dividual offender but by impressing upon, and inculcating within, the public as a whole the moral values of the penal system.[98] But a consistent concern was that if the punishment was too cruel, it might have the opposite effect.[99] Benjamin Rush, who helped spur the creation of the modern American penal system, wrote in 1787 that seeing criminals being cruelly punished increases the propensity for crime among the public by destroying human sympathy and producing a "familiarity" with violence.[100] Rather than creating respect for the law and its values, cruel spectacles made the public pity the offender; and "[w]hile we pity, we secretly condemn the law which inflicts the punishment — hence arises a want of respect for laws in general."[101] The argument in *Panetti* makes sense in this anachronistic context, but not in the context of modern deterrence, which, as the Court has defined it, is intended to affect the decisionmaking of the potential criminal, rather than to instill the values of the law in the general population.

The Court's incoherent treatment of these theories of punishment does not affect the validity of *Panetti*'s conclusion, which rests comfortably on another reason given by the Court: the execution of the presently incompetent "simply offends humanity."[102] The uncontroverted fact that the such executions have been "branded 'savage and inhuman'"[103] since the time of Blackstone, and that the practice is now banned in every state,[104] speaks powerfully to the proposition that executing a prisoner such as Panetti would be improper under the Eighth Amendment — no less than the execution of the prisoner in *Ford*. But the Supreme Court's repeated inability to square this result with its prior understandings of the penological purposes of the death penalty is disturbing in its own right. If, under the treatment of retribution and deterrence that the Court has generally accepted, there is no consistent or coherent way to differentiate between the execution of the competent and the execution of the presently incompetent, then it may be that our system of capital punishment, taken to its logical conclusion, will necessarily produce results offensive to our humanity.

3. Fourth Amendment — Reasonableness of Forcible Seizure. — The Supreme Court has long struggled to determine the circumstances

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[98] *See id.* at 15; Witte & Arthur, *supra* note 89, at 438.

[99] *See* ROSCOE, *supra* note 96, at 16–17.

[100] BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENT UPON CRIMINALS AND UPON SOCIETY 6–9 (1787), *reprinted in* REFORM OF CRIMINAL LAW IN PENNSYLVANIA, *supra* note 96.

[101] *Id.* at 7.

[102] *Panetti*, 127 S. Ct. at 2861 (quoting Ford v. Wainwright, 477 U.S. 399, 407 (1986)) (internal quotation mark omitted).

[103] *Ford*, 477 U.S. at 406 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *24–25).

[104] *See id.* at 408 & n.2.

under which public officers should be protected from civil liability.[1] In 2001, *Saucier v. Katz*[2] established a two-pronged test for resolving such qualified immunity claims. In the first step, a court asks if, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right."[3] Only if the plaintiff establishes a constitutional violation does a court then look to whether the officer is entitled to qualified immunity, determining "whether, at the time of the incident, every objectively reasonable [officer] would have realized the acts violated already clearly established federal law."[4] Last Term, in *Scott v. Harris*,[5] the Supreme Court held that an officer's use of deadly force to terminate a car chase was not a violation of the suspect's Fourth Amendment rights and thus did not satisfy the first prong of the *Saucier* test. The Court's opinion rested on an unsatisfying constitutional holding, the result of its adherence to the problematic *Saucier* decision. A better approach would have been for the Court to decline to apply the *Saucier* standard in the prescribed sequence and instead to decide the case on qualified immunity grounds alone.

On March 29, 2001, a county police officer observed Victor Harris's vehicle speeding on a Georgia highway.[6] The officer pursued Harris and flashed his police lights, but Harris refused to slow down.[7] Other officers joined the chase, following Harris as he sped along a two-lane road, crossed double yellow lines in order to pass vehicles, and ran red lights.[8] Ten miles into the chase, Deputy Timothy Scott attempted to terminate the pursuit by striking the rear of the fleeing vehicle with his bumper.[9] The maneuver caused Harris to lose control

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[1] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

[2] 533 U.S. 194 (2001).

[3] *Id.* at 201.

[4] Garrett v. Athens-Clarke County, 378 F.3d 1274, 1278–79 (11th Cir. 2004) (citing *Saucier*, 533 U.S. at 201–02). The *Saucier* Court noted that "[i]n a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense *must be considered in proper sequence*." *Saucier*, 533 U.S. at 200 (emphasis added).

[5] 127 S. Ct. 1769 (2007).

[6] Harris v. Coweta County, No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at *1 (N.D. Ga. Sept. 25, 2003). Harris was traveling at 73 miles per hour in a 55 miles-per-hour zone. *Id.*

[7] *Id.* Harris refused to pull over in part to avoid an impound fee for his car. *Id.*

[8] Harris v. Coweta County, 433 F.3d 807, 810 (11th Cir. 2005).

[9] *Harris*, 127 S. Ct. at 1773. Scott originally intended to employ a Precision Intervention Technique (PIT), a maneuver designed to safely halt a fleeing motorist by initiating contact that causes the vehicle to spin to a stop. However, Scott determined that he was unable to perform the PIT maneuver safely due to the high speed of the vehicles. *Harris*, 433 F.3d at 810–11.

of his car, which ran off the roadway and crashed, rendering Harris a quadriplegic.[10]

Harris sued Scott under 42 U.S.C. § 1983,[11] alleging, inter alia, that Scott had "violated his Fourth Amendment rights by using excessive force to stop his vehicle."[12] Scott moved for summary judgment, arguing that there had been no constitutional violation because his actions were reasonable given the danger posed by Harris.[13] The District Court for the Northern District of Georgia denied Scott's motion.[14] Recognizing that a seizure had occurred,[15] the court noted Harris's argument that the use of force was excessive given the relative insignificance of the underlying traffic violation and the controlled manner in which he had operated his vehicle during the chase,[16] and concluded that "a reasonable jury could find, under Harris's version of the facts, that Scott's use of force was unconstitutional because it was not an objectively reasonable use of force."[17]

On interlocutory appeal, the Eleventh Circuit affirmed the denial of summary judgment.[18] Taking the facts in the light most favorable to the plaintiff,[19] the court determined that a reasonable jury might find that Scott had unreasonably employed "deadly force"[20] under *Tennessee v. Garner*.[21] Since the alleged use of force "would violate

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[10] *Harris*, 2003 WL 25419527, at *2.

[11] Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (2000).

[12] *Harris*, 2003 WL 25419527, at *4.

[13] *Id.* Scott also argued that he was entitled to qualified immunity. *Id.* at *6.

[14] *Id.* at *12.

[15] The District Court found that the circumstances satisfied the test set forth by *Brower v. County of Inyo*, 489 U.S. 593 (1989), which held that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Harris*, 2003 WL 25419527, at *4 (quoting *Brower*, 489 U.S. at 597 (emphasis omitted)) (internal quotation marks omitted).

[16] *Harris*, 2003 WL 25419527, at *4–5.

[17] *Id.* at *4. The court found that, with regard to Scott's qualified immunity defense, room for disagreement over material issues of fact necessitated submission to a jury. *Id.* at *6.

[18] Harris v. Coweta County, 433 F.3d 807, 816, 821 (11th Cir. 2005).

[19] For purposes of the appeal, the Eleventh Circuit accepted Harris's account of the facts:

> Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians . . . . Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

Id. at 815–16 (citations omitted).

[20] *See id.* at 813–15.

[21] 471 U.S. 1 (1985). The Eleventh Circuit cited *Garner* for the proposition that officers may not use deadly force to secure a fleeing suspect "unless it is necessary to prevent the escape *and*

Harris'[s] constitutional right to be free from excessive force during a seizure[,] . . . a reasonable jury could find that Scott violated Harris'[s] Fourth Amendment rights."[22] Applying the second prong of *Saucier*, the court determined that at the time of the incident, "the law was clearly established that a seizure must be reasonable under the circumstances . . . and that deadly force cannot be used in the absence of the *Garner* preconditions," which had not been met.[23] Accordingly, the court upheld the denial of Scott's summary judgment motion.[24]

The Supreme Court reversed, holding that Scott was entitled to summary judgment.[25] Writing for the Court, Justice Scalia[26] first addressed the threshold inquiry under *Saucier*: "[W]hether Deputy Scott's actions violated the Fourth Amendment."[27] Courts hearing motions for summary judgment are obliged to view the facts in the light most favorable to the non-movant, a standard that generally means adopting the plaintiff's version of the events.[28] However, in this case the record included a videotape that captured the contested events.[29] According to the majority, the videotape clearly contradicted Harris's account of his flight as cautious and controlled, showing that the plaintiff had in fact led police on a high-speed chase that endangered officers and bystanders alike.[30] Since Harris's narrative was thoroughly discredited by the record, no "'genuine' dispute" existed as to the underlying facts,[31] and "no reasonable jury could have believed him."[32] Accordingly, the Court found that the lower courts should not

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the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Harris*, 433 F.3d at 813 (quoting *Garner*, 471 U.S. at 3) (internal quotation marks omitted).

[22] *Harris*, 433 F.3d at 816.

[23] *Id.* at 818–19.

[24] *Id.* at 821. Scott's motion for rehearing *en banc* was denied. Harris v. Fenninger, 175 Fed. App'x 328 (11th Cir. 2006) (table).

[25] *Harris*, 127 S. Ct. at 1779.

[26] Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Ginsburg, Breyer, and Alito.

[27] *Harris*, 127 S. Ct. at 1774.

[28] *See id.* at 1774–75.

[29] *Id.* at 1775. The Court made the video available online at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.

[30] *Id.* at 1775–76 ("Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.").

[31] *Id.* at 1776 (quoting FED. R. CIV. P. 56(c)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986)) (internal quotation marks omitted).

[32] *Id.*

have adopted Harris's version of the events and instead should have accepted the facts as they were presented on the videotape.[33]

Having determined the appropriate treatment of the contested facts, the Court turned to whether Scott's use of force was "objective[ly] reasonable[]" under the Fourth Amendment.[34] In considering the manner in which the seizure was conducted, the Court sought to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[35] After noting the important governmental interest in protecting public safety, the Court found itself in the difficult position of having to weigh the risk of harm that Harris posed to an uncertain number of bystanders against the more serious risk that Scott's actions posed to Harris.[36] At an impasse, the Court added "relative culpability" as an additional factor to be weighed.[37] Contrasting Harris, "who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight," with the innocent bystanders who might have been harmed had the chase continued, the Court concluded that "it was reasonable for Scott to take the action that he did."[38]

The Court continued by rejecting Harris's assertion that Scott's actions were unreasonable given that the police could have protected all the parties by simply halting their pursuit.[39] First, there would have been no way for the police to convey to Harris with any certainty that the chase was off, and therefore he might have continued to drive recklessly even in the absence of pursuers.[40] Second, adopting such a standard would create perverse incentives, encouraging fleeing motorists to drive recklessly so that the police would be forced to let them escape.[41] Instead, the Court elected to lay down what it considered "a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the flee-

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[33] *Id.*

[34] *Id.* (quoting Graham v. Connor, 490 U.S. 386, 388 (1989)). The Court rejected Harris's suggestion that it look to the specific preconditions that had legitimized the use of "deadly force" in *Garner*, as the Eleventh Circuit had done. "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation." *Id.* at 1777 (internal citation omitted).

[35] *Id.* at 1778 (quoting United States v. Place, 462 U.S. 696, 703 (1983)) (internal quotation mark omitted).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See id.* at 1778–79.

[40] *Id.* at 1779.

[41] *Id.*

ing motorist at risk of serious injury or death."[42] Having determined that Harris's constitutional rights were not violated, the Court held that Scott was entitled to summary judgment without evaluating his claim of qualified immunity.[43]

Justice Ginsburg concurred, writing separately in order to underscore two points. First, she emphasized that the Court's decision did not articulate a mechanical rule for determining the reasonableness of police action in response to fleeing suspects, but rather prescribed a situation-specific inquiry.[44] Second, she disputed the position taken by Justice Breyer in concurrence and argued that it was appropriate for the Court to address the constitutional question without reconsidering its decision in *Saucier*.[45]

Justice Breyer also wrote a concurring opinion in which he argued that the Court should overrule *Saucier*'s requirement that "lower courts must first decide the 'constitutional question' before they turn to the 'qualified immunity question.'"[46] Justice Breyer pointed out that *Saucier*'s "fixed order-of-battle rule" led to unconsidered constitutional precedent, had garnered widespread opposition, and violated the fundamental mandate that courts not rule on matters of constitutionality unless such issues are unavoidable.[47] He also "disagree[d] with the Court insofar as it articulate[d] a *per se* rule," finding the Court's standard to be "too absolute" and agreeing instead with Justice Ginsburg that the relevant determination should be fact-specific.[48]

Justice Stevens dissented, arguing that the recording did not conclusively demonstrate that Harris's flight had endangered bystanders.[49] Reasonable jurors might interpret the videotape as indicating that Harris had remained in control of his vehicle at all times, that motorists had been effectively warned of the danger by police efforts, and that, accordingly, the level of force used by Scott had not been objectively reasonable.[50] Justice Stevens further argued that *Garner* established "a threshold under which the use of deadly force would be considered constitutionally unreasonable,"[51] and that it was the

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[42] *Id.*

[43] *See id.*

[44] *Id.* (Ginsburg, J., concurring).

[45] *See id.* at 1779–80.

[46] *Id.* at 1780 (Breyer, J., concurring) (citing Saucier v. Katz, 533 U.S. 194, 200 (2001)).

[47] *See id.*

[48] *Id.* at 1781.

[49] *Id.* at 1781 (Stevens, J., dissenting). Justice Stevens argued that "the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue." *Id.*; *see also id.* at 1782–83.

[50] *See id.* at 1782–84.

[51] *Id.* at 1784. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to

jury's responsibility to make a factual determination as to whether the relevant events reached that level.[52] Justice Stevens concluded by criticizing the majority's "*per se* rule," which he claimed abrogated the flexible, case-by-case approach conventionally used by the Court for determining the reasonableness of alleged Fourth Amendment violations.[53]

In *Harris*, the Court followed the *Saucier* order of inquiry in deciding first whether there was a constitutional violation instead of whether the officer was entitled to qualified immunity. While this analysis led to the correct result, the Court needlessly created a problematic and uncertain precedent concerning the use of force and Fourth Amendment seizures, and also further insulated the troubling *Saucier* decision from reconsideration. A better approach, suggested by Justice Breyer's concurrence, would have been for the Court to decline to follow the *Saucier* test and instead decide the case on qualified immunity grounds. Since there was no clearly established law on the use of force during police chases, Scott did not have adequate notice that his actions were potentially in violation of Harris's constitutional rights. Therefore, Scott was entitled to summary judgment on those grounds.

The *Harris* Court concluded its opinion by issuing what it explicitly termed a "rule": "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[54] This rule raises several concerns. First, as alluded to by the concurrences,[55] it is internally inconsistent with the factual inquiry and balancing of interests undertaken earlier in the majority's opinion.[56] Lower courts seeking to apply *Harris* will lack guidance as to whether to conduct a comprehensive factual inquiry or to merely apply what Justice Stevens critically referred to in dissent as a "*per se* rule that presumes its own version of the facts."[57] Second, the rule itself is flawed, as it ignores several factors relevant to determining the reasonableness of a seizure — most glaringly, the opportunity for police to use alternate

prevent escape by using deadly force." *Id.* (quoting Tennessee v. Garner, 471 U.S. 1, 11–12 (1985)) (internal quotation mark omitted).

[52] *See id.*

[53] *See id.* at 1785.

[54] *Id.* at 1779 (majority opinion).

[55] *See id.* (Ginsburg, J., concurring); *id.* at 1780 (Breyer, J., concurring).

[56] *See id.* at 1772–73, 1775–76, 1778 (majority opinion).

[57] *Id.* at 1785 (Stevens, J., dissenting).

and non-life-threatening methods to terminate the pursuit.[58] Third, and more broadly, the Court's issuance of a rigid rule for dealing with Fourth Amendment seizures may be inappropriate given that constitutional questions tend to be heavily fact-dependent, requiring individualized attention rather than clumsy and inflexible imperatives.[59]

Saucier is at least partly to blame for the *Harris* Court's imprudent foray into rulemaking; among a host of other problems, it encourages judicial rulemaking in at least two ways. First, by encouraging the proliferation of potentially inconsistent lower court constitutional decisions, *Saucier* may indirectly cause the Supreme Court to issue rules out of a need to promote uniformity.[60] Second, *Saucier*'s strict ordering requires that courts determine difficult constitutional questions on motions for summary judgment, when the record is not yet fully developed. Not only may this result in poor decisionmaking,[61] but it also encourages rulemaking because courts faced with incomplete factual records may seek to legitimize their incomplete and unconvincing holdings by framing them as required by unyielding mandates.

The problem of incomplete records is especially severe in the context of qualified immunity claims, which are often raised early in legal

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[58] *See, e.g.*, Brief for Respondent at 5, *Harris*, 127 S. Ct. 1769 (No. 05-1631), 2006 WL 118977 (discussing the possibility of safely terminating the pursuit by placing "stop sticks" across the roadway to flatten the fleeing vehicle's tires).

[59] *See* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 307 (1975) (arguing that areas of the law marked by "the need to reflect rapidly changing norms affecting important interests in liberty" should be governed by "individualized determination[s] . . . not bound by any preexisting rule of thumb" (emphasis omitted)); *see also* Bartnicki v. Vopper, 532 U.S. 514, 541 (2001) (Breyer, J., concurring) ("[W]e should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility."); *cf.* Alex Kozinski, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217, 1225 (1997) ("[J]udges have tended to craft rules of law — and constitutional rules in particular — in cautious and flexible terms . . . .").

[60] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1802 (1991) ("As lower court judges and legal issues proliferate . . . the Court's function of ensuring reasonable uniformity of federal law pushes it toward declarations of clear rules framed to control lower court decisionmaking in future, similar disputes."). Interestingly, Justice Scalia has disputed this assertion in the context of Fourth Amendment decisions, stating that he is inclined to leave the "factual determination to the lower courts" and to tolerate "a fair degree of diversity in what courts determine to be reasonable seizures." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989).

[61] *See* Dirrane v. Brookline Police Dep't, 315 F.3d 65, 69–70 (1st Cir. 2002) (commenting that *Saucier* requires "an uncomfortable exercise where, as here, the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed"). Additionally, lower court judges may not give their full attention to deciding a constitutional issue that they know will be irrelevant to the case's ultimate outcome. Judge Pierre Leval has observed that "in many [qualified immunity] cases, neither the judge nor the defendant has any practical interest in the theoretical question of constitutionality. Both know it can have no effect on the inevitable dismissal of the case. The court's conclusion on this question will come at no price." Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1278 (2006).

proceedings.[62] The *Saucier* ordering compounds this problem by discouraging the parties in some cases from developing the factual record, since it may be efficient for a defendant with a strong argument on the notice-based prong of the *Saucier* test to focus on that aspect of his defense, giving short shrift to whether a constitutional violation actually occurred.[63] Parties are further incentivized to strike this balance given that the constitutional question will often be more complicated, and require more resources to argue effectively, than the notice question.

The dangers of an incomplete record were evident in *Harris*, as the Court's factual analysis was largely restricted to the videorecording of the chase and was strongly disputed in dissent.[64] Testimonial evidence that could have either strengthened the majority's argument or given the Court pause had not been developed. In order to buttress its contested factual interpretation, the majority may have felt compelled to place its analysis within the framework of a strict rule concerning the reasonableness of the use of force in police chases. But by doing so, the Court validated Justice Breyer's warning that *Saucier*'s "order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity."[65]

Ironically, then, *Saucier* may not only have required that the *Harris* Court rule on a difficult constitutional question unnecessarily; it may also have undermined the soundness of that ruling by depriving the Court of information necessary to a thoughtful decision while pushing the Court toward issuing an inappropriate blanket rule. This state of affairs is especially troubling given that the constitutional holding in *Harris* was wholly unnecessary to resolution of the case, which could have been decided based solely on the lack of notice of potential wrongdoing under the second prong of *Saucier*. By mandating that courts resolve whether or not a constitutional violation has

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[62] *See* Behrens v. Pelletier, 516 U.S. 299, 308 (1996) (explaining that the qualified immunity "defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery . . .'" (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis added))).

[63] *See* Brief for the States of Illinois et al. as Amici Curiae in Support of Petitioner at 14–15, *Harris*, 127 S. Ct. 1769 (No. 05-1631), 2006 WL 3747719 ("Individual defendants in § 1983 suits, particularly those employed by municipalities, are often represented by private counsel, who collectively have less interest in the long-term effects of an adverse constitutional ruling than in winning the case as efficiently and inexpensively as possible."). In fact, litigants with a strong notice defense may neglect to argue the constitutional issue at all. *See, e.g.*, Motley v. Parks, 432 F.3d 1072, 1077 (9th Cir. 2005) ("The parties urge us to skip the first step of the *Saucier* analysis. They ask us to assume that the officers violated [plaintiff's] constitutional rights . . . and determine whether those rights were clearly established at the time of the search.").

[64] For instance, there was disagreement over whether other motorists shown on the video pulled over after hearing the distant police sirens or were forced to the side of the road by Harris's speeding vehicle. *Compare Harris*, 127 S. Ct. at 1775, *with id.* at 1782 (Stevens, J., dissenting).

[65] *Id.* at 1780 (Breyer, J., concurring).

occurred before reaching the question of qualified immunity, *Saucier* violates the fundamental maxim that courts should refrain from deciding constitutional questions unless necessary.[66] Instead, courts are forced to step outside of their limited role and issue advisory decisions when there is no real underlying controversy in need of resolution.[67]

Moreover, the purported justification for the *Saucier* test is unconvincing. In *Saucier*, the Court stated that the sequence was necessary in order to develop constitutional law.[68] While there is an important interest in developing constitutional law, requiring that courts decide unnecessary constitutional questions is not the proper mechanism. The law is capable of developing through cases that do not present opportunities for a qualified immunity defense, such as § 1983 claims brought against municipalities.[69] In addition, as evidenced by *Harris*, when a court resolves a constitutional question by laying down an inflexible rule, the fruitful development of the underlying law may actually be impeded.[70] As Judge Sutton has persuasively noted, "the point is not to *maximize* the number of constitutional rulings, but to *optimize* constitutional rulings."[71]

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[66] *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). *But cf.* Fallon & Meltzer, *supra* note 60, at 1797–1807 (arguing that issuing rulings that do not apply retroactively does not necessarily run afoul of general constitutional jurisprudence).

[67] In addition, the *Saucier* test has created a number of problems that are not directly implicated in the instant case, but which the Court's continued adherence to *Saucier* will further inflame in the future. The need to unnecessarily determine difficult constitutional questions will continue to burden lower courts. *See* Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring). And in instances in which qualified immunity is granted, the survival of a multitude of lower court rulings on the constitutional issue, though technically dicta, will serve to confuse matters for future litigants. *See* Wilkinson v. Russell, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring).

[68] *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

[69] *See* Brief for the States of Illinois et al. as Amici Curiae in Support of Petitioner, *supra* note 63, at 19. *But see* John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 410–11 (1999) (arguing that ruling on constitutional issues may be necessary to develop the law and to give notice).

[70] *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992) (indicating that rules do not "permit decision-makers to adapt them to changing circumstances over time"); *see also* Fallon & Meltzer, *supra* note 60, at 1797–98 (discussing the concern that decisions may "'freeze' existing constitutional law").

[71] Lyons v. Xenia, 417 F.3d 565, 583 (6th Cir. 2005) (Sutton, J., concurring). The optimization of constitutional rulings in this sense incorporates "essential administrative values, such as the accurate, efficient and timely resolution of cases in the federal courts." *Id.*

A better approach would be for courts considering claims of qualified immunity to presumptively determine the notice issue first.[72] Such a standard would avoid the dangers, evident in *Harris*, of deciding substantive constitutional cases prematurely on an underdeveloped record and improperly extending the established judicial role of opining only on actual controversies. Only when a court determined that a compelling reason existed to address the constitutional issue first would it be proper to do so. In making such a determination, courts should consider the state of the factual record and the fact-intensiveness of the inquiry, as well as the need for clarification of the law in light of the strength of existing precedent and the frequency and immediacy with which the issue is likely to arise in the future.

If it had adopted this approach, the Court could have decided *Harris* based on the notice prong, without ruling on the constitutional question.[73] Case law prior to *Harris* failed to clearly establish that the level of force used by Scott to detain Harris was not objectively reasonable under the Fourth Amendment.[74] The majority's focus on an original balancing of the constitutional interests, with hardly any reference to relevant precedent, confirms as much.[75] Had the Court taken the notice-first approach in *Harris*,[76] it would have avoided the prob-

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[72] Despite the clear mandate in *Saucier*, lower courts have at times declined to apply the two prongs in their mandated sequence. *See, e.g.*, Motley v. Parks, 432 F.3d 1072, 1078 & n.5 (9th Cir. 2005); Tremblay v. McClellan, 350 F.3d 195, 200 (1st Cir. 2003).

[73] A high standard is applied to determine whether a rule is clearly established for purposes of qualified immunity. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987); *see also* Ted Sampsell-Jones, *Reviving* Saucier*: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 726–27 (2007) (describing how "[t]he *Saucier* framework is meant to vindicate values of notice").

[74] *See* Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1578 (11th Cir. 1992) (Edmondson, J., dissenting) (noting that there were no cases "stating or even hinting that ramming a speeding car that presents danger to the public would be an unreasonable seizure under the Fourth Amendment"), *approved en banc*, 998 F.2d 923 (11th Cir. 1993); Weaver v. State, 73 Cal. Rptr. 2d 571 (Cal. Ct. App. 1998) (holding that police officer's use of deadly force to terminate high-speed pursuit was not unreasonable). The Eleventh Circuit claimed that *Tennessee v. Garner* clearly established certain preconditions that must be met before the police could reasonably use deadly force. *See* Harris v. Coweta County, 433 F.3d 807, 813 (11th Cir. 2005). However, as the *Harris* majority pointed out, *Garner* is better understood as an application of the basic reasonableness standard to a set of circumstances that was wholly incomparable to those at hand. *See Harris*, 127 S. Ct. at 1777.

[75] *See* Transcript of Oral Argument at 54, *Harris*, 127 S. Ct. 1769 (No. 05-1631), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1631.pdf ("And I think that the discussion this morning if nothing else shows that it's not clearly established." (statement of Philip W. Savrin, counsel for petitioner)).

[76] Such an approach would not have been without precedent: last Term the Supreme Court garnered attention for another case in which it ruled that there was no applicable Supreme Court precedent and that a trial judge's decision to permit certain courtroom speech therefore did not violate "clearly established" law for purposes of the Antiterrorism and Effective Death Penalty

lems sure to result from its unclear constitutional holding, and finally put the problematic *Saucier* opinion to rest.[77]

4. Sixth Amendment — Allocation of Factfinding in Sentencing. — *Apprendi v. New Jersey*[1] spawned a series of Supreme Court sentencing decisions which, when viewed together, are at best confusing and at worst contradictory. Commentators and courts have struggled to find a coherent governing principle uniting *Apprendi*, *Blakely v. Washington*,[2] and *United States v. Booker*.[3] The holding in *Apprendi*, originally described as a "bright-line rule,"[4] has proved anything but. Last Term, in *Cunningham v. California*,[5] the Court added another chapter to the *Apprendi* saga when it declared unconstitutional California's Determinate Sentencing Law (DSL). Justice Ginsburg authored the majority opinion that overturned the California Supreme Court's determination that the DSL did not differ in any constitutionally relevant way from the Federal Sentencing Guidelines, as revised by *Booker*.[6] Although at first blush *Cunningham* seems to be an ode to meaningless formalism,[7] reading between the lines of its opinions exposes a substantive debate about what the Sixth Amendment means and why it matters. The Court's decision implicitly protects the role of the jury, so that the voices of individual citizens may serve as a

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Act of 1996 (AEDPA). *See* Carey v. Musladin, 127 S. Ct. 649 (2006) (rejecting appellant's habeas petition). Under AEDPA, the petitioner is not entitled to habeas relief unless adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1) (2000).

[77] Of course, overruling *Saucier*, implicitly or otherwise, would raise general concerns of stare decisis. However, such concerns are unconvincing here given the procedural nature of the *Saucier* test, as well as its relative novelty. *See Harris*, 127 S. Ct. at 1781 (Breyer, J., concurring).

[1] 530 U.S. 466 (2000).

[2] 542 U.S. 296 (2004).

[3] 543 U.S. 220 (2005).

[4] *See Apprendi*, 530 U.S. at 525 (O'Connor, J., dissenting).

[5] 127 S. Ct. 856 (2007).

[6] In *Cunningham*, Justice Ginsburg broke her *Apprendi* silence. She had not since authored an opinion about sentencing under the Sixth Amendment, although her crucial votes in *Booker* gave rise to a paradox in the *Apprendi* line: that a sentencing judge cannot be *required* to consider facts not proved to a jury, but if he is given the choice to do so or not, he may do so with (more or less) impunity. Justice Ginsburg was the only Justice to vote for both *Booker* opinions, suggesting that the logical overlap between them, if there was any, could be found in the mind of Justice Ginsburg. Jurists and critics have therefore waited with bated breath for Justice Ginsburg to write about her Sixth Amendment vision, and *Cunningham* provided that opportunity.

[7] Starting as early as *Apprendi*, dissenters have lambasted the Court's emphasis on statutory maximums as overly formalistic. *See Apprendi*, 530 U.S. at 539 (O'Connor, J., dissenting) ("[I]t is possible that the Court's 'increase in the maximum penalty' rule rests on a meaningless formalism that accords, at best, marginal protection for the constitutional rights it seeks to effectuate."); *Blakely*, 542 U.S. at 321 (O'Connor, J., dissenting) ("[I]t is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision."); *id.* at 333 (Breyer, J., dissenting) ("While 'the judge's authority to sentence' would *formally* derive from the jury's verdict, the jury would exercise little or no control over the sentence itself." (emphasis added)).