

PROBABILITIES IN PROBABLE CAUSE AND BEYOND: STATISTICAL VERSUS CONCRETE HARMS

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I

INTRODUCTION

Human beings often have difficulty applying abstract statistical information to concrete circumstances. In particular, we are more comfortable acting in a potentially harmful way when the anticipated harm is abstract and statistical rather than concrete and specific. For illustration, contrast the willingness of many repeatedly to risk causing death or serious injury by driving while talking on the telephone,¹ with our apparent unwillingness knowingly to drive over a pedestrian's foot to get to the hospital faster, even if the net potential gain is greater (and the cumulative harm lesser, over time) in the latter case than in the former.

Like most standards of proof, "probable cause" necessarily contemplates that official action may be undertaken in situations under which there is some probability that the action will prove to have been "correct" (it will accomplish the objective for which it was initiated), and some probability that the action will prove to have been "incorrect" (it will cause harm that, *ex post*, was not justified). The inevitable consequence of such standards of proof is that, over time, some number of people (better estimated as the total grows) will suffer an undeserved harm.

For example, if there must be a ninety-nine percent probability of guilt before it is permissible to convict a person of a crime, then when 10,000 people are convicted on this standard, we know that approximately one hundred of them are innocent. A ninety-nine percent standard of proof may nonetheless

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1. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS RESEARCH NOTE: DRIVER ELECTRONIC DEVICE USE IN 2008 1 (2009), *available at* <http://www-nrd.nhtsa.dot.gov/Pubs/811184.PDF> (showing that 812,000 vehicles are driven by someone using a hand-held cell phone at any given daylight moment).

sound like a very demanding one. It is almost certainly, in practice, more exacting than our current requirement of guilt “beyond a reasonable doubt.”² Yet, if we have one hundred people standing trial for a crime, and we *know* (after investigating in a timely and diligent fashion) that all but one of the people in the room is guilty and that one is innocent, we likely feel that we are carrying out a serious injustice by convicting and punishing all one hundred people.

This article surfaces this “statistical versus concrete harms” disparity in judicial (and more broadly, human) reactions to probability-based behavior. In particular, it identifies the disparity in case law that either explicitly relies on the distinction as a normatively proper ground for legal decisions or that operates in a manner best explained by resort to this distinction. Though the paper is primarily descriptive, it suggests, tentatively, that lawmakers, judges, and juries should exercise greater care and deliberation in applying what may seem like a “natural” approach to distinguishing between permissible and impermissible harm. It is thus a plea for “conscious” consideration of the statistical–concrete distinction, which is sometimes applied in an unthinking fashion.

In part II, I take up the case of arrest on the basis of “probable cause.” I explore the particular probabilities associated with probable cause and suggest that our intuitive reactions to an arrest scenario in which an individual (about whose guilt an officer is uncertain) is arrested on the basis of probable cause are different from what they are when a group of people (one of whom the officer knows is guilty and one of whom the officer knows is innocent, but between whom the officer cannot distinguish) is arrested.

Part III explores the broader implications of distinguishing between statistical and concrete harm in legal decisionmaking. I consider examples involving the disparate areas of exclusionary-rule application, antidiscrimination or affirmative-action law, the death penalty, and negligent torts. By contrast to the probable-cause context, in which the Supreme Court has yet to reveal whether the law recognizes a statistical–concrete distinction, part III will show that the Court and other legal actors have been clearer in other contexts about both recognizing and attaching important legal consequences to the distinction, both explicitly and by implication.

The fourth and final part provides an account of the difference in our intuitions. Psychological studies indicate that people distinguish between identifiable and unidentifiable victims when contemplating a potentially harmful act.³ The statistical–concrete divide takes things a step further by distinguishing between different kinds of unknown victims—those who are

2. See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 112 (2002) (citing empirical studies showing that the degree of certainty jurors require for proof beyond reasonable doubt varies greatly from 0.92 to 0.51).

3. See Karen E. Jenni & George Loewenstein, *Explaining the “Identifiable Victim Effect,”* 14 J. RISK & UNCERTAINTY 235, 236 (1997) (listing sources discussing the distinction).

determinate (that is, they stand before us and are therefore concrete, but we do not necessarily know precisely who they are)—and those who are statistical (that is, we know that they will exist but their precise identities as victims are both unknown and as yet undetermined). Doing the right thing or avoiding the wrong thing in concrete settings seems more accessible to us emotionally than in situations in which unknown and unknowable (though certain) casualties are involved, where we are able to perform a more flexible, cost-benefit-based calculus.⁴

I conclude that the distinction seems at times sensible and unavoidable but at times arbitrary. I therefore neither endorse nor condemn the distinction but simply suggest that we must apply it with great care, precisely because it comes so naturally to us that we may overvalue it at times. If we use the distinction in a self-conscious fashion, the tension between statistical versus concrete harm provides for a dynamic system in which we can exercise sound judgment.

II

PROBABLE CAUSE AND THE STATISTICAL–CONCRETE DISPARITY

A. How “Probable” is Probable Cause?

The disparity between our intuitive reactions to statistical versus concrete circumstances emerges with clarity in the case of arresting a person on probable cause. The law does not require anything close to one hundred percent certainty as a prerequisite to a lawful arrest, so one need not imagine a courtroom filled with one hundred defendants, one of whom is innocent. The probabilities associated with probable cause are much more modest and thus lend themselves better to realistic intuition-testing scenarios.

We do not know exactly what the phrase “probable cause” means, in strict numerical terms. We do, however, know what it does *not* mean: “probably.” That is, probable cause does not—in the context of Fourth Amendment law—mean that the police must have evidence sufficient to conclude that a suspect is *probably* guilty or that she *probably* has evidence of a crime hidden inside her home. It is, accordingly, perfectly consistent with the constitutional ban on unreasonable searches and seizures—under existing doctrine—to arrest or

4. One might conceive of such a split as reflecting a consequentialist approach to large groups, coupled with a deontological approach to specific victims. This could also be described as the distinction between a legislative approach (in which costs and benefits are widespread and in the future) and an adjudicative approach (in which harms have already taken place and must be addressed in their fully-realized form). John Jeffries has argued that Section 1983 injunctive relief might work better than compensatory relief for certain constitutional violations because juries will not be as concerned about inflicting large costs on particular defendants. See John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50–51 (1998) (“Juries confronting a flesh-and-blood defendant may be less quick to play Robin Hood.”). See also John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 110 (1997) (“Most importantly, injunctions promote reforms, not reparations. They direct societal resources toward investments in future growth and development, not toward cash outlays for past harms.”).

search a person on the basis of suspicion that does not rise to the level of a “preponderance” of the evidence. The arrestee’s guilt (or the presence of evidence in a place to be searched) need not be “more likely than not.”

The Supreme Court has said that “[t]he substance of all the definitions’ of probable cause ‘is a reasonable ground for belief of guilt.’ And this ‘means *less than evidence which would justify condemnation’ or conviction . . .* [I]t has come to mean *more than bare suspicion . . .*”⁵ The Court has also said, in discussing post-arrest, probable-cause hearings, that “[probable cause] does not require the fine resolution of conflicting evidence that a reasonable-doubt *or even a preponderance standard* demands . . .”⁶ Additionally, “only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause . . .”⁷ And finally, the probable-cause standard “*does not demand* any showing that such a belief be correct or *more likely true than false*.”⁸ Though some of the cases are relatively old, the Court has not subsequently retreated from the position—however obliquely stated—that probable cause is something more than bare suspicion but something less than “more probable than not.”⁹

Some may quarrel with the legitimacy of this standard and suggest that a preponderance of the evidence would be a more appropriate prerequisite to arrest.¹⁰ Even if one were to adopt a more stringent definition of “probable cause,” however, it would nonetheless remain the case that the standard does not rule out—and can be said, in fact, to contemplate—that innocent people will regularly suffer the indignity and deprivation of an arrest for crimes of which they are completely innocent. This consequence is unavoidable,

5. *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (emphasis added) (citations omitted).

6. *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (emphasis added).

7. *Spinelli v. United States*, 393 U.S. 410, 419 (1969). *Illinois v. Gates* overruled *Spinelli* in favor of a more lenient standard, thereby leaving the absence of any need for a prima facie showing undisturbed. 462 U.S. 213 (1983), 238–39.

8. *Texas v. Brown*, 460 U.S. 730, 742 (1983) (emphasis added).

9. Despite this language, it may be that in one class of cases, the probable-cause standard requires a preponderance of the evidence. This class consists of situations in which police uncertainty extends to whether or not a crime was even committed. If, in other words, police suspect but are not sure that a crime was committed at all, then it may be—under one reading of lower-court decisions—that police must acquire a basis for concluding that a crime probably did take place before arresting a suspect in connection with that crime. See 2 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 69–70 (3d ed. 1996) (claiming that lower courts apply a preponderance-like standard when there is uncertainty about whether a crime was even committed but a less-than-preponderance standard when the crime is certain and the only uncertainty revolves around the identity of the criminal); see also Sherry F. Colb, “Whodunit” vs. “What Was Done”: *When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV. 939, 948–54 (2001) (discussing the distinction between “whodunit” versus “what was done” crimes and how our evidentiary system does and should distinguish at trial between evidence of a crime in which the prosecution must prove who committed it versus evidence of a crime in which the prosecution must prove that there was a crime at all).

10. In personal communication, my colleague, Joel Atlas, raised the provocative question of how one can “reasonably believe” that something is true, as an officer must do prior to arresting a suspect, if one is not persuaded that, at the very least, the thing in question is more likely to be true than it is to be false.

regardless of the standard, if searches are permissible at all. Indeed, I have elsewhere argued that the Fourth Amendment, in setting out “probable cause” as a limiting principle for searches and seizures, explicitly and inherently balances the privacy and liberty of innocent people against the also-significant goal of protection of the public from criminal predation.¹¹

If it were otherwise, it would not be necessary to tolerate error—the law could simply bar all intrusive criminal investigation on the basis of anything less than proof beyond a reasonable doubt (or better, absolute certainty). Such a robust protection for privacy and liberty, however, would come at a great cost—the inability of law enforcement to act to detect and, perhaps even more importantly, prevent criminal behavior about which they do not already have all of the facts.

The Fourth Amendment compromise thus means, necessarily, that police who investigate to the extent that they may, consistent with constitutional limits, will sometimes inflict frightening, humiliating, and unpleasant law-enforcement events—searches and seizures—on innocent people. If we assume that “probable cause” is as close to a preponderance of the evidence as possible, without actually rising to a preponderance, then the doctrinal standard contemplates that at least fifty percent of those lawfully searched and seized will be innocent and thus undeserving of any intrusion.

The cost of requiring less than one hundred percent certainty is, then, the invasion of innocents’ privacy and liberty. To some extent, we all understand this and we still say that probable cause is an acceptable standard. Yet something happens when we *know* that a police officer is harming a specific and identifiable innocent person in a particular case. Suddenly, the cost of invading innocent privacy feels more immediate and offensive.

Consider a simple hypothetical example: the police arrest two people, knowing that one but only one of them is certainly guilty of a crime. Though the probability of guilt with respect to each of the people is 0.5—enough for “probable cause”—it nonetheless feels, to many, potentially wrong to arrest the two people and thereby knowingly to arrest an innocent.¹²

11. See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1472, 1505 (1996).

12. If the standard were greater than fifty percent, of course, one could still envision, with similar discomfort, a police officer who knows that two of three people are guilty and that one is innocent and arrests all three. One does not, in other words, escape the problem simply by raising the standard for probable cause.

I thank Steve Shiffrin for proposing that the doctrine of double effect (DDE) may explain our intuitions here. The DDE observes a moral distinction between intentionally and directly causing a harmful result (for example, by deliberately killing a person to transplant life-saving organs to five people), and indirectly but knowingly causing a harmful result as an incidental or collateral effect of engaging in otherwise justifiable and properly directed conduct (for example, by swerving a trolley away from hitting a group of five people, knowing that it will consequently hit one person). In the first case, we deliberately and impermissibly use another person as a means of saving five; in the latter, our intentional act is to avoid killing five people, and the death of the one is deemed an unfortunate but undesired (and conceptually severable) effect of that act. Using a person as an organ donor necessarily

In *Maryland v. Pringle*,¹³ the U.S. Supreme Court confronted a case that appeared to present the “knowingly arresting an innocent” problem. A police officer stopped a car in which he found a driver and two passengers.¹⁴ During a consent search, the officer found drugs.¹⁵ The officer told the group that he would arrest all of them if one did not confess to possession of the drugs.¹⁶ All three remained silent, so the police officer arrested the whole group.¹⁷ Ultimately, one of the three confessed and exonerated the others, who were both released from custody at that time.¹⁸ When facing trial, the one who confessed claimed that he was illegally arrested without probable cause, because the police officer was arresting three men for the crime of one man.¹⁹

In telling the men that he would arrest all three if the guilty party did not own up to possession of the drugs, the police officer manifested his belief that only *one* of the three men was responsible for possession. When no one stepped

involves intentionally harming the one person, while swerving out of the way of five people does not. See Sophia Reibetanz, *A Problem for the Doctrine of Double Effect*, 98 PROC. ARISTOTELIAN SOC'Y 217, 217–18 (1998).

When we arrest one person on the basis of probable cause, Shiffrin suggests, we do not intentionally use an innocent person as a means of ensuring that we arrest a guilty person, because we do not know that we have an innocent person in custody. If the person is innocent (as he will often be), that is an incidental effect of our arresting without certainty (collateral damage of an otherwise legitimate act). On the other hand, when we arrest two people, knowing that one is innocent, we are intentionally arresting an innocent in order to make sure that we bring in the guilty person. The known innocent person in the latter example is thus analogous to the organ donor, while the occasional (or even frequent) innocent person in the former example is more like the individual hit by the trolley swerving out of the way of the five.

Though fascinating, the DDE is both under- and over-inclusive regarding the abstract-concrete distinction; the statistical-concrete disparity in intuitions occurs even when the DDE would not treat the circumstances differently. First, imagine a house on fire containing six people. Five of the people will die if the fire is not put out immediately. The sixth is in a separate part of the house with a respirator and could survive the fire but because of his location will drown if firefighters spray enough water to extinguish the fire. The DDE would treat this as a “double effect” situation (because the firefighters spray the water at the fire to put it out, thereby saving lives, and only collaterally cause the drowning of the one person). Yet the harm to the sixth person is concrete rather than statistical and thus intuitively more disturbing to people than, for example, equipping cars with air bags that will predictably cause some number of passenger deaths, because it will save more lives.

Second, consider a military draft system in which a lottery determines which individuals are to go to war to protect the rest of the population. The abstract-concrete distinction does not attach special condemnation to such a system, because the people to be harmed are yet to be determined and accordingly lack concreteness. The DDE, however, would treat such a system as unjust in the same way as the doctor's decision to kill a particular patient to supply organs to another five patients is unjust—both intentionally and directly inflict harm on one individual as a means of helping or protecting others. The harm is not collateral to the purpose but is an inherent part of it. Hence, the statistical-concrete distinction captures moral intuitions that slip through the cracks of the DDE.

13. 540 U.S. 366 (2003).

14. *Id.* at 367.

15. *Id.* at 368.

16. *Id.* at 368–69.

17. *Id.* at 369.

18. *Id.*

19. 540 U.S. 366, 372 (2003) (“Pringle’s attempt to characterize this case as a guilt-by-association case is unavailing.”).

forward, however, the officer arrested—by his own implicit estimation—two innocent men and one guilty man, not knowing which two were innocent and which one was guilty. In addition to knowingly arresting two innocent people, the officer also apparently arrested each of the men on the basis of a one-in-three chance of guilt. Does this amount to probable cause?

Had the Court accepted the proposition that the case truly presented a one-to-three guilty and two-to-three innocent situation, it could have helped clarify the numerical standard for probable cause; it also would have revealed whether there is a constitutional distinction between, on the one hand, taking a statistical risk of 0.67 that one is arresting an innocent person, and, on the other, knowingly arresting two innocent people in the company of one guilty person. As it turned out, however, the Supreme Court said that there was probable cause and noted that the facts were consistent with *all three men* being in possession of the drugs.²⁰ When three people occupy a car together and illicit drugs are located in that car, there is good reason to think, at least preliminarily, that everyone in the car is in possession.

Because of its analysis of the case, the Court failed to answer either of the more-interesting questions. It left open what numerical odds are sufficient to amount to probable cause as well as what Fourth Amendment significance, if any, might attach to the concrete nature of the harm in a case in which the officer *knows* that one or more of the people he is arresting is (or are) innocent. If we imagine a slightly different case, we can hypothesize several possible results for the Court. Consider the case of a police officer who stops a car with three occupants (X, Y, and Z) and finds, in the course of a consensual search, a murder–suicide note, on which is typed “Today is [today’s date]. X, Y, and Z will die through a car explosion today. I am one of the three, and I have programmed the vehicle to explode thirty minutes after battery ignition. We are close friends, and because I will die and want company in the next life, I am taking the others with me.” The officer swiftly removes the three men from the car and, one minute later, watches it explode. All three of the men deny involvement.

The officer now has good reason to suspect that one of the three men is guilty of attempted murder. She also has good reason to suspect that two of the three men had nothing to do with the attempted murder. If the note could be definitively tied to one of the three men, then it would plainly be appropriate to arrest that one alone. However, no such distinction is possible without further

20. *See id.* at 372–73 (“We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly. . . . [A] car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.’ Here we think it was reasonable for the officer to infer a common enterprise among the three men.”).

investigation. The question is whether the officer has probable cause to support the arrest of all three men.

Another, less-outlandish, true example appears in a criminal procedure casebook.²¹ In this example, a police officer sees a car driving erratically and signals the driver to pull over. By the time the officer reaches the car, however, three men are sitting in the back seat, and no one is in the driver's seat. The officer is confident that no one left the car after it was stopped. Therefore, the officer knows that one but only one of the three men was driving while intoxicated. If none of the three admits to being the driver, do police have probable cause to arrest all three? (We can add the stipulation that the car is registered to a fourth person, who is not in the car).

One of the questions entailed is, of course, whether a one-in-three probability is sufficient to make up probable cause. We do not have a definitive answer to this question (and that continues to be the case after *Maryland v. Pringle*). We could, however, simplify the problem if we hypothesized two instead of three men in the vehicle. Statistical odds of one in two would ordinarily be an adequate (and perhaps more than adequate) basis for an arrest.

Often, an officer has some level of defensible suspicion that *all* people to be arrested were involved in committing a crime. Sometimes, however, a greater level of suspicion attaches exclusively to one member of the group of people to be arrested, with the uncertainty going primarily to *which* person committed the offense rather than to whether *any* arrestee or arrestees committed the crime at all.²²

The officer who arrests three or even two people, knowing that—or believing strongly that—only one of the people is guilty of any wrongdoing, makes concrete the reality that two completely innocent people (or one innocent person)—victims, in the car-bomb scenario and simple (non-driving) drunks in the true example—are subjected to a loss of liberty and the associated humiliation and trauma. We intuitively experience this as somehow different from the situation in which an officer finds some evidence on a single individual that would, statistically, make the odds of that individual having committed a crime one in three or one in two (for example, possession of somewhat incriminating items that, in the run of cases, indicates guilt in every third or every second case). On the numbers, in other words, probable cause may be logically present, yet one might feel reluctant to say that it is therefore acceptable for a police officer *knowingly* to arrest innocent people.

21. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 158 (3d ed. 2006).

22. See JEROLD H. ISRAEL & WAYNE R. LAFAYE, CRIMINAL PROCEDURE: CONSTITUTIONAL LIMITATIONS 70 (7th ed. 2006) (distinguishing the two cases and the probable-cause determination with respect to each); see also L. Jonathan Cohen, *Subjective Probability and the Paradox of the Gatecrasher*, 1981 ARIZ. ST. L.J. 627 (1981) (example of analysis focusing on the issue of which person committed the offense).

Yet if one assumes that a police officer performs many arrests in the course of a career in law enforcement, one could argue that distinguishing between concrete and statistical harms to innocent people is irrational. The “statistical” officer (S) arrests whenever the apparent odds of a suspect’s guilt are one in two (for example, the suspect behaves in a manner that, one in two times, identifies a guilty person). The “concrete” officer (C) arrests two people whenever it is clear that one of the two has committed a crime, but it is impossible to tell which of the two is guilty, without first arresting them. Over time, the law of large numbers dictates that if S and C arrest the same number of people (n), then each one will arrest $n/2$ innocent people. That one knows *at the time of arrest* that she is arresting an innocent person, while the other knows only that, over time, she is arresting innocent people, does not alter aggregate outcomes.

One potentially relevant distinction between S and C arises from the state of mind each brings to her job. When S arrests a suspect for whom there is a 0.5 probability of guilt, the officer believes that the person she is arresting is guilty. Such a belief may represent in part a simple “gut” feeling, but such feelings (supported by actual facts) are an important and useful part of decisionmaking.²³ At each arrest, in other words, S has reason to believe that the particular person arrested has committed an offense. C, by contrast, knowingly arrests innocent people on a regular basis. Each time she faces a pair of people, only one of whom has committed a crime, and she decides to arrest both of the people and sort things out later, C knows (or believes with confidence) that she has in custody a completely innocent person. She has therefore decided to sacrifice the liberty and privacy of one innocent suspect to support the apprehension and prosecution of a guilty one. The innocent arrestee can reasonably accuse C of carrying out a knowing, specific injustice on the basis of a cost-benefit analysis. S, on the other hand, can honestly say that she has never knowingly arrested an innocent person. Her goal is to arrest only guilty people, although her level of certainty essentially guarantees that half of the time, she will fall short of her goal. Every time she performs an arrest, she therefore acts in subjective good faith toward every individual arrested. She is, in that sense, less culpable in connection with the harms that she inflicts on innocent arrestees than C is.

To some degree, however, this description of the police officers’ respective behavior is question-begging. It is true that on any given occasion, the statistical officer, S, does not knowingly arrest an innocent person, by contrast to the concrete officer, C. If a person is a repeat player, however, as a police officer who arrests large numbers of suspects over time is, then the fact that the officer may—on any given occasion—be doing no harm matters far less. Over time, in other words, the officer *knows* that she is arresting innocent people, as many

23. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19–29 (2007) (describing evidence of judges’ intuitive decisionmaking).

innocent people as her colleague C is arresting. On a one-time basis, then, it may be sensible to distinguish certain harm to an innocent from the probability of such harm. But police do not act on a one-time basis and must therefore be understood to take responsibility for the known outcomes that their conduct foreseeably produces. There is *knowledge*, in other words, in both S and C. The knowledge is simply statistical for S and concrete for C.

So the question arises again: Is there a morally salient difference between statistical and concrete harm?

B. A Distinct but Related Phenomenon

Before venturing further, it is worth noting a related but distinct phenomenon in people's reactions to statistical versus concrete information: the difficulty that people (and therefore jurors) seem to have when they are asked to process evidence that is general and statistical in nature rather than specific and concrete about the particular parties.

The classic case of this phenomenon is known in evidence circles as the "blue bus case".²⁴ A plaintiff was hit by a blue bus; the defendant owns eighty percent of the blue buses operating in the relevant area.²⁵ When evidence students confront this case, most are not satisfied that by citing the above facts the plaintiff has proven his case against the defendant.²⁶ People want to hear evidence that seems to be about the *particular* bus that hit the plaintiff, such as a dent on the right side or a driver wearing a "Go Yankees" sweatshirt. The more such details about the particular tortfeasor, the better, despite the fact that, for each such "specific" detail, there will be some number of innocent matches in the population (for example, other buses with dents, other drivers with Yankees sweatshirts), and the probative value of the details will therefore turn, ultimately, on the product of the proportions of each characteristic in the population, a product that may well fall short of the simple but overwhelming odds that any blue bus belonged to the defendant.²⁷

24. See Charles R. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1378-79 (1985) (recounting the blue-bus hypothetical). The hypothetical case is based on *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754 (Mass. 1945). There the defendant operated the only bus line that had a route on the relevant street. *Id.* at 755.

25. Nesson, *supra* note 24, at 1379.

26. See Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 986-87 (2006) ("Sometimes naked statistical evidence seems intuitively insufficient to justify a judgment. If the only proof that the plaintiff was injured by the defendant's bus instead of another company's bus was mere evidence that a majority of the blue busses in town belonged to the defendant, many of us would hesitate to find that identification sufficient.").

27. See Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 263 (1990) ("After all, both epistemologically and in most cases practically, how can one ever 'really' know anything? For example, how can eyewitness testimony convince us that Sally Smith 'really' was a gatecrasher, rather than that she was probably one? All evidence is probabilistic, requires inferences to support an ultimate conclusion, and involves a risk of error if thought to establish that conclusion.").

This negative reaction to statistics might reflect a discomfort with mathematics more generally; many people distrust statistical data and find its application to particular situations confusing. As a result, it feels “unfair” to people to blame the blue bus company for a negligent collision simply because it happens to own most of the blue buses in town. People want to know more about the particular bus, a desire that some have characterized as irrational.²⁸

This hostility to statistics appeared to operate as well among the Supreme Court Justices who comprised the majority in *McCleskey v. Kemp*.²⁹ The petitioner in that case challenged the constitutionality of his death sentence on the ground that it reflected a racially biased sentencing process.³⁰ To prove his case, he demonstrated that the primary predictor of whether a defendant is sentenced to life imprisonment or death for a particular murder is not the severity of the respective murders but, instead, the race of the victim (white) and an interaction between the race of the victim and the race of the perpetrator (black on white).³¹

Such statistics strongly suggested that *any* African American defendant sentenced to death for the murder of a white person has suffered the effects of racially biased decisionmaking—or what Professor Randall Kennedy has called “selective empathy.”³² Yet the Supreme Court refused to find an equal-protection violation and insisted that, to show that a death sentence violated the Fourteenth Amendment, a defendant would have to prove something specific about *his jury* that suggested discrimination in its deliberations.³³ To conclude that a particular person or group behaved badly, in other words, the Court—like students considering the blue bus case—did not feel comfortable relying on statistical evidence that seemed not to be *about* the particular person or group accused.³⁴

28. See, e.g., Lea Brilmayer, *Second-Order Evidence and Bayesian Logic*, 66 B.U. L. REV. 673, 675–76 (1986).

29. See *McCleskey v. Kemp*, 481 U.S. 279, 295 n.15 (1987) (“[A]ny inference from statewide statistics to a prosecutorial ‘policy’ is of doubtful relevance.”).

30. *Id.* at 286.

31. *Id.*; see DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 141 (1990) (finding that black defendants who killed white victims have the greatest likelihood of receiving the death penalty).

32. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1420 (1988) (“[R]ace-of-the-victim disparities in sentencing [indicated by the Baldus study] probably reflect racially selective empathy more than racially selective hostility.”).

33. *McCleskey*, 481 U.S. at 292–93 (“[T]o prevail under the Equal Protection Clause, *McCleskey* must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.”).

34. People seem to have a similarly difficult time processing evidence that eyewitnesses frequently make mistakes in identifying a perpetrator. Despite such evidence, jurors continue to find eyewitness identifications compelling and persuasive. See Sherry F. Colb, *The Problems of Eyewitness Identification: A Personal Account*, FINDLAW, Mar. 18, 2009, <http://writ.news.findlaw.com/colb/20090318.html> (reviewing some of the problems with eyewitness identification); see also James Lang, Note, *Hearsay and Relevancy Obstacles to the Admission of Composite Sketches in Criminal Trials*, 64 B.U. L. REV. 1101, 1138 n.203 (citing psychological studies according to which evidence of

Enterprise liability pushes back against the inclination to assess only evidence revolving specifically around the particular parties. In the leading case of *Sindell v. Abbott Laboratories*, a woman brought a lawsuit against a company that manufactured a pharmaceutical called diethylstilbestrol (DES).³⁵ The drug was prescribed to pregnant women to help them avoid miscarriages, but it turned out that DES caused illness and various abnormalities in the children born to those women who had taken the drug.³⁶ The woman who brought suit had contracted cancer that was apparently caused by her mother's having taken DES.³⁷ She could prove only that her mother had taken the drug and that the drug had probably caused her own illness. Because the drug DES was generic, it might have been manufactured by one of a number of different pharmaceutical companies.

Rather than dismiss the plaintiff's suit, as the "blue bus" approach might have inclined it to do, however, the court instead announced a cognizable theory of "market share liability."³⁸ Under this theory, a plaintiff who sued a group of manufacturers of a defective product, a group representing a "substantial share" of the relevant market, could recover damages from each defendant in proportion to its relative share of the particular market.³⁹ A defendant could defend against this theory of liability by proving affirmatively that it *could not* have been the producer of the particular product consumed by the plaintiff. This innovative approach to liability meant that even though Abbott Labs could be identified as only one manufacturer of DES and could not otherwise be linked to the DES that the plaintiff's mother had ingested, Abbott Labs would still be required to pay a statistically based proportion of

eyewitness identification increased a jury's willingness to convict from eighteen percent to sixty-eight percent even after the eyewitness was discredited by further evidence that his eyesight was 20/400 and he had not been wearing his glasses at the time he observed the offender). Courts are often aware of this problem. *See State v. Hunt*, 69 P.3d 571, 576–77 (Kan. 2003) ("[J]uries usually attach great weight to eyewitness identification, while others involved in a trial know and other disciplines have documented that such identification is often unreliable.").

35. 607 P.2d 924, 925 (Cal. 1980).

36. *Id.* at 926 n.3 ("Plaintiff's failure to amend her complaint after Abbott's demurrer was sustained with leave to amend was based upon her inability to identify a specific manufacturer.").

37. *Id.*

38. *Id.* at 937 ("[W]e hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. . . . Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. . . . Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products.").

39. *Id.* ("If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished. While 75 to 80 percent of the market is suggested as the requirement . . . , we hold only that a substantial percentage is required.").

the damages for the plaintiff's injury.⁴⁰ In the blue-bus-case analogue, this theory would have required the defendant company to pay eighty percent of the plaintiff's damages. Even though this approach distinguishes statistical from concrete forms of evidence (the latter of which allow for one hundred percent recovery against a defendant, despite only a fifty-one percent chance of liability), it does not dismiss the former out of hand for lack of concrete evidence.

The evident hostility to statistical versus concrete evidence bears a relation to the tendency to place greater weight on concrete than on statistical harms. Like a concrete victim of harm, concrete evidence may feel more "real" and thus worthy of being taken into account by people who learn of its existence. I would nonetheless distinguish between the two sorts of dichotomies. In the blue-bus and related examples,⁴¹ judges and juries want to receive information that distinguishes particular parties from the crowd of individuals who might be responsible for a particular injury. In this desire, they fail to appreciate fully that uncertainty is uncertainty and that, therefore, any evidence that does not conclusively establish the defendant's responsibility leaves open the possibility that he might incorrectly be held liable. Except where the dearth of party-specific evidence reflects a failure to gather evidence diligently—which might be at work in some cases—the distinction is not rational in this context.⁴²

In the case of approving arrest on the basis of fifty-fifty odds of a suspect's innocence (and disapproving the arrest of two people, one of whom is definitely guilty and one of whom is definitely innocent), however, the difficulty judges and juries have is not with relying on statistical evidence to draw factual

40. For similar reasons, the two defendants in *Summers v. Tice*, 199 P.2d 1, 2 (Cal. 1948), who both shot their guns at the victim at the same time were *both* held responsible for the victim's death, even though it was impossible to attribute the death distinctly to one rather than the other defendant. Unlike in *Sindell*, of course, there really was not one actual cause in *Summers v. Tice*—both shooters were sufficient conditions for the death, and neither was a necessary condition (in the "but for" causation sense). By distributing liability between the two shooters, then, the two people who had caused the concrete death would pay equally for the damages, a result that feels "concretely" satisfying and requires no comfort with statistical models.

41. For a description of the blue-bus scenario, see text accompanying notes 24–28.

42. An example is the gatecrasher case described in Cohen, *supra* note 22, at 627. In the gatecrasher scenario, we know that more than half of the 1,000 people who entered a stadium did not pay for a ticket, but we do not know anything more specific that would allow us to distinguish between the large number of people who did and the even larger number of people who did not pay. Though the odds that any one member of the crowd entered without paying are greater than fifty percent in this scenario, people faced with the hypothetical facts typically oppose the idea of allowing a jury to award damages against an individual in the stadium on the basis of this information. These reactions, however, may well reflect impatience with the plaintiff's failure to watch the door and thereby facilitate the discovery of which people in the crowd entered without paying. David Kaye offers a similar explanation when he argues that in the gatecrasher case "a factfinder should consider the fact that plaintiffs . . . are relying on statistical evidence and nothing more. Unless there is a satisfactory explanation for the plaintiffs' failure to do more than present the gross statistic, a rational juror might well arrive at a subjective probability of less than one-half that the defendant was one of the 501 gatecrashers." David Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L.J. 101, 106 (1979).

conclusions. The difficulty is instead with drawing normative conclusions on the basis of statistical (though certain) factual harms. Rather than feel (perhaps irrationally) that they have not received enough evidence to prove a contested fact, then, people feel instead that the statistical harm that has been proven does not amount to the same morally troubling matter that a comparable concrete harm would. Whether or not statistical evidence qualifies as adequate (or even admissible) proof in a court of law, then, judges and juries may tend to view the proven harms differently, as a normative matter, depending on whether they are concrete or statistical in their certain impact.

III

STATISTICAL VERSUS CONCRETE HARMS IN OTHER AREAS

In the context of defining probable cause, we still do not know whether the Supreme Court endorses the intuition that arresting two people, one of whom is innocent and one of whom is guilty, is constitutionally distinct from arresting one person for whom the probability of guilt is 0.5. The Court has, however, had occasion to speak (both directly and indirectly) to the statistical–concrete divide in other legal contexts. In examining these areas, let us begin with a different Fourth Amendment question, the role of the exclusionary rule in handling the products of searches that were not based upon probable cause.

A. Statistical Versus Concrete Harms in Fourth Amendment Suppression

One can readily identify the clashes of perceived concrete and statistical harms in liberals' and conservatives' discussions of the Fourth Amendment exclusionary rule. On the liberal side, past Justices such as Brennan and Marshall have contended that when a prosecutor introduces the fruits of an unreasonable search or seizure into evidence at trial, the prosecutor has inflicted a further constitutional harm on the defendant who suffered the original unlawful search or seizure.⁴³ That is, according to these Justices, participants in the courtroom process violate a concrete defendant's constitutional rights by introducing against him the evidence taken without a warrant or probable cause. Just as the defendant had a right not to have police perform the search or seizure in the first place, he now has the right not to have to endure the courtroom consequences that would follow from the unreasonable search or seizure. A straightforward application of the Fifth Amendment right against compelled self-incrimination, for example, would similarly bar the introduction of a tortured terrorist's statements at the criminal trial of that terrorist.⁴⁴

43. See *United States v. Leon*, 468 U.S. 897, 935 (1984) (Brennan, J., dissenting) (“For my part, ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures’ comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures.”).

44. *Bram v. United States*, 168 U.S. 532, 557–58 (1897) (holding that the Fifth Amendment requires exclusion of statements given in response to coercive interrogation); Marcy Strauss, *Torture*,

Conservatives and even some liberals, however, have taken the position that a Fourth Amendment violation begins and ends with the unreasonable search and seizure and that the introduction of resulting evidence at trial does not itself violate anyone's constitutional rights.⁴⁵ If this is true—and it is the position of a majority of our current Supreme Court that it is⁴⁶—then allowing prosecutors to introduce illegally searched or seized evidence inflicts no new constitutional harm on the defendant himself, but instead causes harm only to people who in the future will be subject to illegal searches or seizures because police are not deterred and do not fear that such conduct will lead to the suppression of evidence that they find.⁴⁷ Under this approach, though the defendant will not *like* the introduction of the evidence, he is not entitled to its exclusion. The people who suffer a cognizable harm are as yet undetermined, because they will be subject to undeterred Fourth Amendment violations in the future. They are thus *statistical* (albeit real) victims of the failure to suppress evidence and, as such, do not inspire very much outrage in the population.⁴⁸ By contrast, within this framework, the harm of excluding evidence is quite concrete. To paraphrase Justice Cardozo, is the criminal to go free because the constable has

48 N.Y.L. SCH. L. REV. 201, 248 (2004). This may help explain why the federal government has been quite reluctant to place most terrorism-related detainees on trial in criminal court. *See* Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 176–77 (2005) (suggesting that the government's choice of military tribunals was motivated in part by the inadmissibility of evidence obtained through coercive interrogation).

45. *See, e.g., Leon*, 468 U.S. at 906 (“[T]he use of fruits of past unlawful search or seizure ‘[works] no new Fourth Amendment wrong’” (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974))); *see also* Sherry F. Colb, *Kansas v. Ventris: The Supreme Court Misconstrues the Right to Counsel*, FINDLAW, June 10, 2009, <http://writ.news.findlaw.com/colb/20090610.html> (discussing the significance of *when* a violation took place, in the Fourth, Fifth, and Sixth Amendment contexts).

46. *See Herring v. United States*, 129 S. Ct. 695, 699 (2009) (“The Fourth Amendment . . . ‘contains no provision expressly precluding the use of evidence obtained in violation of its commands.’” (quoting *Arizona v. Evans*, 514 U.S. 1, 10 (1995))).

47. The Court, of course, regularly denies that there is even this cost to future search victims when illegally obtained evidence is admitted. *See, e.g., Hudson v. Michigan*, 547 U.S. 586, 596 (2006) (“It seems to us not even true, as Hudson contends, that without suppression there will be no deterrence of knock-and-announce violations at all.”); *Herring v. United States*, 129 S. Ct. 695, 704 (2009) (“[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not ‘pay its way.’”). In *Hudson*, police arrived at the defendant's home with a search warrant for drugs and firearms. They announced their presence but waited only a short time before opening the unlocked door and entering the defendant's home. Inside the home they discovered large quantities of drugs and a gun. The Court determined that the exclusionary rule was inapplicable and suppression of the evidence was not warranted. In *Herring*, police arrested the defendant after failing to update a computer database to reflect the recall of the arrest warrant. The Court found that the mistake was due to negligence and that error, by itself, was insufficient to require exclusion under the Fourth Amendment.

48. It is possible that people are not outraged because they do not realize that the exclusionary rule has been watered down. One study suggests that a majority of the public supports the exclusionary rule, *see* SHMUEL LOCK, *CRIME, PUBLIC OPINION, AND CIVIL LIBERTIES: THE TOLERANT PUBLIC* 45 (1999) (showing that, across all levels of education, less than thirty-five percent of those surveyed were likely to allow illegally obtained material into evidence), although it is difficult to assess whether people like it in the theory but find it offensive and undesirable in concrete cases, an approach that would seem to mirror the Supreme Court's jurisprudence (which has yet to overrule exclusion altogether).

blundered?⁴⁹ The harm is hampering the prosecution of an ostensibly guilty person. When a guilty person gets away with his crime—and we are aware of this fact (as we are when an otherwise compelling case against a defendant is thrown out because of a “technicality”)—we feel outraged and affronted by the concrete miscarriage of justice.

One could, however, characterize things quite differently. One might argue, as some law-enforcement liberals do, that the only “harm” that occurs when evidence is suppressed is that, over time, when guilty people remain at large, some number of them reoffend and hurt new victims. The failure to punish a particular crime does not itself “victimize” anyone (including the past victim) because neither crime victims nor any other individuals are entitled to punish the defendant. In fact, the reason criminal cases are described as “People v. X” is that the party opposing the defendant is not an individual person or victim but rather the government, which can decide whether to even prosecute a particular defendant. Viewed in this way, the harm of a wrongful acquittal is not concrete at all.

Under the Brennan–Marshall view, the cost of introducing the unlawfully obtained evidence is correspondingly concrete because the latter inflicts harm on the defendant in the case. It is because of this harm that defendants are willing to invest resources in arguing their Fourth Amendment claims in motions in limine, and it is also because of this harm that a lawyer who fails to bring an obvious suppression motion is said to deny the defendant the effective assistance of counsel for Sixth Amendment purposes.⁵⁰ Unlike the as-yet-unknown victims who will fall prey to the defendant’s recidivism if he is released without punishment, the defendant’s harm is concrete and specific to him.

Examined closely, the arguments over the exclusionary rule are, in at least one sense, mirror images of each other. On one side of the mirror, people who oppose suppression in a given case view the failure to punish private criminal misconduct—through successful prosecution, conviction, and sentencing—as a concrete harm to crime victims whose rights the defendant violated in committing his crime. In keeping with the parallel, opponents of the exclusionary rule view the “harm” of incomplete Fourth Amendment deterrence as itself statistical (that is, connected to future unknown people to be searched and seized without justification) and subject to mitigation by partial enforcement and alternative remedies (including § 1983 suits).⁵¹ On the other

49. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (“The criminal is to go free because the constable has blundered.”).

50. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 383–87 (1986) (holding that an attorney’s unreasonable failure to file a suppression motion for evidence obtained in violation of the Fourth Amendment constitutes ineffective assistance of counsel).

51. As some have noted, one asset of a § 1983 suit, as compared to suppression, is that an innocent person is particularly well situated to make use of such a remedy. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 797–98, 812–14 (explaining that suppression benefits the guilty and arguing for direct government-entity liability under § 1983 as the solution); *see*

side, some people view the failure to “punish” violations of the Fourth Amendment through the exclusionary rule as concrete harms against the people whose Fourth Amendment rights were initially violated.⁵² By contrast, the perpetrator’s victims have already suffered their injustice at the time of the crime (and therefore cannot be said to suffer cognizable “victimization” when a prosecution is dismissed). Therefore, the only people seriously harmed by suppression are the potential (and accordingly abstract and indeterminate) future victims of an unpunished criminal.

Viewed through the statistical–concrete lens, then, we can see why those who debate the exclusionary rule seem to talk past one another. It is not so much that proponents believe unreasonable searches and seizures are qualitatively *worse* than crime or that opponents believe that the government can do no wrong (though there may be members of each camp who take these positions). Instead, people on opposite sides may conceive of the harms inflicted by intrusive government officials and by criminals differently, in a manner that leads them to find exclusion either necessary to avoid concrete Fourth Amendment violations or contrary to the concrete rights of victims and society in retribution.

It is noteworthy that the pro-defendant view of exclusion has been far less popular and appealing than the pro-government (anti-exclusion) view. This is

also Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcer’s Misconduct*, 87 YALE L.J. 447, 449 n.6 (1983) (arguing that unlike “the guilty person whose conviction is precluded by the exclusionary rule [and who] has, in a sense, obtained a ‘remedy’ for the violation of his rights,” the exclusionary rule provides no remedy to the innocent).

52. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (holding that “the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments”); *Olmstead v. United States*, 277 U.S. 438, 462 (1928) (“The striking outcome of the Weeks Case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction, if obtained by government officers through a violation of the amendment.”); *Dodge v. United States*, 272 U.S. 530, 532 (1926) (“If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used.”); *Weeks v. United States*, 232 U.S. 383, 391–92 (1914) (“[T]he Fourth Amendment . . . put the courts of the United States . . . in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.”); see also Colb, *supra* note 11, at 1524 (arguing that even in the case of a guilty defendant, “[t]hough [he] does not deserve to be free of punishment, he has still suffered the harm of being punished without a procedurally sound determination of his guilt”); see generally Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565 (1983). According to Kamisar, “[t]he likely explanation for the failure of the Fourth Amendment to provide explicitly for an ‘exclusionary rule’ is that the framers thought little, if at all, about *after the fact* judicial control.” *Id.* at 578.

The Court’s decision in *Weeks* seems to recognize two potential constitutional violations: one by the court in admitting the evidence and one by the police in obtaining it illegally. *Weeks*, 232 U.S. at 393–94 (“The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.”).

In addition to the concrete harm to defendants, proponents of exclusion may also worry about the future statistical harm that such failures to enforce the Constitution will inflict on as-yet-unknown people to be searched.

likely because the guilty defendant on whom evidence is found through an illegal search is—in a fundamental sense—just as deserving of punishment as any other guilty defendant on whom evidence is found.⁵³ Stated differently, the guilty defendant would, if he had gone undetected due to state compliance with Fourth Amendment requirements, have been an *incidental* beneficiary of a Fourth Amendment privacy and liberty right that, by its own terms, is designed to protect innocent people. Blocking the search of a secretly guilty defendant, for that reason, is not an intended objective but rather a necessary *cost* of protecting the many innocent people who would otherwise be vulnerable to police searches. Viewing the defendant who moved to suppress evidence as a surrogate for future privacy victims (rather than as a potential victim in his own right) thus better reflects intuitive reactions to the Fourth Amendment. And to the extent that it does, the harm—of introducing the evidence (and failing to deter future violations against unknown and as-yet-undetermined parties)—is accordingly abstract and statistical, by contrast to the concrete harm of possibly releasing a guilty defendant.

Critics of the exclusionary rule have long pointed out the perverse nature of suppressing evidence in a criminal case as a “remedy” for Fourth Amendment violations.⁵⁴ The most vicious crime of all will yield the greatest payoff for the defendant who successfully suppresses incriminating evidence—avoiding a life sentence or the death penalty. The small-time criminal, by contrast, may avoid a few years (or less) behind bars. And the completely innocent person who suffers an unreasonable search or seizure that turns up nothing incriminating gets *nothing* from application of the exclusionary rule (other than the shared, and thus diffuse and statistical, benefit of deterred future violations of the Fourth Amendment). To focus on the concrete, as people are inclined to do, is to view the suppression of evidence as a concrete, present, and disturbing reward that grows in direct proportion to the misdeeds of its undeserving beneficiary.

The Supreme Court, in supporting and applying an exclusionary rule, purports to treat it accordingly, as a means of deterring future Fourth Amendment violations rather than as a reward or direct compensation for the

53. See Colb, *supra* note 11, at 1468–73 (elaborating a hypothetical case to support this argument).

54. See, e.g., Amar, *supra* note 51, at 797 (“[I]f deterrence is the key, the idea is to make the government pay, in some way, for its past misdeeds, in order to discourage future ones. But why should that payment flow to the guilty? Under the exclusionary rule, the more guilty you are, the more you benefit.”); L. Timothy Perrin et al., *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 752 (1998) (“The exclusionary rule bestows the greatest benefit on those accused of the most heinous crimes (and thus facing the most severe sentences) and not those who suffer the most significant injury.”); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 18 (2003) (“‘The criminal is to go free because the constable has blundered’ is the rallying cry.”); Patrick Tinsley, N. Stephan Kinsella & Walter Block, *In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach*, 32 S.U. L. REV. 63, 71 (2004) (“[T]he exclusionary rule gives rights to the guilty they do not deserve and does nothing for innocent victims of illegal searches.”).

criminal defendant who invokes it at trial.⁵⁵ The benefit of mandated exclusion is therefore a statistical benefit, and the harm or cost is concrete. Yet this approach to exclusion clashes with the fact that the Court also requires criminal defendants to have Fourth Amendment “standing” before they may move to suppress evidence obtained in violation of the Fourth Amendment. This means that whatever Fourth Amendment violation occurred must have specifically violated *the moving defendant’s* rights as a prerequisite to her ability to exclude the evidence at her trial.

It does not make sense, on the one hand, to rest a doctrine of exclusion on future deterrence (rather than on a personal entitlement to suppression) and then, on the other, to limit access to exclusion to just those people who have individually suffered Fourth Amendment violations.⁵⁶ If exclusion is *no one’s* entitlement, then the criminal defendant whose own Fourth Amendment rights were violated is in no better a position to take advantage of it than is a criminal defendant whose codefendant’s Fourth Amendment rights were violated. And if the entire purpose of exclusion is future deterrence, then it cannot help but undermine that deterrence to limit the universe of people who can act (as a surrogate) to prevent the state from viewing Fourth Amendment violation as a profitable endeavor.

One possible explanation that the statistical–concrete distinction offers for the Court’s self-contradictory exclusionary-rule policy is that, regardless of the doctrine (which is built on the intuitively appealing notion that exclusion is meant to prevent future violations rather than to compensate a particular criminal defendant), an individual who comes into court and asks for suppression is the most salient, concrete beneficiary of the exclusionary rule and thus outshines the many innocent people who will benefit indirectly from the Fourth Amendment compliance that will result from exclusion. Because the criminal defendant is the salient beneficiary in such a case, it “feels” especially wrong and windfall-like to award the defendant this undeserved benefit when he has not even himself suffered a Fourth Amendment harm. To put this more crudely, the defendant who moves to suppress evidence under the Fourth Amendment exclusionary rule is necessarily a kind of parasite—denying the jury the truth it is entitled to hear for his own selfish gain. So the Court, already repelled by the parasite, demands that it be an *aggrieved* parasite. Then, at least, there is some sense that this particular defendant is *entitled* to relief, though the foundation of exclusion, under current doctrine, is that he has no such entitlement.

55. See *United States v. Leon*, 468 U.S. 897, 906 (1984) (“[T]he exclusionary rule is neither intended nor able to ‘cure the invasion of the defendant’s right which he has already suffered.’ The rule thus operates as ‘a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.’” (citation omitted)).

56. See Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 CARDOZO L. REV. 1663, 1694–96 (2007).

This logical inconsistency suggests that the Court may simply be incapable of moving away from the idea that the defendant who brings a suppression motion is seeking a form of compensation, despite its explicit denial of this model of exclusion. The concrete reality for the Court is a specific person (a defendant) who moves to suppress probative evidence of his guilt, from which suppression he stands to gain. The innocent people who will benefit from any resulting Fourth Amendment compliance are statistical, abstract, and therefore less compelling characters in the unfolding drama. Viewing exclusion as compensation, then, the Court concludes that the defendant must therefore have suffered a loss for which such compensation is due. The statistical–concrete disparity thus accounts for what is otherwise an incoherent requirement for Fourth Amendment standing.

B. Statistical Versus Concrete Harms and Disparate-Impact Discrimination

Application of the statistical–concrete disparity is not limited to Fourth Amendment doctrine. In June 2009, the Supreme Court decided *Ricci v. DeStefano*,⁵⁷ in which it considered the New Haven Fire Department’s decision not to follow through on its procedure to select applicants for promotion. The department had given promotion applicants a pencil-and-paper test as one part of the evaluation process. Had the department certified the test results, none of the three people actually promoted would have been African American, and a starkly disproportionate number of the people who passed the test would have been white. To avoid this disparate impact, the department decided not to certify the results of the test and accordingly not to promote the people who had received qualifying scores.⁵⁸ The white firefighters who had performed well on the test then sued the department under Title VII and the Fourteenth Amendment Equal Protection Clause, arguing that the department had discriminated against them on the basis of race, in violation of both statutory and constitutional law. The alleged discrimination consisted of denying them, on the basis of their race, the promotions that they had earned through their test scores.

The department countered that it had thrown out the test because it would otherwise have been vulnerable to suit under Title VII for “disparate impact” discrimination, in which an employer uses an apparently neutral test that disproportionately disfavors a particular racial (or otherwise impermissibly classified) group. Both the district court and the court of appeals found in favor of the defendant, the department, and ruled that refusing to certify the test did not constitute illegal discrimination.⁵⁹

The U.S. Supreme Court reversed the decision of the U.S. Court of Appeals for the Second Circuit and ruled that the department had unlawfully

57. 129 S. Ct. 2658 (2009).

58. *Id.* at 2664.

59. *Id.* at 2671–72.

discriminated against the qualifying firefighters on the basis of race, in violation of Title VII. The department was not permitted to do so, according to the Court, even if it had simply been trying to avoid a disparate-impact lawsuit, in the absence of a strong basis in evidence for believing it would lose such a suit, if it were brought.⁶⁰ Otherwise, if the test had been projected to have an undesirable racial impact, the Court suggested, the employer could have replaced or modified it *before* anyone had taken the test and passed (or failed) it.⁶¹ Now that specific, existing people had already taken the test and thereby qualified for (or became disqualified from) promotions, the department could not, under Title VII, ignore the test results simply to avoid awarding too many promotions to white people. The Court deferred consideration of the equal-protection question: whether a government actor's consciously employing racial criteria to avoid a disparate-impact suit is unconstitutional, regardless of what Title VII might allow. It decided the issue solely on the basis of Title VII.⁶²

Whether or not one agrees with the outcome of *Ricci*, the distinction the Court drew—between scrapping the test *before* it is given to anyone and scrapping it *after* people have taken and passed or failed it—exposes once again the intuitively appealing (but doctrinally elusive) line we draw between statistical and concrete harms, respectively.

When an employer selects a test for determining whom to promote, she can discover whether the test will produce a racially disparate impact in one of three ways. First, she can simply give her employees the test and see what happens: if the test disproportionately qualifies white people for promotion, the employer has now learned of the disparate impact. This appears to be what happened in *Ricci*. Second, an employer can give the test as a “practice” or otherwise noncounting measure to some of her employees (or to a group of people demographically and professionally similar to her employees) and find out what happens. If the results reveal a racial or other disparate impact, she has now learned of that impact. Third, she can ask testing experts or other similar employers who have used the particular test in the past and find out whether they have found that it results in a racially disparate impact.

Once the employer learns, in one of these three ways, of the test's tendency to produce a disparate impact, she might decide in the future to use a different measure for promotion. According to Justice Kennedy's majority opinion in *Ricci*, such a step would apparently be fine, even though the employer's *reason* for rejecting the test is its foreseeable, racially disparate impact. What would *not*

60. *Id.* at 2677 (“[U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”).

61. *Id.* (“Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.”).

62. *Id.* at 2681.

be fine (absent a “strong basis in evidence” for worrying about losing a disparate-impact lawsuit) is discarding the test *after* applicants have taken it.

What, exactly, distinguishes permissible from impermissible approaches? It cannot be the presence or absence of a racial motive: in both cases, by hypothesis, the employer is choosing to forgo the particular test, whether “before administering” it, during the test-design stage, or once it has been given, because of the racial disparities that the test has produced or will produce. But for that racial disparity, in other words, the employer *would* use the test. It is thus somewhat misleading for Justice Kennedy to suggest that what made respondent’s conduct illegal was the racial motive. In fact, the Court reveals a distinct concern:

The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City’s reliance on raw racial statistics at the end of the process was all the more severe.⁶³

Apparently, then, what distinguishes permissible from impermissible approaches is the degree to which the respective approaches’ *victims* (those who would qualify for promotion under the test but who will not be promoted) are determinate and concrete, as opposed to as-yet-undetermined and statistical. If an employer chooses not to adopt an available promotion test in order to avoid racial disparities, in other words, then neither he nor we can ever know *which* white promotion applicants would have qualified for promotions under the test (but will now miss that opportunity). The difference between the two scenarios therefore has nothing to do with racial intent and everything to do with the distinction between statistical and concrete harms.

It is important to remember here that if an employer had decided to use a rejected test, notwithstanding its known racially disparate impact, then there would have been actual white people who would have been awarded promotions. These people, by virtue of their employer’s decision not to use the particular test, therefore “lost” promotions that they would otherwise have received. These “losses,” moreover, resulted directly from the employer’s desire to avoid a racially disparate impact.

The decisive difference between this and the actual *Ricci* case, then, appears to be that the white employees who would have been promoted (and thus rewarded for their expense and preparation) but for the rejection, pre-testing, of a disparate-impact-producing test are not identified, and the employer would never have been in a position to know *which* employees they were. As in the context of the exclusionary rule, then, it appears that for the U.S. Supreme Court, the concrete reality of a specific, known individual is more powerful—and morally compelling—than the knowledge that such individuals would have existed under the alternate, permissible approach.

63. *Id.* at 2681.

Interestingly, then-Judge Sonia Sotomayor did not anticipate the Court's willingness to differentiate between concrete and statistical harms when she joined the Second Circuit's per curiam opinion in *Ricci v. DeStefano*.⁶⁴ The Second Circuit had upheld the New Haven Fire Department's decision to scrap the promotion test on the basis of the racial disparities it produced.⁶⁵ As Justice Ginsburg stated in her dissent from *Ricci*, the Second Circuit had precedent whose outcome resembled (and, according to Justice Ginsburg, compelled) the result in *Ricci*.⁶⁶

That precedent was *Hayden v. County of Nassau*.⁶⁷ Though *Hayden* involved an employer's taking a potential test's disparate impact into account *before* officially giving any test (that is, the test selected was designed specifically to avoid disparate impact), neither Justice Ginsburg nor, apparently, then-Judge Sotomayor believed this distinction carried any weight. The crucial thing was that "[u]nder Second Circuit precedent, the District Court explained, 'the intent to remedy the disparate impact' of a promotional exam 'is not equivalent to an intent to discriminate against non-minority applicants.'"⁶⁸ Believing that there was no need to elaborate on any distinction between pre-implementation and post-implementation consideration of disparate impact, the Second Circuit simply issued a per curiam opinion when the latter case came up in *Ricci*. It thus appears that neither Judge Sotomayor nor Justice Ginsburg understood there to be a great distinction between the pre-exam, disparate-impact-avoiding selection of a promotion test on the one hand, and a post-exam, disparate-impact-avoiding disposal of a promotion test on the other.

Justice Kennedy and a majority of the Court, however, would evidently have distinguished between *Hayden* and *Ricci*, feeling that real-life, present victims take precedence over statistical, future ones, even if the latter are as certain and perhaps more numerous than the former. This suggests that even New Haven itself—the respondent that lost in *Ricci*—may now throw out the disparate-impact-producing promotional exam at issue in *Ricci* for the future, and for the same reason (to avoid disparate impact), once it has promoted the specific people who performed well in the last, litigated administration of the test.

The Supreme Court appeared to embrace a similar distinction between statistical and concrete harms in an older case about avoiding stark, racially disparate impact, *Wygant v. Jackson Board of Education*.⁶⁹ In *Wygant*, a collective-bargaining agreement had provided for a system of teacher layoffs in which seniority would be dominant. That is, people would be laid off, when layoffs were necessary, in reverse-seniority order, with the most junior person

64. *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008).

65. *Id.* at 102.

66. *Ricci*, 129 S. Ct. at 2695–96 (Ginsburg, J., dissenting).

67. 180 F.3d 42 (2d Cir. 1999).

68. *Ricci*, 129 S. Ct. at 2696 (Ginsburg, J., dissenting) (quoting *Hayden*, 180 F.3d at 51).

69. 476 U.S. 267 (1986).

losing her job first.⁷⁰ The agreement set out to provide, however, for avoiding what would otherwise have been a necessary outcome of seniority-based layoffs: the reinstatement of a legacy of prior intentional discrimination with a disproportionately white set of teachers.

To avoid this problem, the agreement had the employer laying off no more minority candidates than would retain the present minority–majority proportion.⁷¹ This approach respected seniority, in other words, but took measures to address the impact of seniority on minorities, because, otherwise, seniority would necessarily disfavor those who were previously excluded and only recently hired on an equal basis.

The Supreme Court in *Wygant* held this modified-seniority approach unconstitutional under the Equal Protection Clause.⁷² It specifically invalidated a policy of laying people off on the basis of race, even in a case in which the putatively nonracial criterion at issue—seniority—favored white people precisely *because of* a history of invidious racial exclusion. Though the Court did recognize the role of prior societal discrimination in contributing to a disproportionately white seniority rank, it said that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”⁷³ Additionally, the Court said, “We have previously expressed concern over the burden that a preferential layoffs scheme imposes on innocent parties.”⁷⁴ In other words, the Court found offensive the specific, concrete harm that particular, “innocent” white people—people who would otherwise have been retained—must suffer.

By contrast with lay-off schemes, so-called hiring goals aimed at curing racial disproportion struck the *Wygant* Court as far less troubling. The Court explained,

In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.⁷⁵

What makes the two different? The difference rests on what economists have called the “endowment effect,” the fact that people feel worse about *losing* something they consider “theirs” than they do about *not getting* something they

70. *Id.* at 270 (“In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained . . .”).

71. *Id.* (explaining that “except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff”).

72. *Id.* at 284.

73. *Id.* at 276.

74. *Id.* at 282.

75. *Id.* at 282–83.

do not yet have.⁷⁶ This explains, for example, why people seem to feel less hesitant about taking risks when the downside is not getting something additional rather than losing something they already have, even though—in some sense—the distinction is not entirely rational (because lost opportunities are *real* losses of what one could have had).⁷⁷

In thus embracing the endowment effect in *Wygant*, the Court was counting more heavily the losses of people who had brought the *Wygant* case and who were concrete and known “victims” of the minority-retention policy than it was the statistical and therefore abstract (but also real) victims of minority-hiring goals. Minority-hiring goals, if implemented, would, of course, result in white people’s not receiving jobs they would otherwise, by hypothesis, have received. But such people would remain—in their particularity—unknown to the Court (and, in all likelihood, to themselves as well). The Court was thus able to say of them that “hiring goals *may* burden *some* innocent individuals,”⁷⁸ thus downplaying the disappointment of unknown but equally real people who had hoped and qualified for jobs they would not receive as a result of a racial hiring goal, relative to the concrete people who would be subject to lay-offs under the employer’s plan. In this sense, the Court seemed to take account of how it would feel to know that one has lost one’s job because of one’s race, relative to failing to get a job for which the reasons are inevitably more complicated and accordingly likely to be unknown by the relevant “victim.”

C. Statistical Versus Concrete Harms in the Death-Penalty Area

In the criminal-procedure context, appreciating the role of the statistical-concrete dimension of moral reasoning can help illuminate another, otherwise-puzzling decision by the Supreme Court in *Herrera v. Collins*.⁷⁹ This case presented the question whether it violates the Constitution to execute a person who is actually innocent of the crime for which he was duly convicted. Herrera had been convicted of murder and sentenced to death years earlier, and his conviction had become final, but he allegedly had new evidence demonstrating his innocence. Apart from his claim of “actual innocence,” which was modified with the word “actual” to distinguish it from entitlement to an acquittal in the first instance in spite of actual guilt, Herrera did not have a live procedural claim that his conviction or sentence was unconstitutional.⁸⁰

76. *E.g.*, Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194 (1991).

77. *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1483–84 (1998) (describing the endowment effect as an irrational tendency); *see also* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1326–28 (1990) (summarizing psychological studies of the endowment effect).

78. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282 (1986) (emphasis added).

79. 506 U.S. 390 (1993).

80. *Id.* at 393.

The Supreme Court denied Herrera the right to an evidentiary hearing at which he could have attempted to persuade a judge of his innocence. The ground for this denial was that the evidence Herrera purported to have was not sufficiently persuasive, on its face, to make his innocence very probable.⁸¹ The Court did not say specifically that it was constitutionally acceptable to execute innocent people but only that, even if it is not acceptable, a litigant would nonetheless have no right to a hearing at which he might prove his innocence if his purported evidence looked no more promising than Herrera's.

A majority of Justices hinted, in concurring opinions, that they believed that a person *would* have the right to an innocence hearing and would accordingly have the right not to be executed if he could make a persuasive showing that he did not commit the capital crime for which he was convicted and sentenced.⁸² Herrera was simply the wrong vehicle for announcing such a right because his claim of innocence was so weak. For Justice Scalia, however, the notion of a constitutional right against execution of the innocent did not make any sense.

By Justice Scalia's lights, the Constitution provides a variety of procedural rights to accused criminals. Many of these rights are, in the end, intended to separate the innocent from the guilty. Ideally, having an attorney's assistance, a trial, and a jury will lead to a wise and accurate outcome, one that exonerates those who have committed no crime. If a defendant is denied one of these entitlements, moreover, he or she has the right to challenge the outcome of the trial. The challenge does not consist, however, in a claim that the convicting jury or judge reached an incorrect result. The challenge rests instead on the argument that the defendant was not given the requisite procedures by which accuracy within our constitutional system is achieved.⁸³

In some sense, Justice Scalia intimated, it would be nonsense to argue that an innocent person has the right not to be executed.⁸⁴ The sparing of innocent

81. *Id.* at 417 ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.").

82. *Id.* at 419–20 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *Id.* at 442 (Blackmun, J., dissenting) ("I would hold that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent.").

83. *Id.* at 427–28 (Scalia, J., concurring) ("There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

84. *Id.* at 428 ("I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate. With any luck, we shall avoid ever having to face this embarrassing question again,

lives is one major goal of the system, but it is not and cannot be a substantive constitutional rule, according to Justice Scalia. One could mock Justice Scalia for saying that it is not—and, in fact, cannot be—unconstitutional to execute an innocent person. It is difficult to imagine a greater miscarriage of justice than the state-sanctioned punitive killing of someone who has done nothing wrong. Compared with such an injustice, for example, it seems less significant to deny a (guilty) person a trial by jury or to provide a (guilty) person with an ineffective attorney. After all, is not the whole reason for having a jury and a lawyer to enable an innocent person to escape from wrongful punishment?

Considering the contrast between Justice Scalia's focus on procedure and the mocking reaction⁸⁵ to that focus once again illuminates the difference between statistical and concrete facts. Justice Scalia is surely right in one sense. If we wish to protect the innocent from execution, it makes sense for Justice Scalia to focus his energies as a judge on perfecting the *process* by which our system determines guilt and innocence. Process will, over time, maximize the odds of justice, and odds add up to real-life, innocent people being acquitted, though we do not necessarily know who those people are, if the system is functioning well.

If, in place of process, we were simply to say that “innocent people should be freed and guilty people should be punished,” the statement would be empty. One must have procedural mechanisms in place to implement substantive goals, and it is unclear how—apart from procedure—one could give content to a mandate to refrain from executing innocent people.

As Justice Scalia said in the Sixth Amendment context,⁸⁶ emphasizing substance (for example, the importance of guilt and innocence in determining whether a person is punished) risks violating the procedural rights intended to achieve substantive justice. As a statistical matter, all we have is a process by which we make substantive judgments that, over time, will maximize correct outcomes. In fact, it is quite possible that diverting judicial attention to

since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.”).

85. Alan M. Dershowitz, *Scalia's Catholic Betrayal*, THE DAILY BEAST, Aug. 18, 2009, <http://www.thedailybeast.com/blogs-and-stories/2009-08-18/scalias-catholic-betrayal>

(“If a defendant were convicted, after a constitutionally unflawed trial, of murdering his wife, and then came to the Supreme Court with his very much alive wife at his side, and sought a new trial based on newly discovered evidence (namely that his wife was alive), these two justices would tell him, in effect: ‘Look, your wife may be alive as a matter of fact, but as a matter of constitutional law, she’s dead, and as for you, Mr. Innocent Defendant, you’re dead, too, since there is no constitutional right not to be executed merely because you’re innocent.’”).

86. See *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004) (“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”).

reviewing evidence of innocence presented by the condemned could have the consequence of reducing the care and attention that judges give to ensuring fair trials—where most guilt and innocence is likely to be adjudicated. Though the particular innocent litigant may be “concrete,” the statistical victims of inadequate trials are equally real and likely to be far more numerous.

If we want to maximize the odds of acquitting innocent people and convicting guilty people, in other words, the time and energy we dedicate to reexamining and reopening fairly reached convictions and sentences might prove to be a poor allocation of limited judicial resources. In the vast majority of cases, one hopes, such reexamination would yield no fruit. Better, one could argue, to spend extra time ensuring that trials are better truth-seeking mechanisms in the first place.

Yet for many of us, our natural inclination, when we have an actual person in front of us, and he has evidence that he is innocent, is to determine what that person is individually owed and to do right by him, without thinking very much about the implications of such justice for the other “similarly situated” people who may come later (and who may consequently get less attention at trial). From that perspective, it appears callous for Justice Scalia to say that, regardless of how compelling a petitioner’s proof of innocence might be, it is “too bad” for him, because he had a fair trial and was denied no procedural rights. To take this position seems tantamount to accepting a patent injustice because it is “just our policy.”

The Supreme Court has recently provided some reason to think that it will reject Justice Scalia’s refusal to distinguish between statistical and concrete harms in the death-penalty context. A condemned prisoner, Troy Davis, brought an original petition for habeas corpus to the Supreme Court. In the petition, he requested a hearing at which he might prove that he was actually innocent of a murder for which he had been convicted years ago.⁸⁷ Though the district court had denied Davis a hearing, the U.S. Supreme Court issued an order to the district court, requiring that it allow Davis to present his evidence of innocence and that it respond appropriately, depending on the strength of the evidence.⁸⁸ Predictably, Justices Scalia and Thomas dissented from the Court’s order.⁸⁹ But more importantly, the other Justices supported the order.⁹⁰ Regardless of whether such hearings might take time away from trials (and

87. *In re Davis*, 130 S. Ct. 1, 2 (2009) (Scalia, J., dissenting).

88. *Id.* at 1 (“The District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.”).

89. *Id.* at 3 (Scalia, J., dissenting) (“This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged ‘actual innocence’ is constitutionally cognizable.”).

90. *See id.* at 1 (Opinion of the Court, and concurrence written by Justice Stevens, with Justices Ginsburg and Breyer joining).

thereby increase the number of wrongful convictions of innocent people), the Supreme Court was moved by the concrete circumstances of a specific person who stood condemned for a crime of which he might very well have been innocent.

D. Statistical Versus Concrete Harm in the Torts Area

Though references to statistical versus concrete harms are subtle and implicit in some of the areas discussed thus far, tort law more directly relies on this distinction. In the area of torts, for example, the law explicitly distinguishes intentional from negligent misbehavior. Intentionally (which includes both purposefully and knowingly) inflicting harm on another is actionable tortious behavior such as assault and battery. It is often a violation of the criminal law as well.⁹¹ We do not, in such cases, ask whether intentionally inflicting harm will have beneficial consequences. If I intentionally take blood from a nonconsenting patient and use that blood to save a life, I am engaged in an unlawful assault and battery, notwithstanding the fact that preserving life is arguably more beneficial than nonconsensually taking a patient's blood is harmful.

Contrast this approach with that entailed in negligence. Doctors routinely perform diagnostic and treatment procedures that have both upside and downside potential. Many medicines that treat one illness can cause another, and some diagnostic interventions can themselves cause pain, illness, or even death in some proportion of cases. Over time, moreover, doctors who regularly perform such procedures *know* that some patients will become sick, become sicker than they were, or die as a result of the doctor's actions and recommendations. Yet a doctor will not be liable for injuries that result from the procedures that she performs unless such procedures are negligent, a term that either directly or indirectly entails a cost-benefit calculus. The analysis is direct when the standard of negligence is the level of care that maximizes good outcomes and minimizes bad outcomes, in the manner of Judge Learned Hand's "BPL" analysis. ("[I]f the probability [of injury] be called P; the [cost of the] injury L; and the burden [in dollars of preventing the injury], B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less than] PL.")⁹² The analysis is indirect when we defer to customary medical practice, a standard that ostensibly takes into account the positive versus the negative effects of medical interventions in determining their advisability.⁹³ To

91. See, e.g., N.Y. PENAL LAW § 120.10(1) (Consol. 2010) (defining the crime of assault in the first degree as intentionally causing physical injury).

92. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

93. See Neil Meltzer, Comment, *Helling v. Carey: Landmark or Exception in Medical Malpractice; Compliance with the Medical Standard of Care May Not Protect the Specialist from Liability*, 11 NEW ENG. L. REV. 301, 304–05, 305 n.27 (1975) (noting that the medical profession typically sets its own standard of care, and the debate within the profession about glaucoma testing); but see *Helling v. Carey*, 519 P.2d 981, 983 (Wash. 1974) (finding liability when medical custom was not supported by cost-benefit analysis).

put the matter differently, a doctor cannot forcibly take blood, even if the benefits will outweigh the costs, but she can perform procedures the net result of which will be to cause serious harm to some patients, on the basis of the statistical prediction that the procedures will cause greater benefit to other patients, over time.

This distinction within torts is not, moreover, limited to contexts in which people give their consent to be subjected to risks. Though a patient might willingly assume the risk of illness B in exchange for a better chance of recovery from illness A, a negligence standard applies to nonconsensual risks as well. For example, driving a car gives rise to a risk of death (to oneself and one's family as well as to others in the path of one's vehicle), but it also confers benefits. Over time, some people will bear the tragic and foreseen costs (by being injured or killed or having loved ones injured or killed in car collisions and other accidents), while others reap the benefits. Yet driving is legal, and the speed limit necessarily takes into account the net benefits of greater speed compared with the net costs to life and limb. If the speed limit were to go from 65 mph to 55 mph, for example, there would be a sizable drop in annual highway mortality.⁹⁴ Yet society has decided that the benefits to those who do not suffer the consequences of serious accidents—when added together—outweigh the costs to those who do, including the cost of death.

At the same time, it would not be acceptable *knowingly* to kill even one person to provide benefits to large numbers of other people. One classic example is the moral–philosophical dilemma of the doctor who could save five patients by removing the vital organs of one healthy person (thereby killing him) and giving each organ to another of the five who will die without that organ. People seem widely to share the intuition that such an act would be morally unacceptable,⁹⁵ notwithstanding the net positive consequences in terms of lives saved.

With respect to the consequences themselves, however, there is no real distinction between (1) selecting a speed limit that will kill $X+100$ people each year but that yields economic and other benefits, rather than choosing the lower speed limit that would kill only X people, and (2) killing a healthy patient to save the lives and health of five other patients. Indeed, if there is a consequential distinction, it may favor the scenario in which the doctor sacrifices one person to save five, because a higher speed limit is very unlikely

94. See Eric Nagourney, *Safety: As Speed Limits Rise, So Do Death Tolls*, N.Y. TIMES, July 21, 2009 at D6 (citing study showing that a ten-mile-per-hour increase in speed limit, from 55 mph to 65 mph, was to blame for 12,500 highway deaths over a ten-year period); see also EUROPEAN FEDERATION FOR TRANSPORT AND ENVIRONMENT, FACT SHEET: LOWER URBAN SPEED LIMITS (2001), available at http://www.transportenvironment.org/Publications/prep_hand_out/lid:132 (showing that even at lower speeds, lowering the speed limit from 30 mph to 20 mph lowers the number of accidents by twenty percent).

95. E.g., LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 35 (1987); Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481, 506 (2002); Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1396 n.3 (1985).

to save five times as many lives as it terminates. On the contrary, the higher speed limit will almost certainly produce a higher death rate.

The main difference that favors the speed limit over the organ thief is that the doctor *knows* at the time of his action that he is killing a concrete, specific patient to use him as an organ donor. The legislature setting the speed limit has in mind only abstract statistical deaths.

An illuminating example of the statistical-versus-concrete-harm phenomenon is at work in the case of *Grimshaw v. Ford Motor Co.*⁹⁶ The gas tank of Ford Pintos had—after release to the market—proved to be subject to exploding upon impact at common and foreseeable highway speeds. Ford faced a dilemma: it could recall the vehicle and avoid causing the deaths that would result from the exploding tank, or it could choose not to recall the vehicle and cause the deaths, some of which would result in wrongful-death liability payments. Ford chose the latter course.

A memorandum memorializing this decision lists, on one side, the financial loss to Ford if it were to recall the Pinto in question and, on the other side, the financial cost of having to pay wrongful-death judgments.⁹⁷ During a subsequent wrongful-death suit against Ford, the memorandum came to light (through discovery) and led the jury in the case to award severe punitive damages against the defendant, a damage award that was not anticipated in the cost-benefit memorandum.⁹⁸ The cold and calculating nature of the cost-benefit memo elicited outrage among the jurors, who apparently felt that Ford had engaged in a murder of sorts.⁹⁹

What makes the Pinto case interesting for our purposes is that every car manufactured, including the Pinto, could be made safer than it is with an expenditure of money. In other words, it is foreseeable that some number of people will die as a direct result of using a vehicle from a company that made the vehicle less safe than it could have been. Crash tests reveal that it is safer to be inside some cars than others in the event of a collision¹⁰⁰ and that some cars do better than others at avoiding accidents entirely. The less-safe cars will, over time, result in the deaths of real, live occupants who would have survived in

96. 174 Cal. Rptr. 348, 361–62 (Cal. Ct. App. 1981).

97. *Id.* at 370, 384.

98. *Id.* The jury awarded Grimshaw, who suffered severe and disfiguring burn injuries, \$2,841,000 compensatory damages and \$125 million punitive damages, and to Grays, who died in the accident, \$659,680 in compensatory damages. *Id.* at 358 n.1. By contrast, the Ford memo contemplated that the company would have to pay \$200,000 per burn death and \$67,000 per burn injury. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1688 (1992).

99. Hampton, *supra* note 98, at 1689.

100. For example, a Mercedes-Benz C-Class sedan is safer than a Smart car in a collision. See Cheryl Jensen, *Small Cars Rate Poorly in New Crash Tests*, N.Y. TIMES, Apr. 14, 2009, <http://wheels.blogs.nytimes.com/2009/04/14/small-cars-rate-poorly-in-new-crash-tests/> (citing Insurance Institute for Highway Safety test showing that when a Smart car collided with a Mercedes-Benz C-Class sedan, “the little Smart car went airborne and did what amounted to a pirouette”).

another vehicle. Understanding this to be true, it is useful to ask what made Ford worse than other companies.

One possibility is that Ford had an actual memorandum in which it explicitly placed a dollar figure on the value of a life. The problem with this analysis, however, is that car manufacturers routinely decide not to include safety features in some of their vehicles and implicitly engage in the same sort of numerical analysis, under which they decide whether it is worthwhile, from a financial point of view, to include or exclude a particular safety feature. And a company would, of necessity, have to place *some* value on human life—a value that would likely reflect the costs it would be compelled to pay for that life—in deciding to manufacture a car that is not an impregnable tank.

Another possibility is that Ford should have placed greater value than it did on the lives that would be lost to Pinto crashes. But what should the figure have been? Again, it is difficult to imagine a figure bearing any relationship to dollars and cents—a necessary aspect of corporate cost-benefit analysis—that would not have seemed offensive to a jury.

Does this mean that the jury found the Pinto offensive as an inherently dangerous product, one that a company knows will cause deaths? This seems unlikely. There is, after all, no broad movement afoot to eliminate automobiles for safety reasons, and everyone knows that automobiles cause large numbers of deaths. The problem appears to have been that the jury in the Pinto case confronted the real-life, concrete case of two persons, one of whom died an excruciating death in a collision and the other who was permanently disfigured because of Ford's decision not to recall the Pinto.¹⁰¹ It was, in other words, the fact of concrete victims whose lost or ruined lives confronted the jury that caused the jury to view Ford's cost-benefit analysis as evidencing a callous disregard for human life. For Ford, the statistics reflected in its memo had become concrete in the form of plaintiff's decedent. Had the jury been assessing the statistics without the concrete victim, it might have decided the case differently.

IV

STATISTICAL VERSUS CONCRETE HARM AND NORMATIVE JUDGMENTS

The tendency to place greater weight on a concrete than on a statistical harm is a phenomenon familiar to most people. If we see particular individuals suffering, we are far more likely to feel empathy for those individuals and to *do something* to help them, than we are if we learn that some practice consistently leads to suffering in many undetermined individuals. A specified harm touches us, while a predicted harm, even a large one, may feel distant and unconnected to our lives. The knowledge that our minds work in this way has motivated wise reformers to provide the public with concrete examples when attempting to

101. *Grimshaw*, 174 Cal. Rptr. at 358.

provoke outrage. The phrase “poster child” colorfully captures the idea that people seem to need a concrete existing story to feel moved to action.

It is, of course, one thing to observe that people tend to favor concrete over abstract victims, and it is quite another to invoke the distinction as a normative basis or justification for making a decision. Yet the Supreme Court and other legal decisionmakers have relied on this distinction as a basis for distinguishing between permissible and impermissible conduct, whether that conduct concerns police investigation, the death penalty, racial discrimination, or allegedly tortious acts. In doing so, such actors squarely present us with the question whether our inclination to value concrete over statistical harms is normatively proper.

Authors of a 1997 study posed various theories in an effort to explain the “Identifiable Victim Effect,” a phenomenon in which a person predictably feels more empathy and a greater willingness to act to rectify the circumstances of victims who are known to the person than for unidentified or statistical victims.¹⁰² These theories included vividness of identifiable victims, the proportion-of-the-reference group effect, the *ex post*–*ex ante* distinction, and the distinction between certainty and uncertainty. After conducting two empirical studies that involved posing hypothetical examples to subjects, the writers concluded that there is greatest support for the proportion-of-the-reference-group hypothesis: “the major cause of the identifiable victim effect is the relative size of the reference group compared to the number of people at risk.”¹⁰³ In an important sense, for concrete, identifiable victims, the particular people harmed constitute the entire reference group, by contrast to statistical harms in which five out of every one hundred people to use a particular product might have suffered.

Reading these findings in the light of the initial probable-cause question, then, explains why we react to the injustice of arresting the concrete, innocent person in the car (along with his guilty companion): because we know the police officer is choosing to arrest a person he knows to be innocent (because both men cannot be guilty, by hypothesis), and that innocent person therefore constitutes the entire reference group, out of which the officer is accordingly harming one hundred percent. By contrast, when police arrest a person against whom they have probable cause, the reference group becomes the entirety of people arrested, against each of whom there is independent probable cause. If police get it right fifty percent of the time, this necessarily reduces the harm quotient to fifty percent.

There is some rationality—or proto-rationality—in the desire to preferentially condemn actions that harm more (or all) of the relevant population and to think less critically about actions that harm a very small proportion of the population. It is from this impulse, for example, that we might

102. Jenni & Loewenstein, *supra* note 3, at 236–40.

103. *Id.* at 253.

decide to require everyone to have a vaccine against a deadly disease. Though some number of people will become sick because of the vaccine, the number of people who will stay well because of it—if the vaccine is truly warranted—is far greater.

The same is true for doctor-recommended treatments for disease. Pharmaceuticals and surgery are not without risks, and over time and large numbers, the risks are realized in actual victims. In setting a policy—whether for the government or for a particular professional who works with large numbers of people—it is crucial to look at the entire group of people who will be affected and judge the costs and benefits of the policy accordingly.

Though it is rational to consider the big picture, it is not always rational to characterize the one person who stands before us as the entirety of the relevant population. To put this differently, a concrete victim is also frequently a part of a larger group of people subjected to a treatment that was judged appropriate in virtue of its impact on everyone. In such cases, it can be morally misleading to focus on the one concrete victim and ignore the large group of people who did not suffer and who might in fact have benefited because of the treatment that was applied to everyone.

Ricci provides a good illustration of this problem. An employer wished to avoid giving employees a promotion test that disparately excluded minority candidates. Rejecting the results of such a test on the basis of its adverse impact represented a racially based decision (in the sense that but for its racial impact, the test results would have been certified). The Supreme Court thus classified the rejection as racial discrimination (against white employees). At the same time, however, the Court suggested that canceling the test in the exam-development phase, *before* it was to be administered, would have been fine. This is true despite the fact that the *reason* for rejecting the test would have been the same—the (expected) racial composition of the promotion winners. It is true, as well, that—by hypothesis—a different test (selected because it would not produce a disparate impact) would *not* have promoted some of the white people who would have been promoted under the rejected test. In other words, there would still have been people who studied hard for the test, as Frank Ricci did, and who would not have received or qualified for a promotion in virtue of the selection of a test for its lack of a racially disparate impact. The only difference between the hypothetical case described by the Court and the test actually employed in *Ricci* is that the Court knew about Frank Ricci; he was a determinate victim rather than a statistical one.

In such a case, the statistical–concrete distinction appears to rest on an irrational foundation, one that treats relevantly similar phenomena differently. The Court is perhaps tricked into seeing Frank Ricci and his white colleagues who passed the firefighter-promotion exam as the entire universe of relevant actors, even as it treats unknown but similarly situated white people as belonging to a larger group—the group of all employees who take a test that does not produce racially skewed results.

In the context of the death penalty and innocence, it seems intuitively more appropriate to provide a hearing to a person whose only complaint about the proceedings is that the jury reached the wrong result by finding him guilty of murder, even though the criminal-justice system has limited resources and might reduce the accuracy of trials by delving into specific cases after the fact. The reason for this difference, if there is one, is that perhaps we do not and cannot know with any confidence that an innocence hearing will lead to errors at the trial level. There is reason to suspect, in other words, that such hearings may save innocent people from execution *without* negatively affecting the trial process. With so many moving parts in the criminal-justice system, we lack the ability to predict real-world costs and benefits in the way that we can for vaccines and speed limits.

Tentatively, then, I would conclude that the statistical–concrete distinction—a firmly ingrained psychological inclination among people—is not always a logically and normatively trustworthy moral basis on which to make decisions. We are nonetheless evidently inclined to rely on it, and we ought therefore to be very careful when doing so. We must be vigilant and ask ourselves why the concrete harm appears worse than the statistical harm in a particular case. We should attempt to view the concrete in a statistical frame and vice versa to determine whether, in a given case, we are reflexively drawing a distinction without a difference.

V

CONCLUSION

The probable cause case of *Maryland v. Pringle*—and the hypothetical scenarios it has inspired—expose the distinct way in which we tend to think about statistical versus concrete victims of official (and other) conduct. In this article I sought to expose the degree to which this distinction drives decisionmaking in the law, both consciously and implicitly, in areas ranging from the Fourth Amendment suppression context and the death penalty to antidiscrimination law and negligent torts.

Because this is primarily a descriptive paper, my goal has been to demonstrate precisely how the statistical–concrete distinction operates in legal thinking, rather than to suggest that it is either good or bad. Furthermore, even if one were to find fault with it from a normative perspective, one would have to acknowledge that it represents an apparently quite strong inclination, in lay people as well as in judicial professionals. As a result, an attempt to “get away” from the distinction altogether is unlikely to prove fruitful. The very fact that courts explicitly rely on it as a rationale in their decisionmaking process counsels caution in judging it overly harshly.

Nonetheless, there does appear to be arbitrariness—sometimes—about the contrast between what we are prepared to do (or to tolerate others doing) to a concrete, known individual, on the one hand, and what we are prepared to do to individuals whose identities are not yet known but who will just as surely exist,

on the other. It is therefore important for us to scrutinize our reactions, to both concrete and abstract cases, to ensure that we can truly justify distinguishing cases that might really be the same.

Because the project began with the probable-cause case, I will state my own opinion on it, for what it is worth. On the assumption that probable cause amounts to a probability of 0.5 (or less), as the cases say that it does, I would treat the police officer who arrests two people, one of whom is guilty, the same way as I would treat the officer who arrests one person with a 0.5 chance of guilt.

Though an officer in the first instance knowingly arrests an innocent person, the Fourth Amendment itself knowingly authorizes the arrest of innocent people, provided the officer is persuaded (by odds of 0.5, perhaps) that such people are not innocent. To suggest otherwise, it seems to me, is to pretend that the Fourth Amendment precludes—or even approaches precluding—the arrest of innocent people, and this is a destructive pretense that may contribute to the “presumption of guilt” that often seems to accompany an arrest. To state this differently, whatever discomfort we have with authorizing the arrest of innocent people ought to play a role in developing the standard for arrest, rather than generate a different legal approach to the two-people–one-innocent scenario.¹⁰⁴

104. Several of my colleagues, including Steve Shiffrin, identify the “double effect” argument for distinguishing the officer who arrests two (one of whom is innocent) from the officer who arrests one (with a 0.5 chance of innocence). In the first case, on this approach, the officer intentionally arrests an innocent person as a means of finding the guilty person, and it is impermissible, under Catholic doctrine, intentionally to commit a harm against an innocent as a means of accomplishing even an equally or more beneficial objective. In the second case, by contrast, the officer arrests someone he believes to be guilty, so there is no knowing arrest of any innocents.

The Doctrine of Double Effect (DDE) does not entirely track the statistical–concrete distinction because there are cases which violate DDE but which fall on the “statistical” side of the disparity (and accordingly trigger less intuitional discomfort than comparable concrete cases), and there are other cases that satisfy DDE, even though they produce concrete, determinate, and particular harm (and trigger a correspondingly greater moral discomfort). See *supra* note 12. Nonetheless, DDE does appear to map onto the probable-cause scenario here described, and I accordingly want to respond to it, in this limited scenario.

For an individual police officer, it is true that any specific arrest on probable cause will leave uncertain whether the suspect is actually innocent (by contrast to the arrest of the two people, one of whom is known to be innocent). If we consider the dilemma at the level of policymaking, however, rather than at the level of the particular police officer carrying out a particular arrest, some commonalities between the two sorts of arrest scenarios become evident.

First, our decision as a policymaker to select a standard with a higher error rate commits us to arresting some number of innocent people, and we nonetheless choose to authorize all of these arrests—like the officer who arrests the two people, one guilty and one innocent—as a means of ensuring the arrest of more guilty people than we could accomplish with a higher standard of proof. In other words, when we select fifty percent odds as our probable cause standard, the individual police officer may not be using his particular suspect (whom he believes is guilty) in any specific case, but we, in selecting the standard, are deciding to arrest thousands of innocent people to ensure that thousands of guilty people are arrested, and we therefore *are* using the innocent to get at the guilty.

Furthermore, the officer is in fact implicated too. Like the policymaker who authorizes the arrest of a large number of people, at least half of whom will be innocent, the officer who arrests hundreds or thousands of people in the course of a career, employing the probable-cause standard, *knows* that she is arresting a significant number of innocent people. She can avoid doing so by

One way of thinking about the irrationality (in my view) of distinguishing the two sorts of cases in this context is to imagine that an officer confronts the two-people-one-innocent situation. She could, if she embraces the distinction, select one of the two people and arrest him and only him. Such a move would turn the scenario into a typical probabilities case, acceptable to everyone, even though there would be no reason to distinguish between the person she is arresting and the person she is not arresting. Another police officer, seeing what was going on, might then decide to arrest the other person, again on the 0.5 odds rationale that everyone accepts. To suggest that what has happened is morally distinct from the original hypothetical case (of arresting two, knowing one is innocent) or the statistical case (of arresting one out of the crowd, with a 0.5 probability of guilt), however, seems intuitively incorrect.

In my view, the Court—if and when it reaches this issue—should reject the argument that police must never arrest a group of people if one of the people is innocent. Many (including some of my colleagues) might disagree with my assessment of the normative merits of this probable-cause case. More important than its particular application here, however, is the lesson we gain from considering the power that the statistical-concrete distinction holds over our thinking. Such consideration can divest the line of some of its strength and can open our minds to a more subtle analysis of particular cases. The tension between our impulses in statistical versus concrete cases will likely persist, but it will yield greater thought and analysis if we are aware of its presence and of the dangers of assuming that it necessarily draws a valid line in every case.

implementing a stricter standard for arrest (for example, proof beyond a reasonable doubt), which would reduce the number of guilty *and* innocent people apprehended. By the standard she applies, she accordingly, and knowingly, sacrifices some number of innocent people—or, at least, their liberty for the period of arrest—as a means of apprehending a larger number of guilty people. Their sacrifice therefore serves as a means of enabling the apprehension of the additional guilty, and the calculus is *knowing* rather than merely *negligent* or *reckless* with respect to the arrest of the innocent. For a comprehensive discussion of “double-effect” moral reasoning, see generally THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE (P. A. Woodward ed., 2001).