
THE SUPREME COURT AND THE REGULATION OF RISK IN CRIMINAL LAW ENFORCEMENT

JONATHAN REMY NASH*

INTRODUCTION	172
I. COURTS AND RISK ANALYSIS IN THE SETTING OF CRIMINAL LAW ENFORCEMENT	178
A. <i>Overview of Risk Analysis in Constitutional Tort Litigation Alleging Excessive Force</i>	178
1. The Pre- <i>Scott v. Harris</i> Backdrop: Balancing the Interests... 178	
a. <i>Fourth Amendment</i>	179
b. <i>Substantive Due Process</i>	180
2. <i>Scott v. Harris</i> : Balancing the Risks.....	182
B. <i>Overview of Risk Analysis Under the ACCA</i>	187
II. THE SUPREME COURT’S FLAWED EFFORTS AT PARADIGMATIC RISK ANALYSIS IN THE CRIMINAL LAW ENFORCEMENT SETTING.....	192
A. <i>An Overview of the Treatment of Risk in the Context of Environmental Regulation</i>	192
B. <i>Scott v. Harris and Risk Analysis</i>	197
1. Aspirations to Paradigmatic Risk Analysis	197
2. Problems with the Environmental Risk Analytic Paradigm as Applied in <i>Scott v. Harris</i>	204
a. <i>Risk assessment and the lure of objectively definitive evidence</i>	204
b. <i>The lure of cut-and-dried risk management</i>	208
c. <i>The questionable separation of risk assessment from risk management and those who undertake each</i>	211
3. Questioning the Appropriateness of the Environmental Risk Analytic Paradigm for High-Speed Police Chases	213
C. <i>Risk Assessment and the ACCA</i>	215

* Professor of Law, Emory University School of Law. For helpful discussions, suggestions, and comments on prior drafts, I am grateful to William Buzbee, Morgan Cloud, Michael Collins, Lee Anne Fennell, Henry Hansmann, Richard McAdams, Lori Greendorfer Nash, Rafael Pardo, Julie Seaman, Cass Sunstein, and Jonathan Wiener, as well as to participants in presentations at the annual meeting of the American Law and Economics Association and at the annual meeting of the Midwestern Law and Economics Association. I also benefited from faculty discussions of the decisions in *Scott v. Harris* and *Ricci v. DeStefano* at Columbia Law School.

1. Aspirations to Paradigmatic Risk Analysis in the Court's ACCA Common Law Jurisprudence.....	215
2. Shortcomings in the Court's ACCA Jurisprudence.....	218
3. Toward a Better Institutional Design for Risk Analysis Under the ACCA.....	218
III. LESSONS FOR, AND FROM, CRIMINAL RISK REGULATION	219
A. <i>Lessons for Criminal Risk Analysis</i>	220
B. <i>Lessons from Criminal Risk Analysis</i>	222
CONCLUSION.....	224

Criminal law enforcement raises numerous issues of risk regulation. Yet judicial treatment of such issues is anything but rigorous. This Article critically examines the Supreme Court's use of risk regulatory paradigms in the context of criminal law enforcement. It focuses on two such settings – police termination of a high-speed chase by putting a fugitive's life at risk and the sentencing of career criminals. This Article then argues why the Court's efforts are deficient and raises a more general question: Is the judiciary aptly positioned to conduct formal risk analysis in the criminal law context?

INTRODUCTION

Formal risk analysis has become more and more commonplace in recent years. Legislators and regulators have enlisted risk analysis as a tool in protecting public health and safety, perhaps especially in the area of environmental law. These governmental actors undertake the often difficult task of estimating the risk that, to name one example, the widespread use of a new chemical will impose. They decide whether that risk is something about which government ought to be concerned. They then balance that risk against the risk that not using the chemical – for example, higher prices that might deprive people of a particularly beneficial product – might impose.

Criminal law provides a natural home for risk regulation. Police pursue suspected criminals in order to further public safety, although at times such pursuits may themselves endanger the public. Bail hearings require judges to weigh the risk that a defendant will flee the jurisdiction without facing trial and the danger that the defendant if released will pose a threat to the community. The justice system provides for a presumption that a criminal defendant is innocent until proven guilty on the logic that it is “better that ten guilty persons escape than that one innocent suffer,”¹ or put another way, that the risk to society of punishing an innocent person is worse than the risk to society of allowing a guilty person to go free. And sentencing determinations turn, at least in part, on the extent to which the convict posed a threat to the

¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *358; see Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 404-05; Jonathan R. Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 516 (2008).

community and the public by her actions and the extent to which the sentence will reduce the future risk that the convict would otherwise pose.

Despite the growing ubiquity of risk analysis in health, safety, and environmental regulation, risk analysis surprisingly has yet to take hold in criminal law and procedure. This deficit is true at both the practical and theoretical levels. Legislators and regulators do not as a rule undertake meaningful risk analysis in deciding upon the structure of criminal law. And commentators have done little to improve the theoretical underpinnings of criminal law risk analysis.

Despite the substantial absence of legislative, regulatory, and theoretical treatment of risk analysis in criminal law, criminal law's natural affinity for risk analysis has emerged in the Supreme Court's treatment of some aspects of criminal law. To see this, consider two subjects handled by the Court in recent years that lie on opposite ends of a criminal case – the extent to which the police may risk harm to a fugitive in order to terminate a high-speed pursuit² and the determination of whether a crime “presents a serious potential risk of physical injury to another” under the federal Armed Career Criminal Act (ACCA).³

In its 2007 decision in *Scott v. Harris*,⁴ the Supreme Court decided that police officers had not violated Victor Harris's Fourth Amendment rights when they terminated a high-speed car chase by forcing Harris's car from the road, thereby rendering Harris a quadriplegic.⁵ The eight-Justice majority made clear that its decision rested upon review of a videotape of the chase recorded by the police vehicle in pursuit. Indeed, the Court was so confident of its conclusion, that no rational jury could conclude that Harris did not pose a substantial threat to the police and bystanders, that it included a web link to the video in its opinion.⁶

² The outcomes in such constitutional tort litigation are ultimately (if effective) supposed to create desirable incentives for government actors – in this case, incentives for the police. See, e.g., Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 849-58 (2001). To the extent that these incentives effect changes in police behavior, however, those changes – or even perceptions that the police will change their behavior – may in turn influence the behavior of fugitives. See, e.g., *Scott v. Harris*, 550 U.S. 372, 385 (2007) (mentioning that, in response to the police breaking off pursuit of a fugitive, the fugitive might guess that the police had not abandoned pursuit altogether but instead were taking advantage of a shortcut so as to apprehend him, making him “just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow”); cf. Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089, 1119-40 (2005) (discussing the interplay between police enforcement of drug laws and apprehension of drug couriers and contraband).

³ 18 U.S.C. § 924(e) (2006).

⁴ 550 U.S. 372 (2007).

⁵ *Id.* at 385-86.

⁶ See *id.* at 378 n.5.

The *Scott* decision attracted the attention of commentators from the areas of evidence, civil procedure, and criminal law.⁷ Yet inspection of the opinion in *Scott* reveals that the Court undertook something quite common in environmental regulation – an analysis of risk. Indeed, the Court’s approach, facially at least, embraces the general principles of environmental risk analysis as a form of constitutional common law of risk analysis. For example, paradigmatic risk analysis separates risk assessment – the question of whether risk was posed – from risk management – the question of how best to deal with the risk presented; the Court seemed to adhere to such an approach in *Scott*. Similar to traditional risk analysis’s view of risk assessment as grounded in objective science, the *Scott* Court endeavored to treat risk assessment as an objective question. Further, in conducting its risk management analysis, the Court alluded to notions of precaution and risk-risk tradeoffs, concepts common in environmental risk analysis.

At the same time, the Court’s efforts to model its constitutional common law of risk analysis on paradigmatic environmental risk analysis are incomplete. Viewed in the light of environmental risk analysis, the Court’s analysis in *Scott* is based on substantial speculation. Moreover, it is unclear how its approach – including, in particular, its efforts to separate risk analysis from risk management – would apply beyond the particular factual setting in *Scott*.

The shortcomings in the Court’s constitutional common-law version of risk analysis raise the question of whether traditional risk analysis is even the proper paradigm for a setting such as that raised in *Scott*. First, the benefits that regimented risk analysis offer in the context of environmental regulation – such as transparency and predictability – are not so important in the context of police chases. Second, courts as institutions are not as competent as administrative agencies to conduct full-fledged risk analyses. If courts are to continue reviewing police decisions to terminate car chases, then the desirability of aiming to conduct full risk analyses must be questioned.

The environmental paradigm of risk analysis thus reveals problems with the Court’s analysis in *Scott*. As an initial matter, problems exist with the Court’s attempt to mimic environmental risk analysis. First, in an effort to make its

⁷ See, e.g., Karen M. Blum, *Scott v. Harris: Death Knell for Deadly Force Policies and Garner Jury Instructions?*, 58 SYRACUSE L. REV. 45, 54 (2007) (criticizing *Scott*’s implications for § 1983 jury trials involving excessive and deadly force claims); Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1133-40 (2008) (criticizing the *Scott* decision for exacerbating the already confused jurisprudence in determining whether police force is justified); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903 (2009) (providing empirical evidence that questions the Supreme Court majority’s defense of the videotape evidence in *Scott* as definitive); Michael L. Wells, *Scott v. Harris and the Role of the Jury in Constitutional Litigation*, 29 REV. LITIG. 65, 73-78 (2010) (using *Scott* as a starting point in analyzing whether judges or juries should determine reasonableness in constitutional tort claims brought under § 1983).

conclusion seem objectively irrefutable, the Court painted the videotape evidence as compelling without a doubt. In reality, even risk assessments that endeavor to adhere to the best available science will include assumptions that render the conclusions at least somewhat subject to doubt. Second, while the Court again attempted to frame its analysis of the options available to the police as buttressed by a clear risk-risk analysis – a comparison of the competing risks – in fact the Court’s reasoning amounts largely to what some call “casual empiricism”;⁸ it does not live up to risk-risk analysis in the context of environmental risk analysis. Third, the Court’s effort to maintain a dichotomy between identifying the risk, on the one hand, and deciding how to deal with it, on the other, is artificial and does not appear to translate well beyond the particular procedural setting of the *Scott* case. After all, nothing in *Scott* suggests that, in the run-of-the-mill case involving a police seizure following a high-speed pursuit, a jury would not resolve both issues.

There are indeed several reasons to think that environmental risk analysis is not the correct paradigm for cases such as *Scott*. First, the Court’s reasoning in *Scott* was not thorough. Second, such reasoning does not readily translate to other car-chase Fourth Amendment cases. Third, neither of these conclusions is terribly surprising since courts are institutionally ill-suited to conduct thorough risk analyses. Finally, a traditional environmental risk analysis assumes some opportunity for reflection and due deliberation. In contrast, the police in deciding whether to seize a person of whom they are in hot pursuit must necessarily make a quick decision on limited information and without the benefit of deliberation.

Consider next the Court’s recent applications of the Armed Career Criminal Act. The ACCA imposes a fifteen-year mandatory minimum sentence on a defendant who is convicted of violating § 922(g) (the most prominent element of which is possession of a firearm by a convicted felon) and who has three prior convictions for “a violent felony or a serious drug offense.”⁹ The statute proceeds to define “violent felony” to include

any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.¹⁰

If a prior conviction was not for burglary, arson, or extortion, how should a court decide whether it “otherwise . . . presents a serious potential risk of physical injury to another”? The Court has responded to this question in

⁸ See, e.g., Cass R. Sunstein, *Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harm*, 74 U. CHI. L. REV. 1895, 1904-05 (2007).

⁹ 18 U.S.C. § 924(e)(1) (2006).

¹⁰ *Id.* § 924(e)(2)(B)(ii).

language that echoes risk regulation. It has explained that crimes are to be examined categorically rather than on a case-by-case basis; this means that the inquiry into risk is probabilistic.¹¹ Indeed, the Court has decided one case on the basis of statistical data collected by the United States Sentencing Commission.¹²

But the Court's attempts to approximate paradigmatic risk analysis are not complete. For one thing, the Court considers factors that traditionally go beyond the scope of risk analysis, including the relative culpability of parties. More importantly, the Court's efforts highlight how an absence of real data impairs appropriate risk analysis. Indeed, the Court often resorts to casual empiricism to draw its conclusions. Moreover, to the extent that judicial opinions fall prey to casual empiricism, they may be especially poor avenues through which to convey the often controversial niceties of risk analysis. Increased transparency of risk analyses is often preferable in theory, but the public may be less comfortable once forced to confront seat-of-the-pants analyses by non-expert judges. A less normatively desirable outcome may result when the public is fully exposed to how the sausages are made.

This Article uses these two case studies – the decision in *Scott* and recent applications of the ACCA – as a means to examine and critique the Court's forays into risk analysis in the setting of criminal law. It finds the Court's attraction to risk analysis understandable, since risk at some level undergirds the theory and practice of criminal law and procedure. At the same time, the Article finds the Court's importation and application of risk analysis somewhat puzzling and unsatisfying. Courts as institutions generally lack access to information that is vital to accurate risk analysis. Moreover, the Court's reliance on notions of risk analysis seems inapt when it is reviewing action – say, by the police – that had to be made very quickly and under considerable pressure. Risk analysis is most apt when deliberative decision making can occur; when it cannot, then risk analysis may not be an appropriate paradigm on which to draw.

At some level, the fact that courts engage in casual empiricism despite not being good at it is not surprising. Indeed, seat-of-the-pants empiricism is rather ubiquitous in judicial undertakings, from Learned Hand's rule for assessing negligence¹³ to balancing of the social costs and benefits of behavior that is alleged to cause a nuisance.¹⁴ Still, two aspects of the current system call out for change. First, better institutional design could reduce the need for the Court to engage in such assessments. Second, the Court's attempts to cloak

¹¹ See *James v. United States*, 550 U.S. 192, 202 (2007).

¹² See *Chambers v. United States*, 555 U.S. 122, 129 (2009).

¹³ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 369 (2000) (revealing the adaptability of the Hand formula to the setting of constitutional torts).

¹⁴ See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970).

its casual empiricism as more sophisticated than it actually is may artificially lead society to conclude that the courts are more capable to undertake these tasks than they actually are. That, in turn, may result in sub-optimally low demand for changes in the institutional design. Indeed, a sign of the scope of *Scott's* conclusions on risk analysis was the revelation that the case was relied upon in a Justice Department memorandum authorizing the killing of a U.S.-citizen member of Al-Qaeda.¹⁵

In the context of constitutional tort litigation, however, one argument values even mere casual judicial empiricism. Professor Daryl Levinson has advanced a two-pronged argument to question the value of constitutional tort litigation as a method of deterring undesirable behavior by government officials.¹⁶ First, to the extent that courts mishandle cost-benefit analyses in the context of constitutional tort litigation, they may “misprice,” and thus sub-optimally deter, undesirable government behavior.¹⁷ Second, even if courts can impose proper monetary penalties for undesirable government behavior, Levinson argues that government actors simply do not respond to monetary incentives as do private actors; rather, they respond to incentives in political capital.¹⁸ Thus, one cannot expect even properly-priced penalties to have optimal deterrence effects.

One might argue that courts' inexact risk analyses further exacerbate this problem: improperly determined penalties follow from inexact risk analyses that can generate liability when there should be none. But, as Professor Myriam Gilles has argued in response to Professor Levinson, monetary penalties will at least roughly translate into political capital.¹⁹ And there are reasons to believe that risk analysis bears an even closer connection to political capital than does cost-benefit analysis: even if constraining costs and balancing budgets are not always foremost in politicians' minds, the fundamental focus of risk analysis in the criminal law setting – balancing the safety and well-being of innocent individuals, police officers, and alleged criminals – is a matter that seems of direct concern to politicians. In this sense, courts may be speaking more directly to non-judicial government actors when they undertake risk analyses. One might expect politicians to be more attuned to the interests of the public-at-large and law enforcement officers than to the interests of alleged criminals. To the extent that this is true, having courts conduct their

¹⁵ See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1 (stating that the memorandum “cited several . . . Supreme Court precedents, like a 2007 case involving a high-speed chase and a 1985 case involving the shooting of a fleeing suspect, finding that it was constitutional for the police to take actions that put a suspect in serious risk of death in order to curtail an imminent risk to innocent people”).

¹⁶ See Levinson, *supra* note 13, at 347, 373.

¹⁷ See *id.* at 373.

¹⁸ See *id.* at 347.

¹⁹ See Gilles, *supra* note 2, at 858-67.

own independent – if imperfect – risk analyses may be an appropriate check on the political branches.

This Article proceeds as follows. In Part I, I discuss the role of risk analysis in the contexts of constitutional tort litigation and *Scott v. Harris*, as well as in the context of the Armed Career Criminal Act. Part II critically examines the Supreme Court's efforts at undertaking paradigmatic risk analysis in the setting of criminal law enforcement. It first offers a backdrop by presenting a stylized overview of environmental risk analysis. With respect to the setting of high-speed police chases, I explicate how the Court's opinion in *Scott* generally, but hardly entirely, conforms to that paradigm. I highlight shortcomings in the Court's efforts at risk analysis. Finally, I question the very appropriateness of the risk analysis paradigm in the context of the constitutional common law of risk analysis. With respect to the ACCA, I identify shortcomings in the ways in which the Supreme Court has designed federal common law to aspire to paradigmatic risk analysis. I then discuss how risk analysis might be better effectuated in the ACCA context through reliance on institutions other than courts. Part III offers suggestions for areas in which criminal law risk regulation might be improved. It also identifies lessons that criminal law risk regulation offers for risk analysts in other areas.

I. COURTS AND RISK ANALYSIS IN THE SETTING OF CRIMINAL LAW ENFORCEMENT

Insofar as it involves risk to alleged criminals, convicted criminals, the public, and law enforcement officers, criminal law enforcement raises a host of risk-related issues. Many of these issues are handled by courts. In this Part, I elucidate two areas where courts conduct risk analysis. In claims under § 1983 involving the alleged use of excessive force by law enforcement and prison officials, courts understand the Constitution to call for some balancing of the risks. In contrast, under the Armed Career Criminal Act, Congress has expressly called upon the courts to conduct risk analysis in deciding whether certain more severe sentences are appropriate.

A. *Overview of Risk Analysis in Constitutional Tort Litigation Alleging Excessive Force*

In this section, I provide a brief overview of the Supreme Court's jurisprudence regarding claims under § 1983 alleging the use of excessive force by law enforcement and prison officials. I first survey the state of the law prior to the Supreme Court's 2007 decision in *Scott v. Harris*. I next turn to the decision in *Scott*. Finally, I suggest how that decision was in some ways true to earlier precedent yet also changed the legal landscape.

1. The Pre-*Scott v. Harris* Backdrop: Balancing the Interests

For many years, the lower federal courts applied a single multi-factor test in all § 1983 actions alleging excessive force by law enforcement and prison officials, regardless of whether the particular application of force alleged in a

given case might implicate a specific constitutional standard.²⁰ In its 1989 decision in *Graham v. Connor*,²¹ the Supreme Court rejected the notion of a single test and instead directed that different constitutional provisions – and therefore different tests – would apply depending on the circumstances.²² Thus, today, a government actor’s constitutional liability for the injury or death of a fugitive in a car chase is determined under one of two constitutional provisions: the Fourth Amendment’s protection against unreasonable seizures or the Fourteenth Amendment’s guarantee of Due Process. “Where . . . the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment . . .”²³ Thus, “all claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment.”²⁴ In contrast, where the police have taken no affirmative step to seize the fugitive, excessive force claims must be vindicated under the Fourteenth Amendment as a violation of substantive due process.²⁵

a. *Fourth Amendment*

The Fourth Amendment protects “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures.”²⁶ The Supreme Court has explained that, absent an arrest warrant (the issuance of which itself is designed to turn on reasonableness), the Amendment’s reasonableness requirement translates into a balancing test: the government’s interest in seizing an individual must be weighed against “the nature and extent of the intrusion upon the individual’s Fourth Amendment rights.”²⁷ Moreover, the Court in *Graham* explained that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”²⁸

²⁰ See *Graham v. Connor*, 490 U.S. 386, 392-93 (1989) (surveying the existing case law). The lower courts’ decisions were largely premised upon Judge Friendly’s opinion in *Johnson v. Glick*, where the Second Circuit held that substantive due process governed a claim by a pretrial detainee that a guard had assaulted him. 481 F.2d 1028, 1032 (2d Cir. 1973); see *Graham*, 490 U.S. at 392-93.

²¹ 490 U.S. 386 (1989).

²² See *id.* at 393-94.

²³ *Id.* at 394.

²⁴ *Id.* at 395.

²⁵ See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842-45 (1997). The Court in *Lewis* also made clear that the mere fact that the police might have tried unsuccessfully to seize a fugitive does not convert the due process claim into a Fourth Amendment claim. See *id.* at 845 n.7.

²⁶ U.S. CONST. amend. IV.

²⁷ *United States v. Place*, 462 U.S. 696, 705 (1983).

²⁸ *Graham*, 490 U.S. at 396.

In *Tennessee v. Garner*,²⁹ the Court invoked the balancing of factors to conclude that the use of deadly force by the police to stop a fleeing fugitive (albeit not in a car chase) was not per se justifiable under the Fourth Amendment, notwithstanding the existence of probable cause to seize the fugitive.³⁰ The Court emphasized that the loss of the fugitive's life weighed against the use of deadly force, not only because it deprived the fugitive himself of his life³¹ but also because the fugitive's death "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment."³² Therefore, "[t]he use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion," since "[i]f successful, it guarantees that that mechanism will not be set in motion."³³ The government also argued that, on balance, the availability of deadly force actually resulted in more suspects being apprehended alive, since the threat of deadly force would discourage suspects from fleeing.³⁴ The Court recognized this as an empirical question and commented that "the presently available evidence does not support this thesis."³⁵

b. *Substantive Due Process*

The Fourteenth Amendment has long been interpreted to guard individuals against arbitrary government action³⁶ and in particular against executive branch abuse of power that "shocks the conscience."³⁷ In *Lewis*, the Court considered the proper standard for a substantive due process claim arising out of the death of a passenger on a motorcycle being hotly pursued by police.³⁸ Though the police took no affirmative step to seize the motorcycle, its driver, or the passenger, a police vehicle struck and killed the passenger after the motorcycle tipped over.³⁹ The Court rejected the notion that "deliberate indifference" on the part of the police was sufficient to support a claim under § 1983 for a violation of substantive due process rights, concluding instead that an "intent to harm suspects physically or to worsen their legal plight" was required.⁴⁰

²⁹ 471 U.S. 1 (1984).

³⁰ *Id.* at 9.

³¹ *See id.* ("The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon.")

³² *Id.*

³³ *Id.* at 10

³⁴ *See id.* at 9-10.

³⁵ *Id.* at 10.

³⁶ *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1997).

³⁷ *Id.* at 846.

³⁸ *Id.* at 836.

³⁹ *Id.* at 837.

⁴⁰ *Id.* at 854.

The Court reasoned that a “deliberate indifference” standard “is sensibly employed only when actual deliberation is practical.”⁴¹ The Court then proceeded to highlight a setting of constitutional tort litigation where deliberation is the norm: cases in which prison inmates allege excessive force in violation of the Eighth Amendment’s Cruel and Unusual Punishment Clause.⁴² “[I]n the custodial situation of a prison,” the opinion explains, “forethought about an inmate’s welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.”⁴³ Even within the setting of a prison, however, there are occasions – such as prison riots – where the exigencies of the moment make deliberation practically impossible and thus render “deliberate indifference” insufficient alone to establish constitutional liability.⁴⁴

The Court analogized to the setting of prison riots to demonstrate why the “deliberate indifference” standard should not apply to high-speed car chases:

Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. . . . They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made “in haste, under pressure, and frequently without the luxury of a second chance.” A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders.⁴⁵

* * *

Before *Scott v. Harris*, then, the state of the law was this: Claims under § 1983 alleging injury resulting from excessive force in a high-speed chase had to be brought under either the Fourth Amendment – if the alleged excessive force occurred during the seizure of the fugitive – or the Fourteenth Amendment – if it occurred without police intent “to harm suspects physically or to worsen their legal plight.”⁴⁶

Cases under both constitutional provisions, however, recognized the difficult balancing and time pressures faced by police engaged in law enforcement activities, including high-speed chases. The Court seems to have envisioned the balancing of the suspect’s interests as well as (often conflicting) governmental interests. By emphasizing the importance of the decision to take action that will definitely take the life of the fugitive, the Court in *Garner*

⁴¹ *Id.* at 851.

⁴² *Id.*

⁴³ *Id.* at 851-52.

⁴⁴ *See id.* at 852-53.

⁴⁵ *Id.* at 853 (citations omitted) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

⁴⁶ *Id.* at 854.

highlighted the suspect's interest in his or her own life, as well as the government's interest both in preserving lives in general and in keeping suspects alive for the criminal justice system to adjudicate guilt and pass a sentence.⁴⁷ The Court in *County of Sacramento v. Lewis* identified the conflicting government interests in, on the one hand, "stop[ping] a suspect and show[ing] that flight from the law is no way to freedom" and, on the other hand, stopping "the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders."⁴⁸ To the extent that it recognized the difficulties in deliberately and carefully quantifying and balancing conflicting interests, the Court in *Lewis* suggested that, for liability to attach, the interference with the suspect's interest – at least in his or her life – would have to outweigh the government's law enforcement interests.⁴⁹

2. *Scott v. Harris*: Balancing the Risks

*Scott v. Harris*⁵⁰ presented the Supreme Court with a claim that police had violated a fugitive's constitutional rights by terminating a high-speed chase with excessive force, rendering him a quadriplegic. The eight-Justice majority purported to follow existing precedent.⁵¹ As we shall see, however, the opinion differs from earlier cases in several ways. In particular, it focuses on balancing risks rather than balancing interests.

The police chase at issue in *Scott* began with Victor Harris – traveling at seventy-three miles-per-hour in a fifty-five-mile-per-hour zone – ignoring a police request to pull over.⁵² The chase mostly took place on two-lane roads, with Harris often traveling at speeds exceeding eighty-five miles-per-hour.⁵³ Deputy Timothy Scott, who led the pursuit, decided to attempt to "terminate the episode" some "[s]ix minutes and nearly 10 miles after the chase had begun."⁵⁴ He radioed his supervisor for permission to employ a "Precision Intervention Technique (PIT) which causes the fleeing vehicle to spin to a stop."⁵⁵ In response, he was told to "[g]o ahead and take him out."⁵⁶ Rather than using the PIT, Scott "applied his push bumper to the rear of [Harris's] vehicle."⁵⁷ Harris lost control; his car "left the roadway, ran down an

⁴⁷ *Tennessee v. Garner*, 471 U.S. 1, 9 (1984).

⁴⁸ *Lewis*, 523 U.S. at 853.

⁴⁹ *See id.* at 855.

⁵⁰ 550 U.S. 372 (2007).

⁵¹ *See id.* at 381-83.

⁵² *Id.* at 374.

⁵³ *Id.* at 375.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (alteration in original) (quoting *Harris v. Coweta Cnty.*, 433 F.3d 807, 811 (11th Cir. 2005)).

⁵⁷ *Id.*

embankment, overturned, and crashed.”⁵⁸ Harris suffered major injuries and was “rendered a quadriplegic.”⁵⁹

Harris filed suit against Scott and others, alleging, among other things, violations of his federal constitutional rights under § 1983. Scott filed a motion for summary judgment, claiming qualified immunity.⁶⁰ The district court denied Scott’s motion, finding that disputed material issues of fact precluded the relief that Scott sought.⁶¹ On interlocutory appeal,⁶² the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court’s denial of summary judgment.⁶³ Scott sought review in the U.S. Supreme Court. Certiorari was granted, and the Court ultimately ruled in Scott’s favor.⁶⁴ Eight Justices joined Justice Scalia’s majority opinion; only Justice Stevens dissented.⁶⁵

Justice Scalia’s opinion for the Court essentially proceeds in two steps: First, it addresses the proper way for a court to decide (or review a decision on) a motion for summary judgment.⁶⁶ Second, it considers the proper legal standard for whether Scott’s actions constituted a constitutional violation⁶⁷ and then proceeds to analyze whether the facts established such a violation.⁶⁸

Reciting the established, time-honored standard for evaluating requests for summary judgment, the Court stated, “[C]ourts are required to view the facts and draw reasonable inferences ‘in the light most favorable to the party opposing the [summary judgment] motion.’”⁶⁹ The Court was quick to note, however, “an added wrinkle in this case: the existence in the record of a

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 376.

⁶¹ *Harris v. Coweta Cnty.*, 2003 WL 25419527, at *5-6 (N.D. Ga. Sept. 23, 2003), *aff’d*, 433 F.3d 807, 811 (11th Cir. 2005).

⁶² For appeals of denials of qualified immunity, federal courts have created an exception to the usual rule that appeals are only heard once a final judgment has been entered. The logic is that qualified immunity is an immunity from suit and not merely a defense against liability – that immunity would be eviscerated were a determination of entitlement to qualified immunity made available only after a suit has gone forward to trial. *See Scott*, 550 U.S. at 376 n.2.

⁶³ *Harris v. Coweta Cnty.*, 433 F.3d 807, 811 (11th Cir. 2005).

⁶⁴ *See Scott*, 550 U.S. at 386.

⁶⁵ *Id.* at 389-97. In addition to joining the majority opinion, Justices Ginsburg and Breyer each wrote separate concurring opinions. *Id.* at 386-89.

⁶⁶ *Id.* at 380-81.

⁶⁷ *Id.* at 377. A defendant loses entitlement to qualified immunity if she is found to have violated a constitutional right, but only if that constitutional right was then clearly established. *See id.* Thus, if a court holds, as did the Court in *Scott*, that there was no constitutional violation, then the invocation of qualified immunity is proper.

⁶⁸ *Id.* at 378-86.

⁶⁹ *Id.* at 378 (second alteration in original) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)).

videotape capturing the events in question.”⁷⁰ The videotape, according to the Court, “quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals” – that Harris’s actions did not pose a substantial threat to the police and bystanders.⁷¹ The ordinary summary judgment mandate to view the facts in the light most favorable to the party opposing judgment did not apply where that party’s version of the facts “is blatantly contradicted by the record, so that no reasonable jury could believe it.”⁷² The Court concluded that Harris’s “version of events is so utterly discredited by the record that no reasonable jury could have believed him.”⁷³

A second point that the Court did not emphasize looms large with respect to the disposition of the case. The Court concluded that, given its decision that there was no genuine dispute as to any material fact, the question of whether a constitutional violation occurred was a question of law that did not lie within the jury’s province. In a footnote, the Court rejected the dissent’s charge that it was “‘usurp[ing] the jury’s factfinding function,’”⁷⁴ explaining, “At the summary judgment stage, . . . once we have determined the relevant state of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of Scott’s actions . . . is a pure question of law.”⁷⁵

With respect to the legal standard applicable to Harris’s claim, the Court first considered Harris’s argument, premised on *Tennessee v. Garner*,⁷⁶ that Scott’s use of so-called “deadly force” to seize him triggered a special, more exacting legal standard.⁷⁷ The Court rejected this argument: “Whether or not Scott’s actions constituted application of ‘deadly force,’ all that matters is whether Scott’s actions were reasonable.”⁷⁸ The Court proceeded to explain that, “[i]n determining the reasonableness of the manner in which a seizure is effected, ‘[w]e must 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.’”⁷⁹ This meant “consider[ing] the risk of bodily harm that Scott’s actions posed to [Harris] in light of the threat to the public that Scott was trying to eliminate.”⁸⁰

In the end, the Court concluded that the seizure was reasonable. The Court found it “clear” both that (1) Harris posed “an actual and imminent threat” to

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 380.

⁷³ *Id.*

⁷⁴ *Id.* at 381 n.8 (quoting *id.* at 395 (Stevens, J., dissenting)).

⁷⁵ *Id.* (citation omitted).

⁷⁶ 471 U.S. 1 (1984). For discussion, see *supra* text accompanying notes 29-35.

⁷⁷ *Scott*, 550 U.S. at 381-83.

⁷⁸ *Id.* at 383.

⁷⁹ *Id.* (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

⁸⁰ *Id.*

police and civilian motorists and to any pedestrians who might have been present, and (2) Scott's actions posed "a high likelihood of serious injury or death to [Harris] – though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head or pulling alongside a fleeing motorist's car and shooting the motorist."⁸¹ In response to the question the Court posed to itself of how to "weigh[] the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person," the Court found it "appropriate . . . to take into account not only the number of lives at risk, but also their relative culpability."⁸² The Court had little trouble portraying Harris as culpable, while describing "those who might have been harmed had Scott not taken the action he did" as "entirely innocent."⁸³

The Court then turned to Harris's argument that the police had available another option that also would have secured the safety of the innocent while at the same time avoiding the risk to Harris: the police could have stopped their pursuit of Harris. The Court responded that the police were not obligated to "take[] that chance and hope[] for the best."⁸⁴ The Court concluded that, while "ramming [Harris] off the road . . . was *certain* to eliminate the risk that respondent posed to the public," Harris's suggested course of action was not.⁸⁵ The Court also reasoned that to accept that the police had an obligation to break off the chase would create the "perverse" incentive for people fleeing the policy by car to "drive *so recklessly* that they put other people's lives in danger."⁸⁶

* * *

In many ways, the Court in *Scott* was faithful to earlier precedent. The Court agreed that the Fourth Amendment governed the claim since the police had taken affirmative steps to terminate the chase and thus to seize the fugitive.⁸⁷ Indeed, the Court did not purport to overrule or question its earlier holdings.⁸⁸ Finally, the Court emphasized the importance of balancing, as it had in earlier cases.

In some important ways, nevertheless, *Scott* differs from earlier cases. First, *Scott* resolves application of the balancing test in the context of a particular set of facts. It differs from earlier cases that spoke to the viability of constitutional

⁸¹ *Id.* at 384 (citations omitted).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 385.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 381.

⁸⁸ Perhaps the greatest explicit "break" from precedent in *Scott* was the Court's effort to distinguish *Tennessee v. Garner*. See *supra* text accompanying notes 76-78.

violations in broad swaths of scenarios.⁸⁹ In contrast to earlier cases, then, *Scott* elucidates how to apply the governing law in a particular factual setting.

Second, *Scott*, unlike earlier cases, highlights videotapes as important tools to aid courts in resolving factual disputes in many high-speed police chase cases. The *Scott* Court emphasized the unassailable nature of the videotape as a ground for dismissing claims that, in the majority's view, were "blatantly contradicted by the record"⁹⁰ – that is, by the videotape.

Third, the Court made clear that, to the extent that the facts can be resolved before trial, a jury has no role in a case. The application of the balancing test to the undisputed facts is a job for the judge.⁹¹

Fourth, in describing the balancing to be undertaken, *Scott* did not emphasize the importance of a quick decision in the context of law enforcement activities. In earlier cases the Court emphasized that the relevant balancing should incorporate the notion that law enforcement agencies and officers often have to make quick decisions.⁹² In contrast, the absence of such language in the discussion of balancing in *Scott* suggests a more careful – and presumably time-consuming – decision-making process.

Finally, while the *Scott* Court continued earlier cases' reliance upon balancing, the Court spoke of balancing *risks* associated with choices made by government actors, as compared to earlier cases' discussion of balancing *interests*.⁹³ The Court in *Scott* framed the central issue in the case in terms of risk,⁹⁴ and the majority opinion is rife with references to risk and uncertainty.⁹⁵

⁸⁹ *Tennessee v. Garner* held unconstitutional the government's *blanket* reliance on a state statute to justify killing a fleeing fugitive; it did not purport to hold that the death of a fugitive is never warranted under any set of facts. See *supra* text accompanying notes 29-35. The Court in *Lewis* did hold that the government action – tailing a motorcycle so closely that it could not avoid striking a passenger who fell from the motorcycle when it lost control – did not "shock the conscience" and thus did not violate substantive due process. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 854-55 (1997). The holding, however, was based on the absence of even an allegation that the police had "intent to harm suspects physically or to worsen their legal plight." *Id.* In contrast, it was only an examination of the actual evidence that led the Court in *Scott* to conclude that Harris's "version of events is so utterly discredited by the record that no reasonable jury could have believed him." *Scott*, 550 U.S. at 380.

⁹⁰ *Scott*, 550 U.S. at 380; see *supra* text accompanying notes 76-78.

⁹¹ See *supra* text accompanying note 79.

⁹² See, e.g., *Lewis*, 523 U.S. at 853.

⁹³ None of this is to say that the consideration of risks has not previously undergirded Fourth Amendment analysis. Cf. Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 667-77 (1988) (framing Fourth Amendment jurisprudence designed to protect individual's privacy in terms of risks). But the explicit embrace of this paradigm in *Scott* is a marked shift in the Court's approach.

⁹⁴ See *Scott*, 550 U.S. at 374 ("Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the

Perhaps most striking is the fact that these various innovations are not unrelated. Indeed, far from being random, these differences together signal a shift by the Court to conduct balancing tests in high-speed police chase cases – or at least those that raise Fourth Amendment claims – in general accordance with paradigmatic environmental risk analysis. The notion of ascertaining the existence and scope of a risk posed by a fugitive corresponds to risk assessment in environmental risk analysis – the question of whether a particular situation poses a risk. The idea of relying upon purportedly objective evidence such as a videotape to isolate that risk corresponds to the heavy reliance upon objective science in conducting risk assessments. The technique of relying upon the judge to apply the law to the facts once the risk has been found to exist corresponds to the separation in environmental risk analysis between risk analysis and risk management – determining how to deal with a risk that has been scientifically identified. Finally, the concept of deliberative risk analysis – not diluted by the understanding that quick decisions have to be made – and indeed reliance upon the language of risk correspond well to deliberative environmental risk analysis. I explore these points, as well as the shortcomings of the Court in striving to conform its opinion to the environmental risk analytic paradigm, in the next section.

B. *Overview of Risk Analysis Under the ACCA*

The Armed Career Criminal Act provides a sentence enhancement for convicted felons who commit crimes using firearms if they have been convicted of certain predicate crimes three times before.⁹⁶ Where it applies, the ACCA mandates a fifteen-year minimum sentence and a maximum sentence of life in prison.⁹⁷

lives of innocent bystanders?”).

⁹⁵ See, e.g., *id.* at 379 n.6 (“Society accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police.”); *id.* at 380 (“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.”); *id.* at 383 (“[I]n judging whether Scott’s actions were reasonable, we must consider the risk of bodily harm that Scott’s actions posed to respondent in light of the threat to the public that Scott was trying to eliminate.”); *id.* at 385 (“Whereas Scott’s action – ramming respondent off the road – was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not.”); *id.* at 386 (“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.”); *id.* (“The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others . . .”).

⁹⁶ 18 U.S.C. § 924(e) (2006).

⁹⁷ *Id.*

Congress originally enacted the ACCA in 1984. In its original form, the Act mandated the minimum sentence for felons found guilty of possession of a firearm where they had three previous convictions “for robbery or burglary.”⁹⁸ The law was designed to “supplement” existing state “law enforcement efforts against ‘career’ criminals,”⁹⁹ Congress reasoning that “robbery and burglary are the crimes most frequently committed by these career criminals.”¹⁰⁰

The Career Criminals Amendment Act of 1986¹⁰¹ extended the scope of the ACCA.¹⁰² Congress’s motivation in expanding the ACCA was quite similar to its motivation in originally enacting the ACCA: “the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem.”¹⁰³

The Career Criminals Amendment Act expanded the definition of a predicate offense from simply “robbery or burglary” to “a violent felony or a serious drug offense.”¹⁰⁴ The Act then defined “violent felony” as

any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

⁹⁸ 18 U.S.C. app. § 1202(a) (Supp. 1985), *repealed by* Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 459 (1986).

⁹⁹ *Taylor v. United States*, 495 U.S. 575, 581 (1990).

¹⁰⁰ *Id.* at 581. Congress originally enacted a bill that would have made it a federal crime – and would have imposed a mandatory minimum sentence for committing that crime – for an offender with two or more prior robbery or burglary convictions to commit a third robbery or burglary. See James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 545-46 (2009). President Reagan pocket vetoed the bill in 1983. See *id.* at 546 (arguing that the President’s opposition was “likely due to federalism concerns related to providing federal jurisdiction over state crimes”). Congress thereafter amended the bill to abandon the creation of a new federal crime and instead simply to enhance the sentence of felons convicted of certain existing federal crimes. *Id.* at 547. This bill was enacted and signed into law by President Reagan, and it became the ACCA. See *id.* at 546-47.

¹⁰¹ That Act was Subtitle I of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3239 (1986).

¹⁰² In fact, the year 1986 saw two amendments that expanded the ACCA’s reach. Before the Career Criminals Amendment Act, the Firearms Owners’ Protection Act expanded what was then a statutory definition for burglary. See *Taylor*, 495 U.S. at 582. That definition was deleted shortly thereafter by the Career Criminals Amendment Act. See *id.*

¹⁰³ *Id.* at 583.

¹⁰⁴ 18 U.S.C. § 924(e)(1) (2006).

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another¹⁰⁵

A focus on risk undergirds Congress's approach under the ACCA. First, under both the original ACCA and ACCA amendments, Congress intended to reduce the risk posed by career criminals who repeatedly perpetrate violent crimes. Second, the ACCA's remedy – a mandatory minimum sentence of fifteen years – directly seeks to minimize that risk. Through the imposition of the mandatory minimum sentence, Congress sought both to deter career criminals from committing additional crimes and to incapacitate those who nonetheless did.¹⁰⁶ Finally, the statutory structure of the ACCA – both as originally enacted and even more so as amended – emphasizes the risk of harm to others caused by a perpetrator's actions, especially in clause (ii) of the definition of "violent felony" (known as the "residual clause"). For one thing, the fact that "burglary" plays a prominent role in the residual clause stems from congressional belief that burglary prototypically puts third parties at risk of harm. As the Court has explained,

Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense, both in 1984 and in 1986, because of its inherent potential for harm to persons. The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate. And the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape.¹⁰⁷

More generally, the residual clause as currently structured clearly invites – indeed, even directs – courts to undertake a risk analysis in determining whether to impose the mandatory minimum sentence. The residual clause identifies as predicate crimes not only "burglary, arson, [and] extortion" – which Congress evidently believed inherently involved some unacceptably large level of risk of harm to others – but also any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."¹⁰⁸

One can see that Congress, with the ACCA, has undertaken both risk analysis and risk management. On the risk analysis front, Congress has determined that burglary, arson, extortion, and other crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to

¹⁰⁵ *Id.* § 924(e)(2)(B).

¹⁰⁶ Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1178 (2010).

¹⁰⁷ *Taylor*, 495 U.S. at 588.

¹⁰⁸ 18 U.S.C. § 924(e)(2)(B)(ii).

another” are predicate crimes that indicate that a threshold of risk has been met. On the risk management front, Congress has determined that where the threshold level of risk is met, the proper way to address the risk is to impose a mandatory fifteen-year minimum sentence.

Still, Congress did not completely deprive the courts of any role in risk analysis under the ACCA. To the contrary, the residual clause’s sweep of crimes that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another” within the scope of predicate acts leaves the courts with substantial risk analysis responsibilities. The lack of specificity demands that courts engage in substantial interstitial lawmaking.¹⁰⁹

In a series of ACCA cases, the Supreme Court has met this challenge and provided additional detail about the proper application of the residual clause. First, the Court has explained that courts should consider prior crimes for which a defendant has been convicted *categorically*.¹¹⁰ Under this categorical approach, the court asks “whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of th[e] particular offender.”¹¹¹

Second, the Court in *Begay v. United States*¹¹² explained that a crime will only fall within the sweep of the residual clause if it is of a kind similar to the three crimes identified by name under that clause – to wit, burglary, arson, and extortion.¹¹³ If a crime is not sufficiently analogous to burglary, arson, or extortion, then it does not qualify as a predicate crime, even if it imposes a risk of harm on others. Thus, the Supreme Court in *Begay* concluded that driving under the influence of alcohol does not qualify as a predicate crime under the ACCA, notwithstanding the risk it poses to third parties.¹¹⁴ The Court reasoned that, while the crimes listed by name in the residual clause “all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct,” “statutes that forbid driving under the influence . . . do not insist on purposeful, violent, and aggressive conduct.”¹¹⁵ Along similar lines, the Court in *Chambers v.*

¹⁰⁹ See David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 212 (2010) (describing the residual clause as “ill-defined”); *id.* at 216 (contrasting the clarity of the first clause of the “violent felony” definition with the ambiguity of the residual clause).

¹¹⁰ See *James v. United States*, 550 U.S. 192, 202 (2007); *Taylor*, 495 U.S. at 588-89.

¹¹¹ *James*, 550 U.S. at 202.

¹¹² 553 U.S. 137 (2008).

¹¹³ See *id.* at 142-44.

¹¹⁴ See *id.* at 144-47.

¹¹⁵ *Id.* at 144-45 (quoting *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part)). The Court in *Begay* suggested that DUI might not qualify as a predicate crime because it does not involve the use of a firearm: “As suggested by its title, the Armed Career Criminal Act focuses upon the special danger created when a particular type of offender – a violent criminal or drug trafficker – possesses a gun.” *Id.* at 146; see Holman, *supra* note 109, at 222 (stating that, after *Begay*, the ACCA is focused on “the prevention of future armed crimes”). One problem with this logic is that, as the

*United States*¹¹⁶ held that the crime of “failing to report” for penal confinement also was not a predicate crime. The Court reasoned that “the crime amounts to a form of inaction, a far cry from the ‘purposeful, violent, and aggressive conduct’ potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion.”¹¹⁷

Third, the Court in *James v. United States*¹¹⁸ explicated that once a court has concluded that a crime (considered categorically) qualifies as analogous to burglary, arson, or extortion, it next must consider whether the risk that the crime in question imposes on others is at least as great as the risk imposed by the listed crime to which it is most analogous (i.e., burglary, arson, or extortion). Only if it is will the crime qualify as a predicate crime.¹¹⁹ The Court applied this reasoning in *James* to conclude that attempted burglary posed at least as much of a risk to others as did the listed crime of completed burglary: “Attempted burglary poses the same kind of risk [as burglary]. Interrupting an intruder at the doorstep while the would-be burglar is attempting a break-in creates a risk of violent confrontation comparable to that posed by finding him inside the structure itself.”¹²⁰

In sum, the congressional design of the ACCA essentially demands that courts engage in risk analysis. And the Supreme Court has responded by

sentence from *Begay* just excerpted observes, any requirement that a firearm play a role in a predicate crime originates not in the text of the statute but in the statute’s name. Still, even if one accepts this point on some level, one can understand the use of a firearm as a heuristic for the statutory-directed inquiry of whether there is serious potential risk of physical injury to another.

¹¹⁶ 555 U.S. 122, 130 (2009).

¹¹⁷ *Id.* at 128.

¹¹⁸ 550 U.S. 192, 203 (2007).

¹¹⁹ *See id.* at 203-04. Justice Scalia in dissent proposed a distinct, but still risk-centered, approach. *See id.* at 214 (Scalia, J., dissenting). In his view, a crime qualifies as a predicate crime only if it is at least as risky as the least risky crime identified by name in the ACCA residual clause. *See id.* at 219. Justice Scalia concluded that, given the choice of burglary, arson, extortion, and crimes involving use of explosives, the least risky crime is burglary. *See id.* at 220-25. Applying his test to the case at hand, Justice Scalia concluded that attempted burglary is not as risky as burglary and therefore should not qualify as a predicate crime under the ACCA. *See id.* at 225-27.

¹²⁰ *See id.* at 203-04 (majority opinion). The Court further elucidated,

Indeed, the risk posed by an attempted burglary that can serve as the basis for an ACCA enhancement may be even greater than that posed by a typical completed burglary. All burglaries begin as attempted burglaries. But ACCA only concerns that subset of attempted burglaries where the offender has been apprehended, prosecuted, and convicted. This will typically occur when the attempt is thwarted by some outside intervenor – be it a property owner or law enforcement officer.

Id. at 204. The Court did distinguish cases involving attempt laws that “could be satisfied by preparatory conduct that does not pose the same risk of violent confrontation and physical harm posed by an attempt to enter a structure illegally.” *Id.* at 204-05.

crafting interstitial applications of, and guidelines for the application of, risk analysis.

II. THE SUPREME COURT'S FLAWED EFFORTS AT PARADIGMATIC RISK ANALYSIS IN THE CRIMINAL LAW ENFORCEMENT SETTING

In the prior Part, I offered two examples of how risk analysis might fall within the purview of the judiciary in the context of criminal law enforcement. In this Part, I explain how in both settings – constitutional tort litigation involving excessive force allegations, especially in *Scott v. Harris*, and the application of the ACCA – the Court has aspired toward a paradigm of risk analysis that is more commonly used by administrative agencies. In order to elucidate this turn toward paradigmatic risk analysis, I first explicate risk analysis as it is undertaken by agencies in an area where risk analysis is more openly embraced – the area of environmental regulation. I then explain how the Court in *Scott v. Harris* and the ACCA cases – whether consciously or otherwise – has moved toward such a paradigm. I also highlight ways in which the Court's efforts fall short.

A. *An Overview of the Treatment of Risk in the Context of Environmental Regulation*

In order to examine the Court's treatment of risk in the context of criminal law, in this section I provide a somewhat stylized summary of how environmental law responds to risk and uncertainty. The overview I provide focuses on issues that relate to the Court's approach and thus is selective. I address the following questions: (1) Is there any risk? (2) Is the showing of risk sufficient to justify government action? (3) What about the risk-risk tradeoffs? (4) Who is best positioned to answer these questions? Drawing upon environmental legal theory and regulatory practice, I consider each question in turn.

Is there any risk? The dominant U.S. approach to risk regulation emphasizes the importance of analyzing, and if possible measuring, the risk that a particular activity or substance may pose. It does this in two ways. First, it subscribes to a division between the question of the extent to which there is a risk – risk assessment¹²¹ – and the question of how best to respond to

¹²¹ Risk assessment is now enshrined in American administrative law by means of executive orders. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (Clinton administration); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 4, 1985) (Reagan administration); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (Reagan administration). For discussion of the difficulties surrounding the use of risk assessment in the United States, see generally John S. Applegate & Celia Campbell-Mohn, *Risk Assessment: Science, Law and Policy*, 14 NAT. RESOURCES & ENV'T. 219 (2000). For a critique of overreliance on risk assessment, see John S. Applegate, *A Beginning and Not an End in Itself: The Role of Risk Assessment in Environmental Decision-Making*, 63 U. CIN. L. REV. 1643 (1995).

that risk – risk management.¹²² The justification behind this distinction is a perceived dichotomy between the types of questions that risk assessment and risk management are designed to address. The question of the extent to which an activity or the use of a substance poses a risk is viewed as a matter that is appropriately resolved using the best available science. In contrast, the question of how best to respond to the existence of some risk is viewed as a policy question. Risk assessment thus seeks to isolate scientific inquiry from a balancing of policy concerns.¹²³ Only, according to theory, after risk assessment reveals a risk should risk managers be called upon to decide what, if anything, to do about that risk.¹²⁴

Second, the dominant U.S. approach calls for application of science – often stated in environmental statutes as the “best available” science – in analyzing environmental risks and harms.¹²⁵ Using risk assessment as the first step in risk analysis accompanies the idea that one must analyze the risk presented both as scientifically and, implicitly, as objectively as possible. After risk assessment is complete, the analysis shifts to the more policy-centered stage of risk management.

¹²² See, e.g., Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, 23 HARV. ENVTL. L. REV. 93, 97 (1999) (explaining that the government has tried to “distinguish[.]” risk assessment “from risk management, the substantive decision to take or withhold regulatory action,” on the ground that risk management, “unlike risk assessment, explicitly involves political, social, and economic policy questions, such as the acceptable level of risk and the appropriate regulatory response”). For discussion of the distinction, as well as an argument questioning its viability, see *id.* at 96-97, Robert G. Hetes, *Science, Risk, and Risk Assessment and Their Role(s) Supporting Environmental Risk Management*, 37 ENVTL. L. 1007, 1015 (2007), Howard Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment*, 5 YALE J. ON REG. 89, 143-48 (1988) (arguing that risk assessments should be prepared with an expectation they will be relied upon by risk managers, and in a way that facilitates that reliance), and Timothy Riley, *Redressing the Silent Interim: Precautionary Action & Short Term Tests in Toxicological Risk Assessment*, 12 RISK 281, 285 (2001) (“Traditionally, risk management follows risk assessment, and never the two shall meet. Nevertheless, a key normative aspect of toxicological risk assessment is that it is extremely difficult or impossible to separate risk assessment from risk management.”).

¹²³ It is for this reason that commentators believe risk assessment and risk management should be handled by separate actors. See *infra* text accompanying note 143.

¹²⁴ See generally William D. Ruckelshaus, *Risk, Science, and Democracy*, 1 ISSUES SCI. & TECH. 19 (1985). For a discussion of the importance of separating scientific inquiries from policy inquiries, see Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1627-28 (1995). For a discussion of how difficult – whether because of unintentional spillover or intentional interference – identifying and maintaining that separation can be, see *id.* at 1628-73, and Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 83 (1991).

¹²⁵ For a discussion and critique, see Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1602 (2008).

Is the showing of risk sufficient to justify government action? What if risk assessors cannot establish a risk with any real degree of certainty? Perhaps, for example, scientific understanding is too primitive to provide a solid basis for analysis. Here, some environmental policy advocates advert to the precautionary principle. The precautionary principle is generally conceived of as a principle of environmental law. In essence, it calls for a cautionary approach in the face of risk and uncertainty,¹²⁶ although as I shall elucidate below, there is considerable contention over what exactly the principle means and demands.

At the international level, the principle has attained quite a bit of caché. Its importance is evidenced by its inclusion in numerous international statements of environmental law and international and multilateral environmental treaties.¹²⁷ Some assert that the precautionary principle has acquired the status of customary international law.¹²⁸ The frequency with which the principle is quoted in documents, laws, and treaties of the European Union and its member states illustrates that the European Union in particular believes strongly in the principle.¹²⁹

With some exceptions,¹³⁰ U.S. domestic environmental law has not embraced the precautionary principle. This does not mean, however, that the United States does not act in accordance with the principle in other areas. The question is more one of identifying those risks that each sovereign deems to be worth addressing with a precautionary approach.¹³¹ Thus, for example, while the European Union and its member states may follow the strictures of the precautionary principle more closely and more often than the United States with respect to environmental risks, the United States adopts such behavior more than does the European Union with respect to the risks posed by terrorism.¹³²

Commentators have lamented the precautionary principle's lack of clarity.¹³³ Indeed, commentators have identified no fewer than nineteen interpretations of

¹²⁶ See Nash, *supra* note 1, at 498.

¹²⁷ See *id.* at 499.

¹²⁸ See *id.*

¹²⁹ See, e.g., Jonathan B. Wiener, *Precaution in a Multirisk World*, in HUMAN AND ECOLOGICAL RISK ASSESSMENT: THEORY AND PRACTICE 1509, 1510 (Dennis D. Paustenbach ed., 2002).

¹³⁰ See Nash, *supra* note 1, at 499 n.22 and the authorities cited therein.

¹³¹ See Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT'L L. 207, 209 (2003).

¹³² See Jessica Stern & Jonathan B. Wiener, *Precaution Against Terrorism*, 9 J. RISK RES. 393, 397-403 (2006); Cass R. Sunstein, *Irreversible and Catastrophic: Global Warming, Terrorism, and Other Problems*, 23 PACE ENVTL. L. REV. 3, 3-4 (2005-2006); Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 515-16 (2007) [hereinafter Sunstein, *Divergent American Reactions*]; Wiener, *supra* note 131, at 225-30.

¹³³ See Nash, *supra* note 1, at 500.

the principle.¹³⁴ In the face of this lack of certainty, some commentators have endeavored to rescue the principle from ambiguity and contradiction by identifying a “heartland” area of clear applicability for the principle.¹³⁵ The precautionary principle’s “heartland” is situations where (1) “the risks of harm are uncertain”; (2) “harm might be irreversible and what is lost is irreplaceable”; and (3) “the harm that might result would be catastrophic.”¹³⁶ Sometimes, however, the risks on both sides may meet these criteria, in which case the “heartland” applicability of the principle will provide little guidance.¹³⁷

What about the risk-risk tradeoffs? The precautionary principle’s logic applies not only to the risk that exists absent regulation but equally to the countervailing risk to which regulation may give rise – i.e., to the risk which regulating false positives may create.¹³⁸ Thus, “[t]aken to its logical extreme,” the precautionary principle “would ‘bring valuable activities to a halt,’ and would ‘be impossible’ to apply broadly.”¹³⁹ In the face of this danger of inherent contradiction, commentators have endeavored to restore the guiding resonance of the precautionary principle by advocating the use of “risk-risk analysis.” Risk-risk analysis is part of a broader attempt to formalize the process by which regulatory decision making is conducted – including a greater reliance upon cost-benefit analysis and questions of cost-effectiveness. Risk-risk analysis can be seen as an adjunct to cost-benefit analysis.¹⁴⁰ Cost-benefit analysis calls for regulators to compare the benefits and costs of proposed regulations.¹⁴¹ Risk-risk analysis calls upon regulators to balance the

¹³⁴ See Richard B. Stewart, *Environmental Regulatory Decision Making Under Uncertainty*, 20 RES. L. & ECON. 71, 76 (2002) (setting out four interpretations); Wiener, *supra* note 129, at 1513 (citing Per Sandin, *Dimensions of the Precautionary Principle*, 5 HUM. & ECOLOGICAL RISK ASSESSMENT 899, 901-05 (1999), as identifying “19 different formulations” of the principle); *id.* at 1513-18 (setting out three possible interpretations of the principle). Professor Sunstein has expanded upon Professor Stewart’s four possibilities, explaining that those possibilities “identify two axes along which the principle might vary: ‘the level of uncertainty that triggers a regulatory response,’ and ‘the tool that will be chosen in the face of uncertainty.’” Nash, *supra* note 1, at 501 (quoting Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1014 (2003)).

¹³⁵ Nash, *supra* note 1, at 502-03.

¹³⁶ *Id.*

¹³⁷ *Id.* at 503.

¹³⁸ See *id.* at 502.

¹³⁹ *Id.* (quoting Wiener, *supra* note 131, at 224).

¹⁴⁰ See Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021, 1049 (2004) (discussing the compatibility of cost-benefit analysis with risk-risk analysis); cf. DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 116 (1999) (proposing a hybrid of feasibility analysis and cost-benefit analysis, under which cost-benefit analysis would be used “as a benchmark for what is feasible”).

¹⁴¹ See, e.g., Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE

risks that a proposed regulation will reduce against the risks to which regulation itself may give rise.¹⁴² It rests upon the recognition that in general one does not simply succeed in reducing risk; instead, one may often in practice “trade off” a reduction in one risk for an increase in another.

Who is best positioned to answer these questions? The recommended dichotomy between risk assessment and risk management means that different actors should resolve these questions, even if both sets of actors are experts in their respective areas.¹⁴³ Experts – with different areas of expertise – are called upon to perform each task.

One of the improvements that modern environmental law has made over the common law in adjudicating environmental problems is additional reliance upon science and upon experts who can understand that science. Resolution of environmental issues through the common law vested courts with authority to consider and evaluate scientific evidence; the results were often not very pretty.¹⁴⁴ Today, environmental law vests such authority with administrative agencies – generally the EPA at the federal level – that develop considerable expertise in the relevant science over time. Peer review further bolsters an agency’s scientific analysis and conclusions.¹⁴⁵ Courts, in turn, afford great deference to agency decisions that rest upon scientific analysis.¹⁴⁶ One effect of this approach is to reduce the likelihood that government will respond to people’s perceptions of risk, as opposed to what is – at least according to the dominant view – scientifically and objectively established as risky.¹⁴⁷

DAME L. REV. 313, 354-55 (2006).

¹⁴² See John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1, 19-36 (John D. Graham & Jonathan Baert Wiener eds., 1995); Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763, 1765-66 (2002) (arguing that risk-risk analysis should, but in practice often fails to, take into account the ancillary benefits of regulation).

¹⁴³ See *supra* text accompanying notes 121-124.

¹⁴⁴ Consider, for example, Justice Holmes’s foray into the beginnings of epidemiology in *Missouri v. Illinois*, 200 U.S. 496, 523-26 (1906).

¹⁴⁵ See, e.g., J.B. Ruhl & James Salzman, *In Defense of Regulatory Peer Review*, 84 WASH. U. L. REV. 1, 12-14 (2006).

¹⁴⁶ See, e.g., *Nat’l Res. Def. Council v. U.S. EPA*, 16 F.3d 1395, 1401 (4th Cir. 1993) (“[T]his court does not sit as a scientific body, meticulously reviewing all data [compiled by the EPA] under a laboratory microscope.”).

¹⁴⁷ This result is not without critique. See, e.g., Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 743-44 (2008) (arguing that emotional conceptions of risk may be a normatively appropriate basis upon which to regulate); cf. Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 584-95 (2004) (arguing that consumer preferences are an appropriate ground on which trade regulations might be seen as justified). See generally Howard F. Chang, *Risk Regulation, Endogenous Public Concerns, and the Hormones Dispute: Nothing to Fear but Fear Itself?*, 77 S. CAL. L. REV. 743 (2004).

While the distinction between risk assessment and risk management directs that the issues of whether there is risk and how to respond to risk should be handled by different people, modern environmental law still calls upon individuals with some policy expertise to resolve the latter question.¹⁴⁸

Having now shone light on paradigmatic risk regulation as undertaken by agencies in the context of environmental regulation, I turn in the next two sections to the Court's efforts at conducting similar analyses in the context of criminal law enforcement.

B. *Scott v. Harris and Risk Analysis*

In this section, I consider the Supreme Court's treatment of risk in *Scott v. Harris* through the lens of paradigmatic environmental risk regulation. As discussed above, the *Scott* Court framed the central issue it faced in terms of risk,¹⁴⁹ and the majority opinion is full of references to risk and uncertainty.¹⁵⁰ But these linguistic paeans hardly exhaust the Court's efforts to undertake risk analysis. As we shall see, the Court's analysis on its face largely conforms to the environmental risk paradigm discussed in the previous section. At the same time, closer examination reveals flaws in the Court's analysis at several points.

In section II.B.1, I demonstrate how the *Scott* Court's opinion conforms, at least facially, to many typical aspects of risk analysis in the environmental law and policy setting. That discussion also reveals numerous shortcomings in the Court's analysis. In section II.B.2, I consider these shortcomings more systematically, identifying aspects of the Court's risk assessment and risk management analyses that could have benefited from a fuller understanding of environmental risk analysis. Finally, in section II.B.3, I build on those shortcomings, and on other points, to question whether environmental risk analysis is the correct paradigm for risk analysis in the context of a police car chase.

1. Aspirations to Paradigmatic Risk Analysis

Is there any risk? The Court's approach in *Scott* generally adheres to the dominant approach to risk assessment in environmental law. The Court quite deliberately set out first to identify and describe the risk that Harris's actions posed. Consistent with the notion that one first establishes that there is risk before turning to any possible responses, the Court was careful to establish the existence of risk before turning to Scott's response to that risk. Moreover, the Court took great pains to establish the risk that Harris's actions posed in an objective, and one might say almost scientific, way. The Court's reliance upon

¹⁴⁸ Cf. Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2293 (2002) (extolling the virtues of the standard-setting "judgments of administrators, who have advantages both as technocrats and public representatives").

¹⁴⁹ See *supra* note 93 and accompanying text.

¹⁵⁰ See *supra* note 94 and accompanying text.

the videotape as absolute, overpowering evidence of the risk posed echoes the paradigmatic job that risk assessment is supposed to perform by relying upon objective, unassailable scientific evidence.

Indeed, the Court's view of the objective strength of the evidence is reflected in its resolution, on the basis of the videotape evidence, of the question on summary judgment of whether Harris was imposing any risk. No rational jury, according to the Court, could conclude that there was no significant risk. I shall return to the question of whether the Court's conclusion in this regard is supportable. For now, it suffices to observe that the Court viewed this single piece of evidence as definitively resolving the case, both for the Justices themselves and for all rational jurors. Justice Breyer specifically explained that "watching the video footage of the car chase made a difference to my own view of the case."¹⁵¹ So confident was he in the evidentiary power of the videotape that he explicitly "suggest[ed] that the interested reader take advantage of the link in the Court's opinion, . . . and watch it."¹⁵²

Is the showing of risk sufficient to justify government action? The Court's opinion contains numerous references to risks that Harris's actions were imposing on innocent bystanders and the police in pursuit. On at least a simple reading of the opinion, the Court upheld the police's intervention on precautionary grounds: The decision to ram Harris's car was a precaution against the risk that someone else would be hurt coming to fruition. The Court's allusions to the importance of "precaution" are not surprising in light of Professor Sunstein's and Professors Stern and Wiener's assessment of the generally "precautious" approach adopted by the United States with respect to terrorism.¹⁵³ The risks posed – or at least perceived to be posed – by terrorism are similar to those posed by a person fleeing the police in a high speed chase. The concern is that a large number of innocent individuals will be harmed or perish.¹⁵⁴ Taking a "wait and see" attitude, moreover, seems a poor option. As Professor Sunstein explains, "With respect to terrorism, . . . it is difficult to say that the risk is not real or that it is too speculative to warrant immediate action. . . . [I]t is hard to argue that . . . the best approach is one of 'learn, then

¹⁵¹ *Scott v. Harris*, 550 U.S. 372, 387 (2007) (Breyer, J., concurring).

¹⁵² *Id.* (citation omitted).

¹⁵³ See *supra* text accompanying note 132. Nowhere, perhaps, is the U.S. precautionary approach made clearer than in then-Vice President Dick Cheney's enunciation of the so-called "one percent doctrine":

We have to deal with this new type of threat in a way we haven't yet defined

With a low-probability, high impact event like this . . . [i]f there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response

RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11*, at 61-62 (2006).

¹⁵⁴ See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 71-75* (2007); *supra* note 153.

act.”¹⁵⁵ The *Scott* Court used similar reasoning to approve the decision preemptively to “take out” Harris’s automobile.

By contrast, the Court’s use of precaution to justify the police’s actions is at odds with the approach American society generally takes to criminal law. American criminal law can also be said to be precautionary, but the precaution generally is against limiting the freedom of, convicting, and punishing innocent individuals.¹⁵⁶ Doctrines such as the presumption of innocence, the requirement of proving guilt beyond a reasonable doubt, and the rule of lenity seem designed to vindicate the precautionary view of Blackstone that “it is better that ten guilty persons escape than that one innocent suffer.”¹⁵⁷

At the same time, recent years have seen something of a shift in the traditional precautionary criminal law paradigm. Some evidence of this shift can be seen in increases in governmental power to conduct surveillance and hold detainees in order to combat terrorism.¹⁵⁸ Professor Wiener has observed more generally a “rise of stringent precautionary measures in the criminal law area” – including “mandatory minimum sentences and ‘zero-tolerance’ policies on adolescent alcohol use” – that are designed to “incapacitate and deter future dangerousness.”¹⁵⁹ Seen in this light, the *Scott* Court’s invocation of precaution in favor of the public-at-large and against a criminal suspect seems more at home.

What about the lack of clarity that inheres in the precautionary principle?¹⁶⁰ As discussed above, commentators have emphasized the clearer applicability of the principle in a narrower group of “heartland” settings. This heartland consists of situations where the risk of harm is uncertain and the harm might be irreversible and catastrophic.¹⁶¹ Some of the Court’s reasoning suggests an intent to place Scott’s dilemma within this heartland: the Court went out of its way to emphasize that although Scott’s choice of action “posed a high likelihood of serious injury or death” to Harris, it did not raise “the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head . . . or pulling alongside a fleeing motorist’s car and shooting the motorist.”¹⁶² While the Court was technically focused on distinguishing earlier cases,¹⁶³ still the Court’s reasoning linked Scott’s dilemma to the precautionary principle’s heartland by emphasizing the irreversibility of certain death that Scott’s choice avoided.

¹⁵⁵ Sunstein, *Divergent American Reactions*, *supra* note 132, at 525.

¹⁵⁶ See Nash, *supra* note 1, at 516.

¹⁵⁷ BLACKSTONE, *supra* note 1, at *358.

¹⁵⁸ See *supra* text accompanying note 132.

¹⁵⁹ Wiener, *supra* note 129, at 1524.

¹⁶⁰ See *supra* text accompanying notes 133-134.

¹⁶¹ See *supra* text accompanying notes 135.

¹⁶² *Scott v. Harris*, 550 U.S. 372, 384 (2007).

¹⁶³ See *id.*

At the same time, the Court's fixation on the distinction between a risk that imposes a near certainty of death and another that imposes a substantial, but not nearly certain, likelihood of death is odd given other reasoning elsewhere in the *Scott* opinion. Recall that the Court considered and rejected Harris's argument that a showing that a given police strategy would result in the imposition of "risk of bodily harm" should trigger the application of a stricter standard of judicial scrutiny.¹⁶⁴ It is strange for the Court to have rejected a distinction between actions that pose a "risk of bodily harm" and those that do not, while at the same time emphasizing the distinction between actions that will result with near certainty in death and those that will not.

What about the notion that the (proper) application of the principle to countervailing risks renders the principle inherently contradictory? The *Scott* Court seemed to emphasize precisely this point when it highlighted that a risk of bodily harm existed whether the police acted – and thus imposed a risk of bodily harm onto Harris – or not – and thereby allowed a risk of bodily harm to bystanders to continue.¹⁶⁵ In such settings especially, what some see as the important distinction between government "acts" and "omissions" becomes particularly difficult to discern.¹⁶⁶ This point leads us – as it appears to have led the *Scott* Court to some degree – to the broader question of risk-risk tradeoffs.

What about the risk-risk tradeoffs? The Court in *Scott* indicated an awareness (even if a naïve one) of the notion of risk-risk tradeoffs. As the Court explained, "[I]n judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate."¹⁶⁷ It is apparent, then, that the Court recognized the risk-risk tradeoffs faced by Scott in deciding how to proceed: intervening would pose a threat of bodily harm to Harris, while failing to intervene would allow a substantial threat of bodily

¹⁶⁴ See *supra* text accompanying notes 76-86. For criticism of the Court's conclusion, see Blum, *supra* note 7, at 54, and Harmon, *supra* note 7, at 1134-36, 1179-80.

¹⁶⁵ See *Scott*, 550 U.S. at 383-84.

¹⁶⁶ See, e.g., Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 719-28 (2005) (disputing the applicability of the act-omission distinction with respect to government, and in particular with respect to capital punishment); cf. *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (explaining that the state was faced with "the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity" and that "[i]t would have been none the less a choice if, instead of enacting the present statute [and thus choosing to protect one class of property], the state, by doing nothing, had permitted serious injury to the [other class of property] within its borders to go on unchecked"). But see Douglas A. Kysar, *It Might Have Been: Risk, Precaution and Opportunity Costs*, 22 J. LAND USE & ENVTL. L. 1, 44-48 (2006) (arguing that there may be a moral basis on which to distinguish between government acts and omissions).

¹⁶⁷ *Scott*, 550 U.S. at 383.

harm to the public (the existence of which was exemplified and established, in the Court's view, by the videotape evidence) to persist.

The Court justified its balancing of the competing risks in four ways. First, the Court observed that it was "appropriate" to consider "the number of lives at risk."¹⁶⁸ The Court highlighted what it perceived to be a tradeoff between the risk to "numerous bystanders" on the one hand and the risk to "a single person" on the other.¹⁶⁹ As thus described by the Court, this aspect of the risk-risk tradeoff choice faced by Scott bears great similarity to a subspecies of "risk-risk tradeoff" called a "life-life tradeoff." Professors Sunstein and Vermeule coined the term with respect to the government's decision whether to retain capital punishment for murder convicts.¹⁷⁰ There, the tradeoff arises based on evidence of the deterrent effect of capital punishment.¹⁷¹ Professors Sunstein and Vermeule argue that, to the extent that an execution can be shown to deter more than one murder,¹⁷² a life-life tradeoff arises between the certainty of the lost lives of convicted murderers if capital punishment is available and the statistical likelihood of losing numerous innocent victims' lives if the death penalty is not available as a deterrent.¹⁷³ But the Court's analysis fails to live up to Sunstein and Vermeule's approach in a crucial respect. Sunstein and Vermeule provide considerable empirical support for the view that the death penalty in fact can be expected to result in net reduction in loss of life.¹⁷⁴ The *Scott* Court, in contrast, offered no empirical validation of its claims. Its analysis is consequently cursory, an instance of "casual empiricism."¹⁷⁵

¹⁶⁸ *Id.* at 384.

¹⁶⁹ *Id.*

¹⁷⁰ See Sunstein & Vermeule, *supra* note 166, at 708.

¹⁷¹ *Id.* at 706

¹⁷² Professors Sunstein and Vermeule canvass empirical studies that support this proposition, *id.* at 710-16, including recent findings that, "on average, each execution results in eighteen fewer murders." *Id.* at 711 (citing Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 373 (2003)). They also identify the possibility that "capital punishment saves lives on net, even if it has zero deterrent effect," *id.* at 715, for example, based upon "incapacit[ati]on of those who would otherwise kill again in the future," *id.* at 716.

¹⁷³ See *id.* at 706. On the basis of this life-life tradeoff, Professors Sunstein and Vermeule argue that capital punishment may be morally required. See *id.* at 705, 713-16.

¹⁷⁴ See *id.* at 710-13.

¹⁷⁵ See *supra* note 13. Indeed, this is one area where the Court's earlier decisions exhibit greater consideration of the difficult empirical questions that true risk analysis confronts in the area. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court correctly described the government's argument – that, on net, the availability of deadly force actually resulted in more suspects being apprehended alive because the threat of deadly force discouraged suspects from fleeing – as raising an empirical question. *Id.* at 10-11; see *supra* text accompanying notes 29-35. The Court rejected the argument on the ground that "the

A second way that the Court justified its balancing of the competing risks was to focus on the relative culpability of those subject to each risk. In deciding that the imposition of risk on Harris was reasonable, the Court emphasized Harris's culpability as compared to the innocence of potential victims of his reckless driving: "We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability."¹⁷⁶ The Court made clear, while Harris was culpable, "those who might have been harmed had Scott not taken the action he did were entirely innocent."¹⁷⁷

Once again, the Court's analysis here is conclusory. Sunstein and Vermeule also address the relative culpability question, but their analysis is far more rigorous.¹⁷⁸ They do not take as a given the conclusion that a convict's life is worth less. Moreover, their conclusion is bolstered by clear empirical evidence that the tradeoff is between one person convicted of capital murder and a clearly "more numerous group who are certainly innocents."¹⁷⁹ Because the Court offered no equally strong empirical evidence, but only intuition, its conclusion is far less convincing.

Third, the Court justified its balancing of the competing risks by emphasizing that, while the police intervention subjected Harris to some risk of death, it was not certain (or even nearly certain) to result in death: while the police actions "posed a high likelihood of serious injury or death to respondent," they did not give rise to "the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head or pulling alongside a fleeing motorist's car and shooting the motorist."¹⁸⁰ The Court's emphasis of the word *certainty* highlights the importance the Court assigned to the absence of certainty of death in the risk to which Harris was subjected. As discussed above, this distinction stands out as strange in light of the Court's dismissal elsewhere in the opinion of Harris's argument that police action that subjects an individual to a "risk of bodily harm" should trigger closer review.¹⁸¹

The fourth way that the Court justified its resolution of the risk-risk tradeoff dilemma was to observe that an alternate course suggested by Harris – that the police could instead have broken off their pursuit – would have generated competing risks of its own that, according to the Court, would have been worse than the risk imposed on Harris by police intervention.¹⁸² As the Court put it,

Whereas Scott's action – ramming respondent off the road – was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit

presently available evidence does not support this thesis." *Garner*, 471 U.S. at 10.

¹⁷⁶ *Scott v. Harris*, 550 U.S. 372, 384 (2007).

¹⁷⁷ *Id.*

¹⁷⁸ Sunstein & Vermeule, *supra* note 166, at 716-39.

¹⁷⁹ *Id.* at 716.

¹⁸⁰ *Scott*, 550 U.S. at 384 (citations omitted).

¹⁸¹ See *supra* text accompanying note 164.

¹⁸² See *Scott*, 550 U.S. at 385.

was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rear-view mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.¹⁸³

The Court's analysis is very speculative. Once again, the term "casual empiricism" comes to mind.¹⁸⁴

Who is best positioned to answer these questions? The Court's opinion generally conforms to the notions that risk assessment and risk management be performed by experts, albeit different sets of experts. In attempting risk assessment, the Court determined that the videotape definitively established the presence of a substantial risk.¹⁸⁵ In some sense, the videotape itself was presented as an expert with absolutely unimpeachable results.¹⁸⁶

With respect to risk management, the discussion above amply demonstrates the Court's efforts to conduct a thorough analysis of whether the chosen means to address the risk were appropriate.¹⁸⁷ The discussion, of course, also points to several problems in the Court's methodology; still, the point for now remains that the Court's opinion strives for formality and completeness in its analysis of how the risk was managed.

In keeping with the idea that different experts conduct risk assessment and risk management, the Court endeavored to present the risk identification and risk management decisions as having been arrived at separately. According to the Court, the videotape objectively established the presence of risk, while the

¹⁸³ *Id.* (citation omitted).

¹⁸⁴ See *supra* text accompanying note 175. This is not to say that the Court's analysis is wrong. A decision to enforce the law may have the perverse effect of increasing harm to society. Cf. Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 583 & n.269 (2004) (explaining that the decision to regulate stringently a substance as a hazardous waste may create an incentive for people to dump the substance illegally, with the result being worse environmental quality than would be obtained with a less stringent regulatory regime). In this sense, the risk that enforcement is designed to minimize may generate an offsetting risk. Still, in these circumstances, a proper risk analysis is required to evaluate which risk will be greater.

¹⁸⁵ See *supra* text accompanying notes 71-73.

¹⁸⁶ I shall discuss below the question of whether this presentation was a fair one. See *infra* text accompanying notes 191-206. The point for now is simply that the Court's treatment of the matter conforms generally to a notion of expert risk assessment.

¹⁸⁷ See *supra* text accompanying notes 153-186.

Court had to perform a risk management analysis.¹⁸⁸ Another aspect of the Court's decision is consistent with this separation of functions. Recall that the Court, in a brief footnote, decided that there was no role left for the jury once the presence of risk had been definitively decided.¹⁸⁹ That judgment is consistent with some notion that the jury's primary function is (loosely speaking) risk assessment and not risk management.

2. Problems with the Environmental Risk Analytic Paradigm as Applied in *Scott v. Harris*

The previous discussion demonstrates how the *Scott* Court's opinion conforms to, at least facially, many typical aspects of risk analysis in the environmental law and policy setting. That discussion also reveals, however, numerous shortcomings in the Court's analysis. In this subsection, I consider these shortcomings more systematically. I identify aspects of the Court's risk assessment and risk management analyses that could have benefited from a fuller understanding of environmental risk analysis.

a. *Risk assessment and the lure of objectively definitive evidence*

The *Scott* Court presented the videotape as unassailable evidence that Harris's actions posed a substantial risk to the police and to the community at large. In the language of risk analysis, the Court presented the videotape as unassailable and unequivocal scientific evidence of the presence of a risk. There are two problems here. First, it is rare that even scientific evidence is quite so unequivocal. Second, the notion of an absolutely unequivocal piece of definitive evidence is especially unlikely, and problematic, in the context of a typical legal dispute.

We begin by highlighting several factors that are often overlooked but that render most scientific findings less than certain. Science tends to gird itself in the clothing of absoluteness and objectivity. Science rests upon measurements, and the substantially universal reliance upon the scientific method is supposed to ensure uniform procedure and reliable and replicable measurements, as well as limit (or at least force into the open) any bias of the scientists.¹⁹⁰ In reality, however, most science is not as certain as this paradigmatic model suggests. There are numerous assumptions that underlie most scientific studies. Bias, whether conscious or unconscious, is a reality. Indeed, at the end of the day, it is rare for any scientific conclusion to be embraced by all scientists in a field. Rather, science advances as a consensus forms around results.¹⁹¹

¹⁸⁸ *Scott*, 550 U.S. at 383-84.

¹⁸⁹ See *supra* text accompanying notes 74-75.

¹⁹⁰ See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 81-97 (2002).

¹⁹¹ See, e.g., Nash, *supra* note 1, at 507 (discussing the scientific consensus that formed regarding the causal relationship between anthropogenic greenhouse gas emissions and global warming).

The foregoing is no less true of the science underlying most environmental risk assessment. Environmental risk assessment typically requires scientists to make numerous assumptions about various matters – dose-response evaluation (i.e., the extent to which data that show the effect of one amount of a toxin predicts the effect of exposures to lesser amounts) and human exposure assessment (i.e., the extent to which human populations are exposed to a toxin),¹⁹² to name two. Bias is also a problem: commentators assail the notion that risk assessment can effectively be shielded from the policy and politics of risk management and of political actors.¹⁹³ None of the foregoing is to suggest that the scientific approach is not a valid approach, or even the preferred approach, for dealing with problems of environmental risk assessment. The point is only to show that the objectiveness of scientific inquiry lay observers perceive is largely overstated.

The reality that science is not generally objective and definitive makes the Court's elevation of the videotape as objective and definitive evidence in a court case especially strange. Based upon the Court's description and treatment of the videotape, one might think of it as the opposite of evidence that amounts to "harmless error"; the videotape is "harmproof evidence,"¹⁹⁴ one might say. Harmless error results when a court erroneously admits evidence that a reviewing court concludes did not sway the factfinder under the applicable burden of proof.¹⁹⁵ By contrast, harmproof evidence, such as the videotape, is properly admitted evidence that is powerful enough to overcome other evidence (whether properly admitted or not, one must presume) that might suggest another conclusion.¹⁹⁶

¹⁹² See Alon Rosenthal, George M. Gray & John D. Graham, *Legislating Acceptable Cancer Risk from Exposure to Toxic Chemicals*, 19 *ECOLOGY L.Q.* 269, 282 (1992).

¹⁹³ See, e.g., CLIFFORD RECHTSCHAFFEN & EILEEN P. GUANA, *ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION* 87-105 (2002) (critiquing existing risk assessment practices on the ground that they focus on small risks to large populations to the exclusion of large risks to small, vulnerable populations).

¹⁹⁴ Cf. Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 *U. MICH. J.L. REFORM* 493, 507 (2004) (identifying the category "evidence verité, filmic evidence that purports to be unmediated and unselfconscious film footage of actual events"). But cf. *Lavender v. Kurn*, 327 U.S. 645, 649-50, 652 (1946) (finding that, where witness testimony contradicted photographic "evidence tending to show that it was physically and mathematically impossible for [a mail] hook [attached to a train] to strike" the decedent, the jury had "a reasonable basis in the record for inferring that the hook struck" the decedent).

¹⁹⁵ E.g., *United States v. Jones*, 44 F.3d 860, 873 (10th Cir. 1995) ("A harmless error is one that does not have a substantial influence on the outcome of the trial; nor does it leave one in grave doubt as to whether it had such effect."). On harmless error generally, see ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970).

¹⁹⁶ The Court subsequently invoked *Scott's* directive that courts should disregard, when considering a motion for summary judgment, assertions that are "blatantly contradicted by the record," in *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678 (2009) (quoting *Scott*, 550 U.S. at 380). The five-to-four decision in *Ricci* was much closer than *Scott's* eight-to-one tally, and

Was the Court correct in its categorization of the videotape evidence as harmproof? First, consider Justice Stevens's characterization of the chase and videotape evidence in his dissent:

[R]espondent was on a four-lane portion of Highway 34 when the officer clocked his speed at 73 miles per hour and initiated the chase. More significantly – and contrary to the Court's assumption that respondent's vehicle "force[d] cars traveling in both directions to their respective shoulders to avoid being hit" – a fact unmentioned in the text of the opinion explains why those cars pulled over prior to being passed by respondent. The sirens and flashing lights on the police cars following respondent gave the same warning that a speeding ambulance or fire engine would have provided. The 13 cars that respondent passed on his side of the road before entering the shopping center, and both of the cars that he passed on the right after leaving the center, no doubt had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights before respondent or the police cruisers approached. A jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance, and that their reactions were fully consistent with the evidence that respondent, though speeding, retained full control of his vehicle.¹⁹⁷

Justice Stevens further suggested that, far from applying detached objective analysis to the videotape, his colleagues were "unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane."¹⁹⁸ Justice Stevens explained that, had his colleagues "learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways – when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine – they might well have reacted to the videotape more dispassionately."¹⁹⁹ All of this led Justice Stevens to characterize the Court as acting not as a collection of dispassionate experts but rather as members of a "jury."²⁰⁰

the dissenting judges specifically took issue with the majority's characterization of the supposedly undisputed facts. *See id.* at 2690-96 (Ginsburg, J., dissenting). The rule that (at least in some areas of law) the jury's only function is to evaluate the evidence leaves the jury with no role in cases where there is harmproof evidence. *See* Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 475-78 (2008); *infra* note 225 and accompanying text.

¹⁹⁷ *Scott*, 550 U.S. at 390-91 (Stevens, J., dissenting) (footnotes omitted) (citations omitted) (quoting *id.* at 379 (majority opinion)).

¹⁹⁸ *Id.* at 390 n.1.

¹⁹⁹ *Id.* For further discussion, see Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of Scott v. Harris*, 91 JUDICATURE 180, 182 (2008).

²⁰⁰ *Scott*, 550 U.S. at 392 (Stevens, J., dissenting) (referring to the evidence seen by and reasoning of "[m]y colleagues on the jury").

Justice Stevens's opinion also questions the ineluctability of the majority's factual conclusion by inviting a more fulsome count of votes on the issue.²⁰¹ To be sure, viewing the vote as eight-to-one casts Justice Stevens's position as an outlier. This sense, moreover, is echoed by application of the Condorcet Jury Theorem. The Jury Theorem predicts that where there is a question that each voter has a greater than fifty percent chance of getting "correct," then the greater the number of voters, the more likely it is that the selection of a majority of voters will be the "correct" answer.²⁰² If eight of nine Justices cast votes in favor of a definitive factual resolution, then the Jury Theorem strongly suggests that that resolution is the correct one.

The Supreme Court, however, reversed a unanimous court of appeals panel. And, as Justice Stevens's opinion notes, those three judges "apparently did view the [four] videotapes entered into evidence and [yet] described a very different version of events" from the version described by the Supreme Court majority.²⁰³ If those judges are included in the tally,²⁰⁴ then the final vote changes from eight-to-one to eight-to-four. While application of the Jury Theorem still suggests that the Supreme Court majority position is the correct one, the vote is not quite so lopsided, and the degree of certainty is accordingly reduced.

Beyond Justice Stevens's questioning of his colleagues' supposed objectivity, empirical evidence indicates that the videotape evidence cannot objectively be taken as entirely conclusive. Professors Dan Kahan, David Hoffman, and Donald Braman have shown the actual videotape to over one thousand people.²⁰⁵ While the majority of respondents concurred that Harris's

²⁰¹ *Id.* at 389.

²⁰² See Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1916 (2008). Commentators have questioned the Jury Theorem's applicability to legal reasoning and conclusions. See, e.g., Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore*, 3 THEORETICAL INQUIRIES L. 125, 144-46 (2002) (arguing that the theorem is of limited applicability to the appellate court setting because appellate panels bear little resemblance to juries). Here, however, the questions are ultimately factual, which should serve to enhance the Jury Theorem's predictive power.

²⁰³ *Scott*, 550 U.S. at 395 (Stevens, J., dissenting); see *Harris v. Coweta Cnty.*, 433 F.3d 807, 819 n.14 (11th Cir. 2005) ("The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections.").

²⁰⁴ Cf. Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 711-12 (2006) (observing that "[t]he Jury Theorem alone says nothing about why only judicial votes should be counted" and on this basis arguing that perhaps it is appropriate under the Theorem to aggregate the votes of judges on the propriety of a regulation with the votes of the agency commissioners responsible for the regulation).

²⁰⁵ Kahan, Hoffman & Braman, *supra* note 7, at 841.

actions posed a lethal danger to the police and to the public, some categories of individuals were far less likely to share those views.²⁰⁶

The votes of the judges on the court of appeals, the vote of Justice Stevens, and the findings of Professors Kahan, Hoffman, and Braman do not suggest that the position of the Supreme Court majority is objectively wrong. These votes and findings do, however, reduce the certainty with which application of the Condorcet Jury Theorem can declare that position objectively correct. They also suggest that, contrary to the Supreme Court's holding, one could impanel a jury that might not rely upon the videotape alone to conclude that Harris's actions posed a threat to the police and bystanders. Indeed, it may not have been inconceivable for a jury to conclude that Harris's actions did not pose such a threat at all.

b. *The lure of cut-and-dried risk management*

On the risk management side, the *Scott* Court concluded that the police action was justified. It also considered several other possible courses of action advanced by Harris and found that the police were reasonable in rejecting them. In so doing, the Court seemed to suggest not only that the action chosen by the police was proper but also that no other course of action would have been appropriate. In other words, the Court treated the risk management question as cut-and-dried, much like the risk assessment inquiry.

As environmental risk analysis practices demonstrate, however, risk management rarely can objectively produce a single desirable course of action. Rather, risk management raises policy issues: is exposure to a particular risk ever tolerable and, if so, what is the best way to limit exposure to it?

Moreover, risk management practices recognize that the scientific underpinnings of risk assessment are not airtight. The cost-benefit analyses that vindicate risk management turn on the measure of the benefits that risk assessment suggests; that is, risk assessment helps to quantify the benefits that will likely result from action that reduces the relevant risk exposure. In general, however, the limited scientific data and knowledge available for risk assessment will often justify "benefit ranges, not specific benefit numbers," from which the policymaker must then choose.²⁰⁷ Given this range, policymakers often can defensibly choose from among a number of risk management options, all of which are justified by the range of benefits that risk assessment suggests.

The Court's undertaking of risk management analysis is wanting in at least four ways. First, the Court's assertions about how the police action necessarily resulted in a net gain in the number of lives saved rings hollow absent empirical evidence. Second, although presented as evident truths, the Court's musings about what might have happened had the police pursued a different

²⁰⁶ See *id.* at 864-70.

²⁰⁷ See Sunstein, *supra* note 148, at 2278-90.

course are highly speculative. In both of these settings, the Court seems to have engaged in casual empiricism.

A third criticism arises out of the comparison to traditional risk management, where a range of options is usually defensible.²⁰⁸ By contrast, in the *Scott* case, the Court essentially eliminated options that would have led to virtual certain death for Harris and strategies that would have left him on the road. But would *any* means of “taking him out” (short of death) be acceptable? Even if it would, the range of viable options is not a large one.

A fourth problem rests on the fact that the Court itself undertook the risk management analysis, rather than leaving the task for a jury. Had a jury decided the question of whether the police acted reasonably, the jury’s deliberations would have been accomplished in private. The reasoning of the Justices, in contrast, is expressed publicly through the various opinions. Even if the result reached by the Justices is the correct one, there is something unseemly about having the Justices recount so methodically the steps they have taken, and the items they have balanced, to get there. In colloquial terms, it is sometimes a bad thing to see the sausages being made – even if we like how the sausages taste at the end of the day. Here, people may like the outcomes from, but not the inner workings of, cost-benefit and risk analyses. Consider that one might be comfortable with the outcome in *Scott v. Harris* yet not be so pleased with – or indeed even want to know – how the decision maker reached that outcome.

Professor Kip Viscusi has garnered empirical evidence that suggests that the public is uncomfortable with explicit risk analyses.²⁰⁹ He examined the effect of an automobile manufacturer’s explicit design-stage risk analyses on the jurors’ punitive damage award in a lawsuit alleging damages arising out of design flaws. He found that jurors tend to arrive at larger punitive damage awards when companies actually engage in explicit risk and cost-benefit analyses.²¹⁰ Insofar as one would prefer for companies to undertake systematic analyses in making design decisions, rather than to make these decisions in an uninformed, reckless manner, “[t]he resulting incentives are perverse.”²¹¹

Professor Viscusi offers “conjectures” to explain the facially counterintuitive behavior of individuals in this setting.²¹² Among these conjectures is the notion that “[m]oney and lives might be considered

²⁰⁸ *See id.* at 2289.

²⁰⁹ *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 547 (2000).

²¹⁰ *See id.* at 556-57. Viscusi also found that jurors arrived at larger awards when companies used more accurate, but larger, values of life in conducting their cost-benefit analyses than when they used artificially low values of life. *See id.* at 558. Thus, the more sound the cost-benefit analysis, the worse the likely result for the company.

²¹¹ *Id.* at 588.

²¹² *Id.* at 586-87.

incommensurable.”²¹³ People may not be comfortable with explicit cost-benefit and risk-risk analyses, even if they are ready to live with the outcomes of these analyses.²¹⁴

I have explained elsewhere how people’s desire not to confront cost-benefit analyses influences public opinion to prefer, and thus incline legislators and regulators also to prefer, certain regulatory tools over others.²¹⁵ Among the tools in the environmental regulatory toolbox, market-based instruments such as tradable pollution permits and taxes more plainly render the tradeoff between environmental quality and other societal benefits as an explicit choice.²¹⁶ In contrast, though command-and-control regulations also implicitly raise these tradeoffs, they do so more covertly.²¹⁷ This, I argue, is one reason for the continued popularity of command-and-control regimes, even in the face of widespread theoretical support for market-based instruments.²¹⁸

In the context of *Scott v. Harris*, the Justices shared their deliberations by virtue of the public function of appellate decision making. This public airing will be avoided in the run-of-the-mill case where decision making rests with a jury and the jury deliberations are private.²¹⁹ The Court’s facile recitation of its analysis lies in apparent blissful ignorance of the fact that the public will have ready access to, and might react to, that analysis.²²⁰

²¹³ *Id.* at 587. Professor Viscusi also advances the possibility that the jurors might have been affected by hindsight bias and might have seen the corporation as having balanced the costs of improved safety against actual injuries to actual people. *See id.* at 587.

²¹⁴ *Cf.* David A. Strauss, *Do It But Don’t Tell Me* (Jan. 15, 2009) (unpublished manuscript) (on file with the Harvard Law School Library) (identifying regulatory regimes in which “the permissibility of certain conduct turn[s] . . . on whether the conduct has been successfully concealed”).

²¹⁵ *See* Nash, *supra* note 141, at 355-70.

²¹⁶ *See id.* at 356-57.

²¹⁷ *See id.* at 357.

²¹⁸ *See id.* at 358-69.

²¹⁹ Thus, while Justice Stevens accused his fellow Justices of functioning as “jurors,” there is an important distinction between the deliberations undertaken by the Justices and ordinary jury deliberations. *See supra* note 200 and accompanying text.

²²⁰ Perhaps at least in part for this reason, it is generally believed that a trial judge may err on the side of denying a motion for summary judgment when the issue is a close call; to justify the grant of the motion would call for a written, if not a published, opinion, while a denial might be accomplished more efficaciously. *See* William A. McCormack & Maureen B. Hogan, *Summary Judgment: A Strengthened Focus*, 36 *Bos. B.J.* 9, 9 (1992); *cf.* Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 *Wis. L. Rev.* 107, 138-49 (observing that district courts often grant summary judgment by unpublished opinion and sometimes by “written opinions” that, unlike unpublished opinions, are not generally available electronically).

In cases that are not close, however, commentators generally speculate that judges would rather face the costs of granting summary judgment over the costs of having a trial. *See* John Bronsteen, *Against Summary Judgment*, 75 *Geo. Wash. L. Rev.* 522, 542 (2007)

c. *The questionable separation of risk assessment from risk management and those who undertake each*

The *Scott* Court held that, once it determined that no underlying facts were at issue, there was nothing left for a jury to do. This holding demonstrates the Court's belief that (at least in this case) the line between risk assessment and risk management was clearly delineated; were it otherwise, the Court presumably would have been more hesitant to take the case from a jury. It also reflects the Court's belief – consistent with the Court's view that the videotape evidence conclusively and objectively established the presence of risk – that risk assessment can be conducted objectively, that is, without interference or influence from the risk management-policy side.

Yet these basic lessons are more problematic than they might seem at first blush. The notion that risk assessment can be shielded from the influence of risk management and policy considerations is far from clear. Some believe as a general matter that scientific inquiries cannot be shielded from political and personal beliefs and commitments.²²¹ Even if that is not the case – and therefore some inquiries can be conducted with at least substantial objectivity – some suggest that the conduct of scientific inquiries by governments is especially prone to influence by policymakers.²²² As Professor Holly Doremus has argued, science can be used to defend government decisions not to regulate.²²³

(arguing that “summary judgment creates an incentive for judges to act unfairly” and to err in favor of *granting* motions for summary judgment, insofar as “[w]hen a judge grants a motion for summary judgment, the case goes away; whereas when a judge denies such a motion, a trial remains possible”); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 *YALE L.J.* 73, 93 (1990) (arguing that current Supreme Court jurisprudence “encourages the grant of summary judgment through an expansive view of the role of the trial court in determining what issues merit presentation to the ultimate trier of fact”); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 *OHIO ST. L.J.* 95, 171 (1988); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 *VA. L. REV.* 139, 178 (2007); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 *N.Y.U. L. REV.* 875, 906 (2006).

²²¹ For a discussion and critique of the theory, see GEORGE COUVALIS, *THE PHILOSOPHY OF SCIENCE: SCIENCE AND OBJECTIVITY* 1-10 (1997).

²²² See, e.g., Christopher Marquis, *2 Scientists Contend U.S. Suppressed Dolphin Studies*, *N.Y. TIMES*, Jan. 9, 2003, at A5 (describing how two scientists at government-financed research facilities claimed that the Clinton and Bush administrations had suppressed their research in order to justify policy goals). For a discussion of the susceptibility of government research to political pressures, see Doremus, *supra* note 125, at 1601-03.

²²³ Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 *ECOLOGY L.Q.* 249, 249 (2005); see also David S. Caudill & Donald E. Curley, *Strategic Idealizations of Science to Oppose Environmental Regulation: A Case Study of Five TMDL Controversies*, 57 *U. KAN. L. REV.* 251, 251-54 (2009).

Still, many argue that it is possible to isolate objective factfinding from the application of law in settings, such as the one in *Scott v. Harris*, that raise constitutional challenges to particular individuals' behavior.²²⁴ If that is true, then the risk analytic paradigm suggests that a good way to attain the goal of conducting the factfinding shielded from policy is to allocate the risk analysis and risk management responsibilities to different actors.

Yet the Court in *Scott* did not endorse this approach. While it did indicate that a jury would normally – that is, where facts were in dispute – conduct the risk assessment side and thus delineate risk assessment from risk management, in the end the Justices themselves conducted both the risk analysis and the risk management. The question arises, then: why did the Justices not leave the risk management question – in *Scott*, whether the police action was constitutional in light of the facts – to the jury? While the Court dismissed the idea of a jury handling that question – indeed, the Court thought the issue so clear that it relegated its thinking to a brief footnote – the fact is that the question of whether juries have a role to play in a case where the underlying facts are not in dispute varies greatly, and often by area of law.²²⁵ It cannot be gainsaid, as the Court opinion suggests, that juries never have a role to play in such settings.

What is the proper role for juries in these cases? On the one hand, if juries are instructed in cost-benefit analysis, perhaps they will function as risk management “experts.” On the other hand, the Court’s decision not to allow a jury to decide the risk management issue in *Scott* suggests perhaps that juries are not so qualified to perform such “expert” functions. But, if that is so, why should juries ever be called upon – as they will be in run-of-the-mill cases – where there is little if any factual dispute?

²²⁴ See, e.g., Daniel L. Faigman, *Scientific Realism in Constitutional Law*, 73 BROOK. L. REV. 1067, 1068-69 (2008).

²²⁵ Courts and commentators have grappled over the years with the question of the extent to which juries have a role to play in cases beyond resolving factual disputes. For a discussion of this issue, see J.L. Clark, *A Mixed Question of Law and Fact*, 18 YALE L.J. 404, 405-08 (1909) (describing the issue in negligence cases), Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1146-53 (2003), and Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 132-34 (1985) (discussing the issue in negligence cases). For a discussion in the context of the *Scott* case, see George M. Dery III, *The Needless “Slosh” Through the “Morass of Reasonableness”: The Supreme Court's Usurpation of Fact Finding Powers in Assessing Reasonable Force in Scott v. Harris*, 18 GEO. MASON U. C.R. L.J. 417, 417-19 (2008), and Seaman, *supra* note 196, at 475-78 (arguing that advances in lie detection technology may ultimately reduce the jury's factfinding role and questioning what roles the jury might still play).

3. Questioning the Appropriateness of the Environmental Risk Analytic Paradigm for High-Speed Police Chases

The foregoing discussion raises the question of whether the *Scott* Court was correct to model its reasoning on environmental risk analysis. There are several reasons to think it was not. First, as just discussed, the Court's determination that both the existence of risk and the proper course of action were obvious is dubious. The Court's reliance on casual empiricism masks severe problems with its analysis. Moreover, even if those conclusions apply in the *Scott* case, it is doubtful that they will apply in the run-of-the-mill police chase case.

Second, reliance upon a paradigmatic approach in addressing environmental risk administratively produces numerous benefits: uniformity, transparency, and predictability. In contrast, it is entirely unclear whether the Court's approach should be imported to other police chase cases, and if so how. For example, can or must jury instructions in such cases now direct the jury to undertake a cost-benefit analysis?

Third, the institutional character of courts differs substantially from that of government agencies engaging in risk analysis. Agencies employ (or have access to) experts; they have access to information on which to rely; and they have the ability, if not the mandate, to canvas large swaths of societal actors for input when undertaking risk analysis.

In contrast, courts are institutionally limited in many ways. They are unlikely to have relevant expertise; they are far less likely to have access to relevant information; and they are generally limited to the arguments and opinions of parties to the cases that they hear (perhaps as augmented by the arguments and opinions of amici). Indeed, these shortcomings were among the main reasons for the perception that the common law failed to provide adequate protection for environmental amenities and for the development of the modern administrative state.²²⁶ It is not surprising, in other words, that judicial actors are not able to engage in full-fledged risk analyses; they are not competent institutionally to do so.

Cost-benefit analysis conducted even by experienced government agencies can be subject to substantial critique.²²⁷ Some of the problems with formal

²²⁶ See, e.g., Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1, 4-6 (2007); see also Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 577-84 (1996) (detailing the shortcomings of common law approaches to environmental harms); N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality, Part I: State Pollution Control Programs*, 52 IOWA L. REV. 186, 196-201 (1966) (discussing the same effect for water pollution). For an argument that the common law can continue to play an important role in environmental protection and the evolution of environmental law, see Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. ENVTL. AFF. L. REV. 1, 1 (2007).

²²⁷ Some commentators find fault with the entire practice of cost-benefit analysis. See, e.g., Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of*

government cost-benefit analysis may have their roots in ideological concerns.²²⁸ Still, many of the problems are fundamentally structural in nature; they are shortcomings in the process as it has evolved.²²⁹

If it is problematic for government agencies to conduct valid, thorough cost-benefit analyses with the benefit of time, deliberation, and information, then one can expect the challenge to courts to be exponentially larger.

Finally, the environmental risk analytic paradigm might not be the best model for analyzing risk in police chase settings because such fundamentally different modes of decision making are required in the two settings. The environmental risk analytic paradigm calls for reasoned, deliberative decision making. In contrast, a police chase will almost always require split second decision making. Perhaps the Court's cursory cost-benefit analysis is appropriate because, under exigent circumstances, it mirrors the cost-benefit analysis "on the quick" that the police have to undertake when there is not time to do any better.

Along these lines, perhaps the courts should defer to the police, both as to matters of fact regarding the existence of risk and as to how best to respond. The point here is not that the police should be given free reign, but only that the use of a full risk analysis (which in any event a court is ill positioned to conduct) may not be the best paradigm against which to gauge the propriety of the police's actions.

As mentioned above, the Court has previously recognized – albeit sometimes in the context of other constitutional provisions – the reality that the police need to make quick decisions. For example, in *Whitley v. Albers*,²³⁰ the Court, in rejecting the applicability of a "deliberate indifference" standard to determine prison officials' Eighth Amendment liability arising out of a response to a violent disturbance, emphasized the need to make quick decisions under such circumstances.²³¹ And in *County of Sacramento v. Lewis*,²³² the Court relied on *Whitley* to conclude that "deliberate indifference" also should not apply where a person injured in a high-speed car chase with the police (but not by virtue of a seizure by the police) brought suit under the Due

Environmental Protection, 150 U. PA. L. REV. 1553, 1553-56 (2002). Others criticize not the notion of relying upon cost-benefit analysis but rather how it has tended to be applied. See, e.g., RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 55-183 (2008).

²²⁸ See REVESZ & LIVERMORE, *supra* note 227, at 21-45.

²²⁹ See *id.* at 55-183 (critiquing the existing structure of and identifying pervasive fallacies in federal government cost-benefit analysis and suggesting ways to improve it).

²³⁰ 475 U.S. 312 (1986).

²³¹ See *id.* at 320-21.

²³² 523 U.S. 833 (1998).

Process Clause. The Court reasoned that high-speed car chases similarly call for quick decisions by the police.²³³

The Court has drawn a jurisprudential distinction between car chases where the injury is the result of a police seizure, such as in *Scott*, and car chases where it is not, such as in *Lewis*. Indeed, the Court in *Lewis* emphasized that no seizure had taken place²³⁴ and, while it found it “hard to avoid” the analogy between prison riots and “sudden police chases,” it restricted the comment to claims brought “under the Due Process Clause.”²³⁵

Even accepting these jurisprudential distinctions, however, one is hard pressed to explain exactly why the same policy considerations that motivated the Court in *Whitley* and *Lewis* ought not to be relevant in a case such as *Scott*. While it may not be appropriate to import the “intent to harm” standard from *Whitley* and *Lewis* to *Scott*, it might still be possible to incorporate some of the deference that the Court determined was appropriate. In particular, why not make it clear – and instruct juries – that liability should attach where the police action was not reasonable *in light of the circumstances and exigencies*? Such a contextualized conception of reasonableness would be consistent with some reliance on casual empiricism. After all, it is reasonable to expect that, given the exigencies, the police could do little better than casual empirical analysis under such circumstances.

C. Risk Assessment and the ACCA

In this section, I discuss the Supreme Court’s application of risk analysis in cases involving the Armed Career Criminal Act. I first explore ways in which the Court’s holdings aspire to, although do not reach, paradigmatic risk analysis. I then highlight shortcomings in the Court’s approach. Finally, I question the ACCA’s current institutional design, arguing that the courts are poor institutions to implement risk analysis in the ACCA context.

1. Aspirations to Paradigmatic Risk Analysis in the Court’s ACCA Common Law Jurisprudence

The Court’s interstitial ACCA lawmaking in many ways aspires to paradigmatic risk analysis. First, the categorical approach adopted by the Court emphasizes traditional notions of risk analysis. The categorical approach calls on courts not to examine whether a particular person’s acts put anyone at risk, but rather to ask whether the offenses of a crime *typically* will result in a third party being put at risk. In effect, the categorical approach calls on courts to determine whether, when repeated again and again, a crime will tend to put third parties at risk. As the Court acknowledged in *James v. United*

²³³ *Id.* at 853-54 (quoting *Whitley*, 475 U.S. at 320; *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

²³⁴ *See id.* at 843-45.

²³⁵ *Id.* at 853.

States, application of the categorical approach involves “inherently probabilistic concepts.”²³⁶ The Court elucidated,

One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury – for example, an attempted murder where the gun, unbeknownst to the shooter, had no bullets Or, to take an example from the offenses specifically enumerated in [the residual clause], one could imagine an extortion scheme where an anonymous blackmailer threatens to release embarrassing personal information about the victim unless he is mailed regular payments. In both cases, the risk of physical injury to another approaches zero. But that does not mean that the offenses of attempted murder or extortion are categorically nonviolent.²³⁷

Along these very lines, the Court in *Chambers v. United States*²³⁸ relied in part upon statistical evidence in concluding that failing to report for penal confinement is not a crime that lies within the ACCA residual clause. The government advanced the argument that “a failure to report reveals the offender’s special strong aversion to penal custody.”²³⁹ The government rested this argument on “three cases arising over a period of 30 years in which reported opinions indicate that individuals shot at officers attempting to recapture them.”²⁴⁰ The Court accepted, for sake of argument, the premise that violence could be relevant even if it may occur “long after an offender fails to report”²⁴¹ but relied on empirical evidence to reject the government’s argument:

The question is whether [someone who fails to report for penal confinement] is significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a “serious potential risk of physical injury.” § 924(e)(2)(B)(ii). And here a United

²³⁶ *James v. United States*, 550 U.S. 192, 207 (2007).

²³⁷ *Id.* at 208.

²³⁸ 555 U.S. 122 (2009).

²³⁹ *Id.* at 128.

²⁴⁰ *Id.*

²⁴¹ *Id.* By not deciding this issue, the Court artfully dodged an important question about the proper scope of ACCA risk analysis. It may well be that people who commit ACCA predicate crimes are more likely to cause physical harm to third parties in the future. Indeed, if the ACCA is properly calibrated to identify and punish “career criminals,” one would expect this to be the case. At the same time, however, it seems that the ACCA statute is structured so as to allow courts only to take into account potential risk of violence to third parties *during the actual commission of the relevant predicate crimes*. In that case, the fact that harm is likely to befall third parties *after* someone fails to report for penal confinement is irrelevant to the ACCA risk inquiry. *But cf.* Levine, *supra* note 100, at 566 (suggesting that harm caused to family members and a third party four days after a “walk-away” escape from a federal minimum security work camp perhaps should count for ACCA purposes).

States Sentencing Commission report helps provide a conclusive, negative answer. . . .

The Commission's Report identifies every federal case in 2006 or 2007 in which a federal sentencing court applied the Sentencing Guideline, "Escape, Instigating or Assisting Escape," 1 United States Sentencing Commission, Guidelines Manual § 2P1.1 (Nov. 2008), and in which sufficient detail was provided, say, in the presentence report, about the circumstances of the crime to permit analysis. The analysis included calculation of the likelihood that violence would accompany commission of the escape or the offender's later apprehension.

Of 414 such cases, 160 involved a failure to report either for incarceration (42) or for custody after having been temporarily released (118). . . . Of these 160 cases, none at all involved violence – not during commission of the offense itself, not during the offender's later apprehension – although in 5 instances (3.1%) the offenders were armed. . . . The upshot is that the study strongly supports the intuitive belief that failure to report does not involve a serious potential risk of physical injury.²⁴²

The Court went on to explain that the evidence the government proffered was not inconsistent with this conclusion.²⁴³ It then concluded by stating that "the Government provides no other empirical information."²⁴⁴

Second, the Court's requirement that a crime generally requires purposeful violence to qualify as a predicate crime introduces an element of culpability (for the violence) into the risk analysis. Begay's DUI conviction was not a predicate crime because the DUI crime does not generally require specific intent to cause violence. And *Chambers* concluded that failure to report was not a predicate crime because the crime involves "inaction,"²⁴⁵ and inaction cannot include specific intent to cause violence. As the Court put it, "While an offender who fails to report must of course be doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury."²⁴⁶

Third, the Court's test for whether a crime qualifies as a predicate crime relies upon quintessential elements of risk analysis. As set out in *Chambers*, courts must determine whether the crime in question poses at least as much risk as the named crime to which the crime in question is the closest analog. This calls upon courts to examine and to compare the risks for harm posed by the named analogous crime and the crime in question.

²⁴² *Chambers*, 555 U.S. at 128-29 (citing U.S. SENTENCING COMM'N, REPORT ON FED. ESCAPE OFFENSES IN FISCAL YEARS 2006 AND 2007, at 7 (2008)).

²⁴³ *Id.* at 129-30.

²⁴⁴ *Id.* at 130.

²⁴⁵ *Id.* at 128.

²⁴⁶ *Id.*

2. Shortcomings in the Court's ACCA Jurisprudence

The Court's ACCA jurisprudence falls short of paradigmatic risk analysis.²⁴⁷ First, the inclusion of culpability (for violence) in the ACCA risk analysis is, much like its inclusion in the risk analysis undertaken by the Court in *Scott v. Harris*,²⁴⁸ at least somewhat inconsistent with paradigmatic risk analysis. The Court's conclusion that perpetrators of some crimes – DUI and failing to report for penal confinement – may be less culpable than perpetrators of other crimes lacks theoretical grounding. In effect, the Court is suggesting, through the lens of risk analysis, that the liberty interest of those who commit some crimes is more valuable than the liberty interest of those who commit other crimes, notwithstanding that the actions of those in both groups impose equal risks on truly innocent third parties.

Second, while the Court properly recognizes that the categorical approach it has adopted for ACCA cases is inherently probabilistic,²⁴⁹ it fails to confront the fact that in most cases courts applying the standard will be forced to rely upon anecdotal evidence, i.e., casual empiricism. In fact, the *Chambers* Court was able to rely upon broader empirical evidence.²⁵⁰ That evidence, however, was gathered by the Sentencing Commission in response to a suggestion in the lower court opinion authored by Chief Judge Richard Posner.²⁵¹ How often will lower courts have the benefit of such data?

3. Toward a Better Institutional Design for Risk Analysis Under the ACCA

The shortcomings with the application of risk analysis under the ACCA identified in the last section suggest that the ACCA as currently structured has a poor institutional design. The courts lack the institutional ability to conduct rigorous risk analysis. Moreover, *Chambers* notwithstanding, they generally lack the information necessary to conduct a valid analysis.

Would another body be better situated to conduct rigorous risk analysis? The *James* Court quoted a First Circuit opinion authored by then-Chief Judge Breyer, asserting that “[t]he [Sentencing] Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between’ a particular offense and ‘the likelihood of accompanying violence.’”²⁵² One might consider simply having Congress implement the ACCA as part of (or at

²⁴⁷ One also can criticize the risk approach adopted by Congress, *see, e.g.*, Russell, *supra* note 106, at 1180, but the Court is bound to that approach.

²⁴⁸ *See supra* text accompanying notes 176-179.

²⁴⁹ *See supra* text accompanying note 236.

²⁵⁰ *See supra* text accompanying note 242.

²⁵¹ *Chambers*, 555 U.S. at 129.

²⁵² *James v. United States*, 550 U.S. 192, 206 (2007) (first alteration in original).

least similarly to) the Sentencing Guidelines and delegate to the Sentencing Commission responsibility for defining the relevant parameters.²⁵³

Congress could itself assume greater responsibility in defining the scope of the relevant risk inquiries. Justice Alito suggests as much in his concurrence in *Chambers*: “[T]he only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA’s sentencing enhancement.”²⁵⁴

A hybrid approach is also possible. The system for identifying hazardous – and therefore risky – wastes under the environmental Resource Conservation and Recovery Act (RCRA)²⁵⁵ and the regulations thereunder is instructive. EPA has generated four “characteristics” of hazardous wastes: “ignitability,” “corrosivity,” “reactivity,” or “toxicity.”²⁵⁶ Some substances are regulatorily “listed” hazardous wastes, meaning that if they are wastes, they are de facto hazardous; each listed hazardous waste identifies at least one of the four characteristics.²⁵⁷ Beyond that, a waste is hazardous even if it is not a listed substance if it exhibits one of the four characteristics of hazardous wastes.²⁵⁸ A similar approach could be adopted for the ACCA. Congress could list additional crimes that per se qualify as predicate crimes. In addition, instead of simply announcing that other crimes “similar” to the listed crimes also qualify as predicate crimes, it could delineate characteristics that, if met, would make other crimes qualify as predicate crimes.

III. LESSONS FOR, AND FROM, CRIMINAL RISK REGULATION

In this Part, I suggest some lessons that those who conduct and design criminal risk analysis can take from paradigmatic risk analysis, as well as lessons that extant criminal law risk analysis might offer to improve paradigmatic risk analysis. Criminal risk analysis can be improved by having institutions other than courts undertake the bulk of risk analyses because courts generally lack information to conduct the analyses accurately. At the same time, courts can offer an important check on the political branches when they

²⁵³ See Levine, *supra* note 100, at 558-66 (calling for conforming the ACCA to the Sentencing Guidelines).

²⁵⁴ *Chambers*, 555 U.S. at 134 (Alito, J., concurring).

²⁵⁵ RCRA § 1004(5), 42 U.S.C. § 6903(5) (2006), defines “hazardous waste” as a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –
(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.
RCRA also directs EPA to come up with criteria by which hazardous wastes can be identified and listed. See RCRA § 3001, 42 U.S.C. § 6921.

²⁵⁶ See 40 C.F.R. §§ 261.20-.24 (2011)

²⁵⁷ See *id.* §§ 261.30-.35.

²⁵⁸ See *id.* §§ 261.20-.24.

conduct even uninformed risk analyses in the context of constitutional tort litigation. With respect to the conduct of paradigmatic risk analysis, judicial forays in risk analysis in the criminal law enforcement setting highlight the traps into which even those experienced in risk analysis might tend to fall.

A. *Lessons for Criminal Risk Analysis*

Perhaps the two most important shortcomings in the treatment of risk in *Scott v. Harris* and under the ACCA are that courts generally lack sufficient information to conduct meaningful risk analysis and, as a consequence, the paucity of concern over institutional design in criminal risk regulation.

Risk analysis draws upon empirical evidence. Courts are highly unlikely to have access to that information, both because they deal with matters on a case-by-case basis and because of institutional limitations. The risk analysis in *Scott v. Harris* was especially uninformed. The Court failed to consider the possibility of deferring to the actor who must often conduct the relevant risk analysis under time-pressured and extenuating circumstances – the police.

The risk analysis approach under ACCA is preferable. That is not surprising, given Congress's greater role in formulating that approach. Again, however, Congress should consider providing greater direction to the courts and perhaps involving the Sentencing Commission in developing ACCA risk analysis protocols.

At the same time, it would be wrong to suggest that judicial efforts at risk analysis in the criminal law enforcement setting are devoid of value. Indeed, even mere casual judicial empiricism offers an important benefit in the context of constitutional tort litigation: it may put a check on risk analysis conducted by the political branches, which may tend to be biased against alleged criminals.²⁵⁹

The argument that judicial risk analysis in constitutional tort litigation provides a valuable function stands in contrast to a view advanced prominently by Professor Daryl Levinson that questions the value of constitutional tort litigation as a method of deterring undesirable behavior by government officials.²⁶⁰ Professor Levinson first argues that, to the extent that courts mishandle cost-benefit analyses in the context of constitutional tort litigation, they may “misprice,” and thus suboptimally deter, undesirable government behavior.²⁶¹ Professor Levinson argues further that, even if courts can impose proper monetary penalties for undesirable government behavior, government actors simply do not respond to monetary incentives as do private actors; rather, they respond to incentives in political capital.²⁶² Thus, one cannot expect even properly-priced penalties to have optimal deterrence effects.

²⁵⁹ Cf. REVESZ & LIVERMORE, *supra* note 227, at 21-45 (discussing how government cost-benefit analysis tends to overvalue costs and undervalue benefits).

²⁶⁰ See Levinson, *supra* note 13, at 345.

²⁶¹ See *id.* at 350-52, 373.

²⁶² See *id.* at 347.

One might argue that courts' inexact risk analyses will further exacerbate this problem: not only will courts be imposing penalties that are inaccurately determined (leading to suboptimal incentives), but they also will be imposing those penalties based upon results obtained from inexact risk analyses. In effect, not only may the amount of liability imposed be incorrect, but it may even be the case that liability will be imposed when there should be none.

A response offered by Professor Myriam Gilles to Professor Levinson in the context of monetary penalties resounds even more in the context of risk analysis. Professor Gilles argues that, even if Professor Levinson is correct that monetary penalties in constitutional tort litigation are inaccurate and do not optimally deter government actors, these monetary penalties do have at least some rough proportional translation into political capital.²⁶³ Thus, she concludes that, even if monetary penalties do not provide optimal deterrence, they do provide deterrence and that deterrence is generally desirable.²⁶⁴

Professor Gilles's arguments about the value of monetary penalties apply with even greater force to the setting of risk analysis. Professor Levinson's concern is essentially that government actors' focus on political capital leaves them comparatively immune to concern over the imposition of costs. In contrast, risk analysis raises issues that bear more directly on political capital: while constraining costs and balancing budgets may not always be foremost in politicians' minds, it does seem that the fundamental focus of risk analysis in the criminal law setting – balancing the safety and well-being of innocent individuals, police officers, and alleged criminals – is a matter of direct concern to politicians.²⁶⁵ In this sense, judicial risk analyses and the outcomes that flow from them may feed even more directly into the metric of political capital than does the imposition of monetary penalties. Thus, if Professor Gilles is correct that there is a beneficial, albeit rough, translation between monetary penalties and political capital, it would seem that judicial risk analyses would be even more in sync with political capital concerns and thus would enhance optimal deterrence.

The deterrence value of independent judicial risk analysis might be even greater to the extent that one believes that, if anything, risk analyses conducted by the political branches will be biased against alleged criminals. One might well expect politicians to be more attuned to the interests of the public-at-large and law enforcement officers than to the interests of alleged criminals. If that is true, then having courts conduct their own independent – if imperfect – risk analyses may be an appropriate check on the political branches. Indeed, the whole purpose of constitutional tort litigation is to provide a check on the

²⁶³ See Gilles, *supra* note 2, at 858-67.

²⁶⁴ See *id.*

²⁶⁵ Cf. Barnes, *supra* note 2, at 1098-1107 (summarizing and critiquing empirical analyses of racial profiling in drug trafficking interdiction and lauding approaches that discuss total social benefits and social costs).

political branches and thus to vindicate constitutional protections meant to secure rights of individuals against the government and the majority.²⁶⁶

B. *Lessons from Criminal Risk Analysis*

While the Court's forays into risk analysis in *Scott v. Harris* and under ACCA mostly demonstrate the difficulties in importing risk analysis to the setting of criminal law, they also provides a few lessons for those who conduct formal risk analysis. Study of the Court's attempt to conduct – and, indeed, its failure to succeed at – risk analysis highlights some of the problems and challenges inherent even in formal risk analysis.

First, the *Scott v. Harris* Court's over-reliance on the definitive nature of the videotape evidence highlights the tendency, even of experts, to jump to conclusions too readily. The Court's experience sounds the cautionary note that risk analysis is quite often not as easy as it seems. The existing environmental regulatory regime may be said sometimes to have ignored this point. Under current law, individual government officials are sometimes allowed to bypass deliberative government decision making in what are deemed to be exigent circumstances. Power to exempt the government from requirements imposed by the Endangered Species Act is given to the Secretary of Defense if the Secretary determines that such an exemption is "necessary for reasons of national security."²⁶⁷ A separate statute Congress enacted in 2005 also vests broad authority in the Secretary of Homeland Security to waive any law if the Secretary "determines [that waiving that law is] necessary to ensure expeditious construction of the barriers and roads" that are necessary to attain border security.²⁶⁸ The Secretary recently used this authority to facilitate construction of the national border fence along the U.S.-Mexico border in the southwestern United States.²⁶⁹ Such authorizations and actions are well cabined because they raise the specter of single individuals reaching conclusory decisions when in fact the attendant facts are more complex than they might at first blush seem.

Second, and more generally, while the Court in *Scott* and the ACCA cases engaged in casual empiricism without recognizing it, those who endeavor to

²⁶⁶ Cf. Gilles, *supra* note 2, at 849-51 (discussing the importance of constitutional tort litigation to separate out acceptable from unacceptable government behavior).

²⁶⁷ Endangered Species Act § 4(j), 16 U.S.C. § 1536(j) (2006).

²⁶⁸ REAL ID Act of 2005, Pub. L. 109-13, § 102(c), 119 Stat. 302, 306 (codified at 8 U.S.C. § 1103 note). An earlier statute already conveyed similar authority to the Attorney General to waive application of the ESA and NEPA. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 103, 110 Stat. 3009-546, 3009-555 (2006) (codified as amended at 8 U.S.C. § 1103 note) (waiving the ESA and NEPA "to the extent that the Attorney General determines necessary to ensure the expeditious construction of the barriers and roads under this section").

²⁶⁹ See *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 121-22, 129 (D.D.C. 2007) (upholding the Secretary's authority).

conduct complete cost-benefit and risk-risk analysis should bear in mind that they will often be operating with incomplete, if not inaccurate, data. Still, they ought to strive to avoid complacency and to do the best they can with the data that they have.²⁷⁰

A third point that the Court's undertakings in *Scott v. Harris* and the ACCA cases highlight is that culpability is a tough issue for environmental law. A good deal of the *Scott v. Harris* Court's attention was focused on the relative culpability of Harris, on the one hand, and the innocent would-be victims of his continued reckless driving, on the other hand. Similarly, the Court in *Begay* declined to find DUI to be a predicate crime for ACCA purposes, at least in part because the Court found DUI not to require a specific intent to put others at risk, i.e., because it found perpetrators of DUI less culpable.

In contrast, environmental law has had a harder time coming to terms with the notion of culpability. Indeed, the question of culpability as applied in the context of environmental degradation and regulation is a difficult one. Some have argued that pollution is an evil akin to murder or discrimination.²⁷¹ As a consequence, they argue that the act of polluting should be stigmatized. To the extent that society does not associate stigma with the act of polluting – for example, by simply imposing a fee for pollution or by creating tradable environmental degradation permits – society inadvisably gives rise to a “right to pollute.”²⁷²

Others, however, emphasize the distinction that those (or at least the vast majority of those) who degrade the environment do so not for the sake of degrading the environment – to which one would presumably attribute a high level of culpability – but rather as a byproduct of engaging in some behavior or producing some primary product that is societally valuable.²⁷³ On this

²⁷⁰ Cf. Cass R. Sunstein & Adrian Vermeule, *Interpretive Theory in its Infancy: A Reply to Posner*, 101 MICH. L. REV. 972, 974 (2003) (“[T]he inevitability of casual empiricism, in areas where little is yet known, doesn't mean we can't simultaneously try to find out more . . .”).

²⁷¹ For example, commentators have assailed tradable permit schemes to regulate pollution emissions by highlighting how inappropriate such schemes would be to “regulate” discrimination and murder. See Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CALIF. L. REV. 597, 600-03 (1991) (parodying the notion of legislation that would establish a market for racial discrimination rights); J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 804 (1996) (describing a hypothetical situation in which people have an alienable right not to be murdered); see also Robert E. Goodin, *Selling Environmental Indulgences*, 47 KYKLOS 573, 575, 578-87 (1994) (drawing an analogy between environmental regulations' “sales” of pollution rights and the Catholic Church's sales of indulgences during the Middle Ages).

²⁷² For explication of the argument, see Nash, *supra* note 141, at 325-27; for a critique, see *id.* at 334-43.

²⁷³ See Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1407-12 (2007); Nash, *supra* note 141, at 358-62; Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 263 & n.195 (2001) (highlighting the difference between racial

understanding, culpability fades into the background as the focus shifts to the calculus of whether the costs of environmental harm are outweighed by the benefits offered by the societally valuable behavior or product.

The question of whether and how to consider culpability for environmental harm has important ramifications for risk analysis and cost-benefit analysis. Consider that the touchstone for cost-benefit analysis is Kaldor-Hicks efficiency: if the greater good is advanced, a program is seen to be good, even if some in society suffer disproportionately more of the harms and enjoy fewer of the benefits.²⁷⁴ Professor Douglas Kysar has argued that this approach is normatively inappropriate: if an affirmative undertaking will put some members of society at greater risk, then that action should be questioned more than maintaining a status quo under which some members of society are at greater risk.²⁷⁵

My point here is not to resolve the issue but rather to highlight its import. The ease with which the Court addressed and resolved the culpability issue in the context of a car chase stands in stark contrast to the density and ambiguity of the culpability issue in the context of environmental law.

Finally, *Scott v. Harris* should remind those who conduct risk analysis in environmental law that people may like the outcome, but not the inner workings, of cost-benefit and risk analyses.²⁷⁶ In the context of most trials, the jury provides an out. Since a jury's deliberations are private, the tradeoffs that the jury chooses to undertake are not shared publicly. Thus, the jury need not feel concern over whether society might second guess or disparage those tradeoffs. Those who conduct environmental risk analyses do not have that luxury. Their calculi and decisions are made under the light of public access. Their job is, if not to convince the public that they have always reached the correct answer, then at least to ensure public confidence that they have done as good a job as possible under the circumstances.

CONCLUSION

In this Article, I have examined attempts by the Supreme Court to import paradigmatic risk analysis into the criminal law. I have highlighted how *Scott v. Harris* reflects an attempt to import paradigmatic environmental risk analysis into the setting of high-speed chase, excessive-force constitutional

discrimination, which a flat ban appropriately suggests is illicit and signals that it is "the sort of practice to be eliminated, rather than be brought to some optimal point," and pollution, for which "there is an optimal level of pollution, and it is not zero, and polluting activity – so long as it is part of a legitimate business, and not an intentional tort – is not the kind of thing that it is appropriate to delegitimize as such").

²⁷⁴ For a discussion and critique, see John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 410-31 (2008).

²⁷⁵ See Kysar, *supra* note 166, at 44-48 (questioning the notion that acts and omissions are indistinguishable).

²⁷⁶ See *supra* text accompanying notes 209-220.

jurisprudence. I have also explored how, beneath the surface, the Court's efforts fall short of that paradigm. Similar efforts to import risk analysis into cases under the ACCA fare better, but still fall short of the ideal.

The Court's forays into risk analysis invite comparisons to the actual practice of environmental risk analysis. The Court's analysis is quite problematic when measured against paradigmatic risk assessment and risk management. These shortcomings raise the broader question of whether paradigmatic environmental risk analysis is the proper model for courts evaluating the actions of police in terminating high speed automobile chases. At the same time, judicial risk analysis in the setting of constitutional tort litigation over criminal law enforcement may provide an important check on the political branches.

The Court's attempts at risk analysis provide some lessons for the practice of environmental risk analysis. First, the problems faced by the Court sound a cautionary note for all risk regulators that it is very difficult to prepare a thorough and valid risk analysis. Second, the relative ease with which the Court discussed culpability in *Scott v. Harris* and *Begay* should flag for environmental risk regulators the challenges that considerations of culpability pose in environmental regulation. Third, *Scott v. Harris* should remind environmental risk regulators of an irony inherent in what they do: while transparent preparation of risk analyses is desirable on many levels and encourages public participation, the fact remains that the public may often be sympathetic to such analysis in theory but less comfortable when forced to confront how the sausages are actually made.