, not only were some of the state sanctioned reasons potentially improper triggers for hitching post punishment, but an investigation by the DOJ showed many facilities misused the hitching post for unauthorized and trivial non-emergency offenses.[107] The *Austin* court noted that the non-binding standards of the American Correctional Association and the American Bar Association found that the use of restraints, such as hitching posts, in non-emergency situations caused harm to inmates.[108] Because such punishment served no

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[99] *Id.* at 1215.
[100] *Id.* at 1254-55.
[101] *Id.* at 1260.
[102] *Id.* at 1256-57.
[103] *Id.* at 1240.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1249-50.
[108] *Id.* at 1259-60.

penological purpose, it met the Supreme Court's definition of cruel and unusual punishment as defined in *Gregg*.[109] There was also evidence that in some cases inmates were denied the required water breaks and bathroom breaks to the point where they defecated on themselves.[110] In sum, the District Court ruled that the routine use of hitching posts in non-emergency situations, which consistently subjected inmates to pain and where they were often denied basic human needs during their time on the post, illustrated that the practice of disciplining an inmate on the hitching post was an objective violation of the Eighth Amendment.[111]

The court in *Austin* argued that both subjective standards of deliberate indifference and malice should be used in determining whether the hitching post punishment violated Eighth Amendment principles.[112] In instances when the hitching post was used in non-emergency situations, the court decided to apply the deliberate indifference standard because these incidents were effectively part of prison conditions.[113] Additionally, an official could be liable under the Eighth Amendment for denying humane conditions only if he or she knew the inmate faced a "substantial risk of serious harm" and "disregarded the risk by failing to take reasonable measures to abate it."[114] Under this analysis, the court argued that because the risks of physical harm attached to the use of the hitching post were very obvious, officials must have known the risks and simply failed to reasonably abate them.[115] Thus, deliberate indifference was shown proving an Eighth Amendment violation.[116] Alternatively, in instances when the hitching post was used in emergency situations, the court decided to apply the malice standard per the Supreme Court's rulings in *Whitley* and *Hudson*. For example, the court interpreted Hope's incident of being handcuffed to the hitching post on June 7 as a situation where an inmate's behavior created an emergency situation that justified the use of force.[117] Even under this analysis, the court found that the officers who cuffed Hope to and mistreated him on the bar acted maliciously and sadistically to cause him harm.[118] The guards' denial of Hope's required bathroom and water breaks, their cruel taunting of him for his thirst, and the lack of evidence that it was

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[109] Gregg v. Georgia, 428 U.S. 153, 183 (1976).
[110] *Austin*, 15 F. Supp. 2d at 1245-46.
[111] *Id.* at 1260.
[112] *Id.* at 1261-65.
[113] *Id.* at 1261.
[114] Farmer v. Brennan, 511 U.S. 825, 847 (1994).
[115] *Austin*, 15 F. Supp. 2d at 1261.
[116] *Id.* at 1262.
[117] *Id.* at 1264.
[118] *Id.* at 1264-65.

necessary to keep Hope in restraints to maintain prison order or security satisfied *Whitley*'s subjective standard of malice, deeming the use of the hitching post unconstitutional.[119] The court conceded that using the hitching post for the purpose of quelling an emergency threat may be appropriate, but that the post's capacity as a means of discipline was unconstitutional.[120]

B. ELEVENTH CIRCUIT DECISION

By the time Hope appealed his individual suit to the Eleventh Circuit in 2000, he had dropped his excessive force claim and his suit against five of the eight officers, leaving Mark Pelzer, Gene McClaran and Jim Gates as the remaining defendants.[121] The Court of Appeals held that Hope's constitutional rights were violated after considering both the objective and subjective requirements of the Eighth Amendment analysis, but that the guards were entitled to qualified immunity under 42 U.S.C. § 1983 because they did not have fair notice that they were violating constitutional rights.[122] At the same time, the Eleventh Circuit agreed with the District Court's holding in *Austin,* which ruled the policy and practice of using a hitching post as a form of punishment unconstitutional.[123]

Under the objective test, an infliction of pain that offends the evolving standards of decency, is grossly disproportionate to the offense, or serves no penological purpose, constitutes cruel and unusual punishment.[124] The Eleventh Circuit ruled that the placement and treatment of Hope on the restraining bar satisfied all these definitions.[125] It cited *Gates v. Collier*,[126] a case where officers routinely cuffed inmates to stationary objects as punishment.[127] *Gates* held that handcuffing inmates to the fence or cells for long periods of time ran afoul of the Eighth Amendment because such conditions of confinement violated evolving concepts of decency.[128] Thus, handcuffing an inmate to a hitching post was found similarly offensive by the Court of Appeals.[129] Furthermore, because Hope was denied the basic

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[119] *Id.* at 1265.

[120] *Id.*

[121] Hope v. Pelzer, 240 F.3d 975, 977 (11th Cir. 2001).

[122] *Id.* at 975-81.

[123] *Id.* at 980.

[124] *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Gregg v. Georgia 428 U.S. 153, 173 (1976); Trop v. Dulles, 356 U.S. 86, 100 (1958).

[125] *Hope*, 240 F.3d at 979.

[126] 501 F.2d 1291 (5th Cir. 1974).

[127] *Hope*, 240 F.3d at 979.

[128] *Id.* (citing *Gates*, 501 F.2d at 1306).

[129] *Id.*

human needs of water, shelter from the heat and sun, and bathroom breaks while he was fastened to the bar on June 7, his treatment offended the civilized standards of humanity and decency and was thus a violation of the Eighth Amendment.[130]

Under the subjective test, the Circuit court applied the deliberate indifference standard.[131] It characterized Hope's punishment on the post as a condition of confinement and not as a punishment triggered by an emergency situation.[132] The court followed the same classification used in *Farmer* where the failure to protect a transsexual inmate from predictable abusive treatment by his peers was assessed as a condition of confinement requiring the deliberate indifference standard.[133] The Eleventh Circuit found that, in line with *Farmer*'s definition of deliberate indifference, Hope proved that the guards were more than simply negligent; the guards disregarded a "substantial risk of serious harm" of Hope's dehydration, sunburn, and pain, by failing to take reasonable measures to abate that risk.[134] *Farmer* emphasized that officials only needed to be aware of the risk of harm, not believe that actual harm would occur.[135] Therefore, the court inferred that the guards were aware of the risks of harm to Hope since the risks were obvious.[136] Furthermore, the court cited the DOJ's warning to the ADOC of the unconstitutional nature of the hitching post as a punishment and also its discovery that guards frequently used the rail for improper punitive purposes.[137] Thus, it ruled that since the ADOC was aware of the substantial risk of harm created by use of the hitching post for prolonged periods of time, the act against Hope was committed with deliberate indifference.[138]

Meanwhile, the Eleventh Circuit pointedly noted that it declined to follow the district court's use of the malice standard in *Austin* as it applied to Hope.[139] The court in *Austin* applied *Whitley's* malice standard when evaluating Hope's claim because, the court reasoned, he initially threatened prison security and triggered an emergency situation, which led to his placement on the post.[140] In contrast, the Eleventh Circuit stated that

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[130] *Id.* (citing Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

[131] *Id.* at 978.

[132] *Id.*

[133] *Id.*

[134] *Id.* (citing Farmer v. Brennan, 511 U.S. 825, 847 (1994)).

[135] *Id.* (citing *Farmer*, 511 U.S. at 842).

[136] *Id.*

[137] *Id.* at 979.

[138] *Id.*

[139] *Id.* at 978.

[140] *Id.* at 979 (citing Austin v. Hopper, 15 F. Supp. 2d 1210, 1255 (M.D. Ala. 1998)).

because Hope was already subdued in leg irons and driven back to the prison after his altercation created a threat to safety, the status of "emergency" was over by the time he was placed on the hitching post.[141] Even though the ADOC claimed that Hope would have been released if he had agreed to return to work, the court noted that Hope never refused to work and that, because the officers transferred him back to the distant facility, it was unlikely he could have returned to the squad had he voiced an interest to return.[142] Therefore, it was unlikely that he was placed or remained on the bar because he continued to threaten prison order.[143] Instead, his placement on the bar represented a condition of confinement.[144]

Finally, the court established a "bright-line" rule for future cases involving prison authorities' use of the hitching post.[145] Because restraining an inmate beyond the need to maintain security was cruel and unusual punishment, the Eleventh Circuit supported *Austin's* ruling in that the policy and practice of using the hitching post as a means of discipline was unconstitutional.[146] The only permissible reason for hitching an inmate to a post would be for non-punitive, emergency situations.[147] The court granted the guards qualified immunity under 42 U.S.C. § 1983, arguing that defendant officials had no fair notice that their actions were unconstitutional prior to the Circuit's creation of this bright-line rule.[148] It posited that other cases did not serve as fair notice because the cases did not have facts that were "materially similar" to Hope's case.[149] The court also stated that no cases had clearly indicated to a reasonable official that use of the hitching post was unconstitutional.[150] Thus, it affirmed the district court's judgment that the guards were not individually liable or financially responsible for their constitutional violations.[151]

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[141] *Id.* at 978 (citing *Austin*, 15 F. Supp. 2d at 1265).
[142] *Id.* at 980.
[143] *Id.*
[144] *Id.* at 978.
[145] *Id.* at 981.
[146] *Id.* at 980-81.
[147] *Id.*
[148] *Id.* at 981.
[149] *Id.*
[150] *Id.* at 981-82 (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
[151] *Id.* at 982.

C. PETITION FOR CERTIORARI

In 2000, Hope filed a petition for writ of certiorari to the Supreme Court, which was granted.[152] In 2002, the Court agreed to consider three issues: (1) whether an inmate was subjected to cruel and unusual punishment when prison guards handcuffed him to a hitching post for disruptive behavior after the inmate was already subdued; (2) whether officials had fair notice that their conduct was unconstitutional even in novel factual circumstances; and (3) whether Alabama prison guards were entitled to qualified immunity under 42 U.S.C. § 1983.[153] The Court granted certiorari in order to determine whether the Court of Appeals' qualified immunity requirement on "materially similar" facts comported with the Supreme Court's ruling in *United States v. Lanier*[154] that prior decisions may give reasonable warning despite notable factual differences.[155]

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

The majority opinion, written by Justice Stevens, held that: (1) Hope was subjected to cruel and unusual punishment in violation of the Eighth Amendment when prison guards cuffed him to a hitching post for disruptive behavior after he had already been subdued; (2) officials can be on notice that their conduct violates established law even in novel factual circumstances; and (3) Alabama prison guards were not entitled to qualified immunity from inmate's claim in light of: (a) binding Eleventh Circuit precedent, (b) ADOC regulation, and (c) DOJ report informing ADOC of the regulation's constitutional infirmity in its use of the hitching post.[156]

1. Attaching Hope to the Hitching Post Under his Alleged Circumstances Violated the Eighth Amendment

The Court first established that when pain was inflicted "totally without penological justification," it was "unnecessary and wanton,"[157] and

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[152] Joint Appendix at 4, *Hope* (No. 01-309).

[153] Hope v. Pelzer, 536 U.S. 730, 730-31 (2002).

[154] 520 U.S. 259 (1997).

[155] *Hope*, 536 U.S. at 736. (citing *Lanier*, 520 U.S. at 269).

[156] *Id.* at 730-31. Justice Stevens delivered the opinion of the Court, joined by Justices O'Connor, Kennedy, Souter, Ginsberg and Breyer. Justice Thomas filed a dissenting opinion and was joined by Chief Justice Rehnquist and Justice Scalia.

[157] *Id.* at 737 (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).

an "unnecessary and wanton infliction of pain" that constituted cruel and unusual punishment—an objective violation of the Eighth Amendment.[158] In particular, if pain was inflicted as a condition of confinement, then the Court would additionally determine whether the action was done with "deliberate indifference" to the inmate's health or safety.[159] In such a case, if there was both an objective violation and the requisite state of mind, the Court would find a constitutional violation.[160] When the risk of harm to the inmate was obvious, a fact finder could infer that the requisite state of mind existed, and conclude that the actor manifested deliberate indifference.[161]

The Court held the guards violated the Eighth Amendment under both objective and subjective standards.[162] Borrowing heavily from the Alabama district court's findings in *Austin*, the Court stated that the guards' violation of the Eighth Amendment was "obvious."[163] Because there was a clear lack of an emergency situation where prison security was threatened, no reason could have justified inflicting pain on Hope by his placement on the bar.[164] First, Hope was already subdued in leg irons and handcuffs after the altercation with the guards and before he was taken back to prison to be shackled to the post.[165] Furthermore, it was unlikely that Hope was transported away from the work squad to prevent further disruptive behavior or to coerce him to work in order to maintain prison security measures.[166] He never actually refused to work and was not likely given the chance to return to the squad considering the great distance he was from the work site.[167] Hope's placement on the post was clearly a "punitive" and "gratuitous" infliction of pain which had no penological purpose and was thus an objective violation of the Eighth Amendment.[168]

Second, his denial of water and bathroom breaks for a seven hour period and his unnecessary exposure to the sun proved that the guards "knowingly subjected him to a substantial risk of harm" and were aware of that harm, which proved deliberate indifference.[169] Relying again on the findings in *Austin*, Justice Stevens noted that an awareness of harmful risk

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[158] *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).

[159] *Id.* at 738 (quoting Hudson v. McMillan, 503 U.S. 1, 8 (1992)).

[160] *Id.*

[161] *Id.* (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.* at 737.

could also be determined by the pattern of treatment inmates generally receive when attached to a hitching post, which *Austin* proved was commonly inhumane.[170] Thus, deliberate indifference in this instance was deducible.[171]

2. Despite its Consistency With Eleventh Circuit Rulings, the Court of Appeals' Requirement that Prior Cases' Facts be "Materially Similar" to Hope's Situation in Order to Give the Defendant Officers Fair Notice of the Law is Inconsistent with Supreme Court Precedent

By deigning it a "rigid gloss" on the qualified immunity standard, the Court criticized the Court of Appeals' requirement that only "materially similar" case facts could provide officers fair notice of unconstitutional behavior.[172] The Court disagreed with the Eleventh Circuit's finding that because Hope's facts were not "materially similar" to other Circuit precedent which held analogous facts unconstitutional, it meant that the officers in Hope's case had no fair notice that their actions violated the Eighth Amendment.[173] In fact, the Eleventh Circuit's requirement contradicted the Supreme Court's ruling in *United States v. Lanier*.[174]

First, as it was stated in *Saucier v. Katz*,[175] the purpose of § 1983's qualified immunity protection was to ensure that officers were on notice that their conduct was unlawful before they were subject to suit.[176] Under § 1983, officers may be shielded from liability for civil damages if their actions did not violate clearly established rights of which a reasonable officer would have known.[177] "Clearly established" rights meant the law was sufficiently clear for a reasonable official to understand that he was violating it.[178] At the same time, it was not necessary for the exact action of the official to have been previously held unlawful in order to provide him fair notice that his act would be considered such.[179] For example, if pre-existing law proved the unlawfulness was apparent, that would be sufficient notice.[180]

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[170] *Id.* at 738 (citing Austin v. Hopper, 15 F. Supp. 2d 1210, 1246-47 (M.D. Ala. 1998)).
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] 533 U.S. 194, 206 (2001).
[176] *Hope*, 536 U.S. at 739.
[177] *Id.* (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
[178] *Id.* (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
[179] *Id.* (citing Mitchell v. Forsyth, 472 U.S. 511, 535 (1985)).
[180] *Id.* (citing *Anderson*, 483 U.S. at 640).

Second, under *United States v. Lanier*, officers have the same right to "fair notice" in § 1983 claims as they do in 18 U.S.C. § 242 claims.[181] *Lanier* established that fair notice existed as long as precedent cases gave reasonable warning that the conduct violated constitutional rights.[182] It did not matter whether there were notable factual distinctions between precedent cases and the case at issue.[183] In that case, the Supreme Court explained that clear notice did not require cases to be "fundamentally similar" in factual character.[184] Therefore, officials can still be on notice if their situation presents "novel factual circumstances."[185]

3. Guards Were Not Entitled to Qualified Immunity Because They Had Fair Notice that Their Use of the Hitching Post Clearly Violated the Eighth Amendment

The Court held that the guards had fair notice that their use of the hitching post in Hope's case violated the Eighth Amendment in three ways: (a) binding Eleventh Circuit precedent that indicated handcuffing an inmate to a post was unconstitutional, (b) the ADOC regulation establishing the circumstances for the post's use, and (c) the DOJ report informing the ADOC of the unconstitutionality of its hitching post practices.

The Court noted that Supreme Court precedent on Eighth Amendment claims already established fair notice to the defendant officers that their conduct was unconstitutional.[186] At the same time, it emphasized that the Eleventh Circuit precedent also provided clear warning—first in *Gates* and then in *Ort*.[187] In *Gates*, the court held that handcuffing inmates to the fence and to cells for long periods of time or forcing them to stand in awkward positions for long periods violated the Eighth Amendment.[188] Even the government's amicus curiae brief stated no reasonable officer could have thought cuffing an inmate to a post was constitutional when cuffing one to a cell or fence was found unconstitutional in *Gates*.[189] In *Ort*, the court found that a denial of a basic human need, such as drinking water, was constitutional if it was necessary to maintain prison security due to an emergency situation, including the security threat of an inmate

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[181] *Id.* at 739-40 (citing United States v. Lanier, 520 U.S. 259, 270-71 (1997)).

[182] *Id.* (citing *Lanier*, 520 U.S. at 269).

[183] *Id.*

[184] *Id.*

[185] *Id.* at 739-40.

[186] *Id.* at 740.

[187] *Id.*

[188] Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974).

[189] *Hope*, 536 U.S. at 742-43.

refusing to work on-site.[190] However, once the coercive measure extended beyond the need to ensure order and safety, it was unconstitutional.[191] It was merely "punishment" without penological justification.[192]

The guards had also operated beyond the framework of the ADOC rules concerning the proper use of the hitching post in two ways.[193] The defendant officers disregarded the ADOC rule of fifteen-minute log-in entries for water and toilet breaks.[194] Moreover, the restraining bar's official function was to coerce inmates to return to work after they were found disruptive to the squad, which could threaten security.[195] The regulation instructed guards to release and allow inmates to join the work squad as soon as they vocalized their willingness to return to work.[196] Because it appeared likely that the guards did not intend to offer Hope an option of conditional release, and that it was common practice to deny it, they seemed aware of their wrongful conduct.[197]

Finally, the DOJ study in 1994 proved that guards in Alabama prisons consistently disregarded the regulations and that the hitching post was used as a punishment for trivial offenses as opposed to a means of restoring order and security as defended by the ADOC.[198] In fact, the DOJ had already notified the ADOC that its regulation was unconstitutional in 1994.[199] Therefore, the Court found that the officers had fair notice.[200]

B. DISSENTING OPINION

Justice Thomas delivered the dissenting opinion and was joined by Justice Scalia.[201] In summary, he criticized the majority ruling on its qualified immunity jurisprudence and its views on the appropriate methods of prison discipline. He also noted that Hope's pleadings were unclear as to which acts the named defendants had actually committed. It was not clear, for example which defendant guard actually handcuffed him to the post.[202]

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[190] *Id.* at 743 (citing Ort v. White, 813 F.2d 318, 325 (11th Cir. 1987)).
[191] *Id.*
[192] *Id.* (citing *Ort*, 813 F.2d at 326).
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.* at 744.
[197] *Id.*
[198] *Id.*
[199] *Id.* at 745.
[200] *Id.* at 745-46.
[201] *Id.* at 748 (Thomas, J., dissenting).
[202] *Id.* at 748-49 (Thomas, J., dissenting).

The dissenting Justices could not reconcile how Hope sued three prison guards for violating his rights while his exact allegations against each guard were vague, especially against McClaran and Pelzer.[203] They argued that Hope never alleged that McClaran and Pelzer participated in the June 7 incident—the primary event effecting the constitutional violation—and thus, it was not clear how the Court determined that these two defendants violated the Eighth Amendment.[204]

The dissent had another major concern. Justice Thomas argued that the unconstitutionality of cuffing an inmate to a restraining bar was not "clearly established."[205] He stated that the Eleventh Circuit requirement that a plaintiff's circumstances and prior cases must share "materially similar" facts in order to warrant officers' fair notice was appropriate.[206] He cited to an unreported case from an Alabama district court that had rejected an inmate's Eighth Amendment claim that his placement on the restraining bar had no penological justification.[207] It was not obvious that guards acted with "deliberate indifference" because the violation was not "obvious," especially in light of how the district court ruling proved the opposite.[208]

Lastly, Justice Thomas argued that: (a) the DOJ notice to the ADOC was not fair notice if the guards did not know about it, (b) the guards were obeying the ADOC regulations, and (c) *Gates*—a Fifth Circuit case, and hence Eleventh Circuit precedent, that held cuffing inmates to cells and fences unconstitutional—did not establish a "bright-line" rule because it was not clear how long the inmates were cuffed in that case nor did it indicate whether water and toilet breaks were offered in that situation.[209]

C. MAJORITY OPINION'S REBUTTAL TO JUSTICE THOMAS' DISSENT

The majority made three points in response to Justice Thomas' dissent.[210] First, it argued that nothing in the decision foreclosed the officers from using other defenses.[211] In granting certiorari, the Court did not take the question about the sufficiency of pleadings, which stated the three named officers who were responsible for the punitive act of shackling

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[203] *Id.* at 749 (Thomas, J., dissenting).
[204] *Id.* at 751 (Thomas, J., dissenting).
[205] *Id.* at 752 (Thomas, J., dissenting).
[206] *Id.* at 754 (Thomas, J., dissenting).
[207] *Id.* at 756 (Thomas, J., dissenting).
[208] *Id.* at 751 (Thomas, J., dissenting).
[209] *Id.* at 758-64 (Thomas, J., dissenting).
[210] *Id.* at 746-48.
[211] *Id.*

alleged by Hope.[212] Second, the Court decided that Hope's punishment was unconstitutional because there was an infliction of pain absent a threat of disorder or a refusal to work, and therefore the infliction had no penological justification.[213] The denial of water and bathroom breaks was an exacerbating factor.[214] Third, the unreported district court opinions cited by the officers do not outweigh the Eleventh Circuit precedent of *Ort* and *Gates*, which are consistent with the Supreme Court cases on Eighth Amendment violations.[215] The Supreme Court applied an objective immunity standard of what a reasonable officer would understand in light of federal judicial precedent.[216]

V. ANALYSIS

A. THE MAJORITY OPINION

1. Why the Court's Use of the Deliberate Indifference Standard in the Eighth Amendment Analysis Represents an Expansion of Prisoners' Rights

Writing for the majority, Justice Stevens first held that the placement and treatment of Hope on the hitching post violated the Eighth Amendment mainly because Hope had already been subdued.[217] Because the majority believed that any emergency need to restrain him ended prior to his attachment to the bar, it ruled that any further inflictions of pain had no penological purpose. Such conduct constituted cruel and unusual punishment under the objective test.[218]

When it came to analyzing the subjective component of Hope's claim, the Court's choice to apply the deliberate indifference standard instead of the malice standard signaled a conscious move by the Court to lower the subjective threshold in finding constitutional violations. Moreover, the decision was delivered by Justice Stevens, a critic of subjective standards in Eighth Amendment cases. In the past, Justice Stevens not only disagreed with *Estelle* and *Wilson's* implementation of the deliberate indifference standard as it applied to conditions of confinement, but adamantly opposed the use of the malice standard.[219] In Stevens' view, the objective

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[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.* at 736-38.
[218] *Id.*
[219] Stevens, in a concurring opinion in *Hudson v. McMillian*, 503 U.S. 1, 12-13 (1992),

component of cruel and unusual punishment was enough to signal a constitutional violation.[220]

Again, historically, when the Court determined an objective violation of the Eighth Amendment existed in a case involving a prison inmate, it would then determine whether the cruel and unusual punishment was simply a condition of his confinement or occurred in response to an emergency situation, so that it could know whether to apply the deliberate indifference or the malice standard. The malice standard was clearly a higher threshold than deliberate indifference.[221] The former asked whether the defendant had used force in good faith to maintain order or maliciously and sadistically to cause harm.[222] In *Whitley*, for example, the defendant officer's shooting of an inmate during a prison riot was held not to violate any constitutional right; the officer was responding to an emergency situation where his obligation to maintain prison safety competed against his duty to prevent harm to an individual.[223] When there was a threat to security, *Whitley* argued that not only should prison administrators and their practices be granted greater deference by the courts, but that the deliberate indifference standard would thwart this capacity.[224] The malice standard would instead address the complexity of emergencies.[225] Justice Stevens joined in the criticism of *Whitley's* heightened threshold and argued that "emergency" situations did not always infer the defendant was in danger or

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stated that the Court's application of the malice standard to determine whether excessive force was used against an inmate was incorrect. He also joined in Justice Marshall's dissent in *Whitley v. Albers*, 475 U.S. 312, 328 (1985), which argued that the majority had erred in its "especially onerous standard," referring to the use of the malice standard in "emergency" situations where prison order or safety was threatened. Marshall explained that the standard was "particularly inappropriate because courts deciding whether to apply it must resolve a preliminary issue of fact that will often be disputed and properly left to the jury."

[220] *Hudson*, 503 U.S. at 12 (Stevens, J., concurring); *Whitley*, 475 U.S. at 328-29 (Marshall, J., dissenting).

[221] The malice standard required the Court to determine whether evidence showed more than a mere dispute over the reasonableness of an actor's use of force. *Whitley*, 475 U.S. at 322.

[222] *Id.* at 320-21.

[223] *Id.* (citing Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)) ("[P]rison administrators are charged with the responsibility of ensuring the safety of the prison staff, administrative personnel, and visitors, as well as the 'obligation to take reasonable measures to guarantee the safety of the inmates themselves.'").

[224] *Id.* ("In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.").

[225] *Id.*

needed to inflict harm on an inmate.[226] In fact, in the *Whitley* case, there was great dispute as to whether emergency status still existed by the time the guard shot the inmate without warning.[227] Other evidence existed that the guard was not in danger.[228] Thus, the *Whitley* dissent found the application of a heightened standard that was merely triggered by a prison disruption to be over-inclusive of situations where no force or harm was necessary.[229]

In assessing *Hope's* facts, like *Whitley*, it is unclear when the emergency terminated because it is unclear how long Hope resisted authority. Hope claims he did not refuse to work before being placed on the bar, but there is also no evidence as to whether guards asked if he was willing to return to the work squad while on the post.[230] The Court infers that this was not an option since Hope was transported a great distance from the work site.[231] Moreover, evidence showed that the hitching post was informally used by guards for disciplinary action, not as a means to contain emergency situations.[232] Therefore, the exact point at which Hope would no longer have been perceived as resistant or disruptive seems open to interpretation.

Depending on how it characterized the state of emergency faced by the guards, the Court could have applied either the deliberate indifference standard or the malice standard.[233] For example, the Court determined that

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[226] *Id.* at 329-30 (Marshall, J., dissenting).

> The full circumstances of the plaintiff's injury, including whether it was inflicted during an attempt to quell a riot and whether there was a reasonable apprehension of danger, should be considered by the factfinder in determining whether that standard is satisfied in a particular case. There is simply no justification for creating a distinct and more onerous burden for the plaintiff . . . merely because the judge believes . . . the injury at issue was caused during a disturbance that 'pose[d] significant risks to the safety of inmates.'"

Id.

[227] *Id.* at 330-31 (Marshall, J., dissenting).

[228] *Id.* at 330 (Marshall, J., dissenting).

[229] *Id.* at 329 (Marshall, J., dissenting).

[230] Hope v. Pelzer, 536 U.S. 730, 736 n.5 (2002) (citing Hope v. Pelzer, 240 F.3d 975, 980 (11th Cir. 2001) ("There is nothing in the record . . . claiming that he refused to work . . . therefore, it is not clear that the solution to his hitching post problem was to ask to return to work.")).

[231] *Id.* (citing *Hope*, 240 F.3d at 980) ("Hope was placed in a car and driven back to Limestone to be cuffed to the hitching post . . . it is improbable that had Hope said, 'I want to go back to work,' a prison guard would have left his post . . . to drive Hope back to the work site.").

[232] *Id.* at 745 ("[T]he DOJ report noted that ADOC's officers consistently failed to comply with the policy of immediately releasing any inmate from the hitching post who agrees to return to work.").

[233] *See supra* notes 112-20 and accompanying text. The court, in *Austin v. Hopper*, 15 F.

the act of placing Hope in leg irons and handcuffs after the fight indicated he had been subdued.[234] Thus, when he was placed on the bar, no threat to security existed and any questionable treatment from that point on would be a condition of confinement demanding the deliberate indifference standard.[235] By contrast, *Austin v. Hopper*, which ruled that use of the hitching post as a disciplinary measure was unconstitutional, considered the possibility that Hope's incident was one of emergency up through the time that he was placed on the restraining bar.[236] The district court in *Austin* applied the malice standard because it believed Hope may have continued to be a threat to security for being disruptive to the work squad.[237] Even with this heightened standard, the *Austin* court held the guards had maliciously caused the plaintiff harm because they mistreated and humiliated him *while* he was on the bar, not because they improperly chose to place him on it from the start.[238] Therefore, even if the majority in *Hope* had applied the heightened standard of malice and had treated the entire incident as one of emergency, which could have been a possible interpretation, it would not have necessarily precluded the Court's determination that Hope's rights were violated. Thus, it appeared that the *Hope* court wanted to find the guards' acts unconstitutional under a test with a lower threshold.

Most likely, the Court intended to compel prison officials to choose more cautiously when deciding whether their actions against inmates were strictly punitive or necessary for good cause. Not only would this restrain the *Whitley* and *Hudson* rulings that highlighted court deference to administrative discretion, but also would temper lower federal court rulings that promoted the same principles.[239] Eleventh Circuit cases like *Williams*

Supp. 2d 1210, 1261-65 (M.D. Ala. 1998), explained why it analyzed the guards' cuffing of Hope to the hitching post under both the deliberate indifference standard and the malice standard.

[234] *Hope*, 536 U.S. at 738 ("Any safety concerns had long since abated . . . because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison.").

[235] *Id.*

[236] *See Austin*, 15 F. Supp. 2d at 1263-65 (applying the malice standard as it was applied to situations threatening prison order and safety in *Whitley*).

[237] *Id.* at 1264-65. The *Austin* court noted that the one instance in the record that indicated an emergency situation justifying the use of force was Hope's fight with six other corrections officers which preceded his being handcuffed to the hitching post. *Id.*

[238] *Id.* at 1265. The court found that the guards' act of giving water to the dogs while allowing Hope to suffer from thirst and the lack of evidence that they had any intention of allowing Hope to return to work indicated malicious and sadistic intent. *Id.*

[239] *See* Hudson v. McMillian, 503 U.S. 1, 6 (1992) (arguing that prison administrators should be given deference in executing practices that in their judgment are necessary to

v. Burton granted tremendous deference to prison authorities in their practical responses to perceived threats against internal security.[240] In *Williams*, after an inmate exhibited severely threatening behavior, he was placed in a four-point restraint for twenty-eight hours even though the dissent argued twenty-eight hours likely extended beyond the point at which the inmate was dangerous.[241] On one hand, *Williams* asserted that any continued use of harmful force after an inmate halted resistance to authority violated the Eighth Amendment.[242] On the other hand, it ruled that the point at which restraint is no longer necessary comes under the good judgment of prison officials.[243] Under *Williams's* logic, an official or administration could greatly expand his or its interpretation on which situations are "emergencies" or justify force. Now, after *Hope's* ruling, prison officials have more incentive to accurately assess genuine emergency situations if any force against one of the inmates will result in harm.

Hope's more controlled definition of an emergency situation tempers both *Whitley* and *Hudson's* extension of court deference to the "good judgment" of prison administrators as well as other lower court decisions like *Williams*.[244] In the past, Justice Stevens' interest in removing all subjective components from Eighth Amendment analyses reflected his interest in the Court's duty and capacity to police constitutional violators within the state prison system.[245] *Hope* did not remove those components. Instead, by flexibly interpreting the facts in order to apply a lower subjective threshold, *Hope* inevitably grants the court more control over prisons and gives less deference to the discretion of state prison administrations.

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maintain prison security); Whitley v. Albers, 475 U.S. 312, 322 (1986) (stating that neither judge nor jury should substitute their judgment as to whether force was necessary when confronted with a prison threat for that of an official who made a "considered" choice).

[240] Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991).

[241] *Id.* at 1574, 1577-78.

[242] *Id.* at 1576 ("The basic legal principle is that once the necessity for the application of force ceases . . . any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation.").

[243] *Id.* ("How long restraint may be continued calls for the exercise of good judgment on the part of prison officials.").

[244] *See infra* note 247 and accompanying text.

[245] The subjective component to the Eighth Amendment analysis thwarted inmates' attempts to find poor prison conditions or mistreatment unconstitutional. *See* JOHN A. FLITER, PRISONER'S RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 172, 180 (2001).

2. The Guards Had No Fair Notice that Their Use of the Hitching Post Clearly Violated the Eighth Amendment Based on Eleventh Circuit Precedent and the DOJ Report to the ADOC

The Majority argued that the guards had fair notice based on clearly established rights through three means: (1) Eleventh Circuit precedent; (2) ADOC Regulation; and (3) the DOJ report informing the ADOC that its use of the hitching post was unconstitutional.[246]

a. Eleventh Circuit Precedent Did Not Provide Fair Notice

Justice Stevens' assertion that Supreme Court precedent provided fair warning to the defendants of their unconstitutional conduct is well supported.[247] According to any of the Court's earlier rulings, the guards would have had no defense. Even under *Whitley's* emergency threshold, Hope's denial of water and toilet breaks and lack of evidence that he could return to work to end the "emergency" situation indicated unconstitutional conduct by the guards.

However, Stevens' inclusion of Eleventh Circuit precedent as providing fair notice for the officers is less convincing. The Court first points to *Gates*, a Fifth Circuit case within Eleventh Circuit precedent, which ruled that it was unconstitutional to cuff inmates to cells and fences for long periods of time.[248] The Court refers secondly to *Ort*, which held that an official may use drastic means, including denying an inmate drinking water or another basic human need, in order to prevent threats to safety and order.[249] *Ort*, however, was careful to warn that harm inflicted against an inmate for a past action as retaliation or using more force than was reasonably necessary would violate the Eighth Amendment.[250] However, it is the Circuit's more recent decision in *Williams* that mars the clarity of the law, or at least the parameters to which officials should adhere when faced with threats to prison order. In *Williams*, the court granted great deference to the prison administration in its severe use of a four-point restraint on an inmate for twenty eight hours.[251] *Williams* stated that, in

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[246] Hope v. Pelzer, 536 U.S. 730 (2002).

[247] Under the deliberate indifference standard set out by *Estelle* or *Farmer*, the guards' acts violated the Eighth Amendment. *See* Farmer v. Brennan, 511 U.S. 825, 827 (1994); Estelle v. Gamble, 429 U.S. 97, 104 (1976). Under *Whitley* or *Hudson's* malice standard, their actions were also unconstitutional. *See* Hudson v. McMillian, 503 U.S. 1, 4-10 (1992); Whitley v. Albers, 475 U.S. 475, 320-21 (1986).

[248] Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974).

[249] Ort v. White, 813 F.2d 318, 325 (11th Cir. 1987).

[250] *Id.* at 325-26.

[251] Williams v. Burton, 943 F.2d 1572 (11th Cir. 1991).

emergency situations, the court would rely on the officers' "good judgment" as to when that threat had ended.[252] Therefore, in applying this legal precedent, the officers in *Hope* could have extended their interpretation on the length of time Hope was a threat under *Williams*' "good judgment" language. This flexibility would allow the guards to inflict allegedly "necessary" harm on Hope even if outside observers considered it unnecessary. For example, the dissenting judge in *Williams* argued that the twenty-eight hour restraint seemed to go beyond the logical length of time necessary to subdue an inmate who exhibited calmness at earlier points before his release.[253] However, because the majority in *Williams* granted deference to the good judgment of the officers as to the necessary length of restraint, outside judgment of what seemed reasonable proved irrelevant.[254] Therefore, Eleventh Circuit precedent did not seem to provide fair notice for the guards in *Hope*. A reasonable officer in *Hope* could have believed he was not violating the inmate's rights if he had the discretion to restrain an inmate under the *Williams* logic. He could merely defend any prisoner's length of time on a hitching post as appropriate to maintain security in *his* "good judgment."

Fortunately, no matter which Circuit decision may have extended the discretionary authority of prison administrators, the superiority of Supreme Court precedent already provided fair notice to the guards that their acts were repugnant to Eighth Amendment principles. In sum, the defendants in *Hope* ultimately had no defense; they had adequate case law to deduce that their actions violated the Constitution.

b. DOJ Report to the ADOC Did Not Provide Fair Notice

There is also no support or explanation for the Majority's conclusion that a 1994 DOJ report which investigated the common misuse of the hitching post and declared the practice unconstitutional would have provided "fair notice" to the guards. Justice Thomas levied this criticism in his dissent, but it went unanswered by Stevens. In *Hope*, the court noted that there was no evidence the ADOC communicated the report to anyone.[255] Moreover, there was no indication that the department altered its internal policy as a response to the DOJ report so that officers could have known about the DOJ's statement.[256] "Fair notice" is defined as "clearly

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[252] *Id.* at 1576.

[253] *Id.* at 1577 (Pittman, J., dissenting).

[254] *Id.* (Pittman, J., dissenting).

[255] Hope v. Pelzer, 536 U.S. 730, 745 (2002) ("[T]here is nothing in the record indicating the DOJ's views were communicated to respondents.").

[256] Austin v. Hopper, 15 F. Supp. 2d 1210, 1249 (M.D. Ala. 1998) (showing that the

established law" that would sufficiently inform an officer that his conduct was unconstitutional regardless of whether or not that exact conduct was previously found unlawful.[257] Therefore, a DOJ report would not provide officers with "fair notice" because an investigational report is unequal to prior case law that an officer is under a duty to know. As the Supreme Court stated when explaining the requirements of claiming qualified immunity under §1983 in *Harlow v. Fitzgerald*, a "reasonably competent public official should know the law governing his conduct."[258] Thus, the Court was justified in ruling that the officers in *Hope* should have been aware of their constitutional violations based on earlier Supreme Court decisions regarding use of force, but there is no basis to claim non-legal forms of notice were necessarily "fair."

The Majority's inclusion of the DOJ memorandum within its rubric of fair notice appeared to set a precedent for state prison administrations that federal warnings on unconstitutional policies would still establish individual liability for its officers, regardless of whether the administration chose to modify its actual prison practices. This arrangement would both compel state administrations to inform their officers of the federal branches' constitutional interpretations of the prison's policies and encourage state officers to comply with any official warning from such branches castigating state-sanctioned policies or practices as unconstitutional. Under *Hope*, compliance would be the only way for those officers to completely avert individual liability under § 1983 for conduct found unconstitutional either by precedent law or by the federal government—in this case the Executive Branch. In this way, the Court clearly forced the state's executive and legislative branches to heed the federal government's constitutional criticisms of their state management. The issue then is whether or not this violated the "separation of powers" principle.

3. The Federalism Question: Did the Court in Hope Overstep Its Judicial Bounds?

The Supreme Court Justices have continually disagreed on the level of judicial intervention allowed in state prison management. *Rhodes v.*

DOC had disagreed with the DOJ's finding that its use of the hitching post was unconstitutional and argued it was a "valid means of maintaining security"); *id.* at 1262 ("There is no evidence in the record to show that after its receipt of the Department of Justice's letters the DOC interviewed or monitored officers . . . to determine whether violations of [the hitching post regulation] were taking place.").

[257] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[258] 457 U.S. at 819.

Chapman underscored this tension when it held that the "double-celling" of prisoners was a discretionary decision of prison administration.[259] The policy was not unconstitutional unless it violated a basic human need, which would then legitimatize judicial protection.[260] Otherwise, the Court argued that courts should not intervene in prison management—a jurisdiction of the state legislatures—and should never assume that the state's executive and legislative branches are "insensitive" to constitutional requirements.[261] While the Court recognized that the courts were "ill-equipped" to take charge of prison reform needs, it assured that it would intervene when the Constitution had been violated.[262] Therefore, on one hand *Hope's* judicial directive to halt the use of the hitching post did not invade the state's administrative or legislative pale.[263] There was sufficient evidence that the restraining bar in Alabama's prison system was used or consistently misused in a way that deprived inmates of basic human needs, such as water, toilet breaks or protection from exposure.[264] There was also evidence that it was frequently used by guards to retaliate against prisoners for past offenses instead of for "emergency situations," constituting cruel and unusual punishment due to its lack of penological purpose.[265] Unlike *Rhodes'* lack of factual support that double-celling proved cruel and unusual or deprived inmates of basic human needs, *Hope* had ample support from another district court case, testimony from the ADOC Commissioner, and the investigational findings of the DOJ that the hitching post invited constitutional violations.[266]

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[259] 452 U.S. 337, 349 (1981) ("[T]hese considerations . . . are weighed by the legislature and prison administration rather than a court.").

[260] *Id.* at 348.

[261] *Id.* at 352.

[262] *Id.* at 351-52 (citing Procunier v. Martinez, 416 U.S. 396, 404-05 (1974)).

[263] Because the Constitution does not spell out specifically the proper relationship between the three branches of government or the relationship between federal and state authority, there is no "compelling" argument against judicial intervention if constitutional rights are in fact being violated. Powers and responsibilities of the branches overlap. FLITER, *supra* note 245, at 12. "In prison reform, the actions and omissions of legislative bodies and executive agencies have created the impetus for judicial intervention . . . appeals to federalism and states' rights are not a sufficient argument against federal judicial intervention." *Id.*

[264] Austin v. Hopper, 15 F. Supp. 2d 1210, 1247 (M.D. Ala. 1998) ("Inmates were not given water while shackled to the hitching post, and were denied access to toilet facilities while shackled . . . certain corrections officers . . . taunted [inmates] while they were clearly suffering from dehydration or had been forced to defecate or urinate in their clothes.").

[265] *Id.* at 1249-50.

[266] In *Rhodes*, the Court found that there was no factual evidence that double-celling inflicted either unnecessary or wanton pain or was a punishment grossly disproportionate to the severity of the inmates' crimes, for example, double-celling did not deprive prisoners of

On the other hand, *Hope's* inclusion of the DOJ report as sufficient "fair notice" to officers that their conduct was unconstitutional pushes the limits of judicial authority in prison management in terms of its effects. It was unnecessary for *Hope* to rule this way in order to find individual liability with the officers as they had fair notice of their violations through prior Supreme Court decisions. The only purpose of this ruling would then be to compel state administrations to acknowledge the federal government's constitutional criticisms of their policies and practices and to inform their officers who would fear individual liability for conduct that disregarded federal warnings. Therefore, even before the judiciary could rule at law whether certain conduct was in fact unconstitutional, an officer would have to comply with federal criticism against certain state-sanctioned policies in anticipation that such criticism may be found legitimate by the courts later, subjecting him to individual liability under § 1983.

While the *Hope* Court may have exceeded its judicial limits in this one respect, it cannot be overlooked that Alabama's state prison system has been the battleground between the federal judiciary and the state's executive and legislative branches before. This is not the first time the federal courts have vigorously criticized the Alabama state prison system for egregious constitutional violations for its inhumane treatment of its prisoners and for frustrating judicial orders to correct those violations.[267] Most notably, in district court cases such as *Pugh v. Locke*[268] and *Newman v. Alabama*,[269] the judiciary imposed specific parameters for the state system to instill regarding overcrowding, segregation and isolation, mental health care, protection from violence, living conditions and food service among others.[270] In the end, Alabama's legislature was able to avoid total

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basic human needs. *Rhodes*, 452 U.S. at 348. In contrast, the *Hope* court had the benefit of factual support from the evidentiary records in *Austin* and the DOJ reports. Hope v. Pelzer, 536 U.S. 730 (2002). Also, in *Austin*, the ADOC Commissioner testified that some of the state-sanctioned premises for cuffing an inmate to the post that were non-emergency situations were improper. 15 F. Supp. 2d at 1240.

[267] Newman v. Alabama, 466 F. Supp. 628, 635-36 (M.D. Ala. 1979) ("The history of federal litigation in Alabama is replete with instances of state officials who could have chosen one of any number of courses to alleviate unconstitutional conditions of which they were fully aware, and who chose instead to do nothing."). *See also* Consuelo A. Vasquez, *Prometheus Rebound by the Devolving Standards of Decency: The Resurrection of the Chain Gang*, 11 ST. JOHN'S J. LEGAL COMMENT. 221, 224 nn.68-72 (1995).

[268] 406 F. Supp. 318, 331-37 (M.D. Ala. 1976).

[269] 349 F. Supp. 278 286-88 (M.D. Ala. 1972). *Newman* ordered the state to comply with medical care guidelines for prisoners designed by the court. *Id.* Five years later, in *Newman v. Alabama*, 559 F.2d 283, 289 (5th Cir. 1977), the court held that the Human Rights Committee appointed earlier intruded on the ADOC's discretion to execute and implement prison policies and practices.

[270] Pugh v. Locke, 406 F. Supp. 318, 328-36 (1976). The *Pugh* court appointed a Human

compliance by excusing their failures through claims of limited funding.[271] Although these court orders definitely intruded upon state administration, it appeared that the state's executive and legislative branches had little incentive to ensure constitutional conditions for prisoners otherwise. As Justice Brennan would later recount in *Rhodes*, "public apathy and the political powerlessness of inmates have contributed to the pervasive neglect of the prisons."[272] In truth, when Alabama's executive and legislative branches failed in their duty to protect the inmates, it seemed there was little choice but to protect prisoner rights through judicial intervention.[273] In *Hope*'s case, the state administration's total disregard of a 1994 warning from the Executive Branch, regarding a specific prison practice, could have rekindled the judiciary's suspicions of Alabama's chronic failure to uphold constitutional practices for its prisons. Thus, taking all the facts in totality, perhaps the judiciary did not overstep its bounds if this was the only way to institute a check on the delinquent administration of prisons by the other branches.[274]

VI. CONCLUSION

In sum, *Hope v. Pelzer* held that: (1) Hope was subjected to cruel and unusual punishment in violation of the Eighth Amendment when prison guards cuffed him to a hitching post for disruptive behavior after he was already subdued, (2) officials can still be on notice that their conduct violates established law even in novel factual circumstances, and (3) the Alabama prison guards in this case were not entitled to qualified immunity from inmate's claim in light of (a) binding Eleventh Circuit precedent, (b)

Rights Committee to implement "Minimum Constitutional Standards for Inmates of the Alabama Penal System" and ensure compliance by the state administration to prevent unconstitutional prison conditions or inmate mistreatment. This case exhibited the federal court's active intervention in an area typically reserved for the state legislative and executive powers with its detailed provisions on *how* the state was to preserve constitutional prison conditions.

[271] *Newman*, 466 F. Supp. at 629-30 (arguing that the failure of Alabama's Board of Corrections to remedy the "conditions of confinement" so as not to violate the Eighth Amendment in compliance with federal court order could not legally be excused by the state legislature's failure to adequately fund these court-ordered improvements).

[272] Rhodes v. Chapman, 452 U.S. 337, 358 (1981).

[273] *Newman*, 466 F. Supp. at 635-36

> There can be no doubt that the paramount duty of the federal judiciary is to uphold the law . . . when a state fails to comply with the Constitution, the federal courts are compelled to enforce it. The habit that some states have fallen into of ignoring their responsibilities until they are faced with a federal court order is by now an all too well-known syndrome.

Id.

[274] *Id.*

the ADOC regulation on hitching posts, and (c) the DOJ report informing the ADOC that its hitching post regulation was constitutionally infirm.[275]

The Court's decision to apply the deliberate indifference standard in this case signifies its attempt to narrow the application of the malice standard by scrutinizing more critically the point at which an emergency situation terminates and an inquiry into a lower threshold of deliberate indifference begins. Ultimately, this increased scrutiny results in a higher capacity for judicial intervention and less discretionary authority from state prison staff. Instead, the court—and not merely the officers' good judgment—determines when a threat to security has ended and when the use of force or an infliction of pain becomes punitive, excessive and cruel. *Hope* also expanded the sources of "fair notice" in its inclusion of the DOJ warning to the ADOC of the prison's unconstitutional punishments so that officers would be more accountable, and even financially responsible, for violating constitutional rights.

In sum, *Hope* is a decision that moves the Court in the direction of increased judicial intervention in state prison policies and practices. However, such intervention may be warranted when a state such as Alabama has continuously allowed its executive and legislative branches to neglect the constitutional rights of it inmates.[276] As Justice Brennan reminds the *Rhodes* Court of the critical role the judiciary has played in reforming inhumane prison conditions, "judicial intervention is *indispensable* if constitutional dictates . . . are to be observed in the prisons."[277]

Alison Chin

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[275] *Hope,* 536 U.S. 730.

[276] FLITER, *supra* note 245, at 14 ("Prisoners, probably more so than any other minority group in society, need to have their rights protected by the courts, because it is not in the political interests of members of Congress or state legislatures to champion the rights of convicted person.").

[277] *Rhodes*, 452 U.S. at 354 (Brennan, J., concurring).