

# THE ROLES OF SONIA SOTOMAYOR IN CRIMINAL JUSTICE CASES

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## I. INTRODUCTION

The unexpected death of Justice Antonin Scalia in February 2016<sup>1</sup> reminded Americans about the uncertain consequences of changes in the composition of the Supreme Court of the United States.<sup>2</sup> It also serves as a reminder that this is an appropriate moment to assess aspects of the last major period of change for the Supreme Court when President Obama appointed, in quick succession, Justices Sonia Sotomayor in 2009<sup>3</sup> and Elena Kagan in 2010.<sup>4</sup> Although it can be difficult to assess new justices' decision-making trends soon after their arrival at the high court,<sup>5</sup> they may begin to define themselves and their impact after only a few years.<sup>6</sup>

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<sup>1</sup> Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [https://perma.cc/77BQ-TFEQ].

<sup>2</sup> Adam Liptak, *Supreme Court Appointment Could Reshape American Life*, N.Y. TIMES (Feb. 18, 2016), <http://www.nytimes.com/2016/02/19/us/politics/scalias-death-offers-best-chance-in-a-generation-to-reshape-supreme-court.html> [http://perma.cc/F9QB-4UC5]; see also Edward Felsenthal, *How the Court Can Reset After Scalia*, TIME (Feb. 25, 2016), <http://time.com/4236982/supreme-court-next-trial> [https://perma.cc/2UQW-8BH5] (“It is too early to tell, and may even require undue optimism in this season of vitriol, but perhaps Scalia’s departure will boost Roberts’ efforts” to encourage coherence and consensus among the justices.).

<sup>3</sup> Peter Baker & Jeff Zeleny, *Obama Hails Judge as “Inspiring,”* N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/us/politics/27court.html> [http://perma.cc/T9CS-Q64Z].

<sup>4</sup> Paul Kane & Robert Barnes, *Senate Confirms Elena Kagan’s Nomination to Supreme Court*, WASH. POST (Aug. 6, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080505247.html> [http://perma.cc/9LT7-C34V].

<sup>5</sup> Justice William O. Douglas contrasted the differences between what a mature, experienced Supreme Court Justice might do and the actions of newcomers who are “usually too unsure” to make the same decisions that they will make later in their careers. WILLIAM O. DOUGLAS, *THE COURT YEARS 1939–1975*, at 45 (1980).

<sup>6</sup> For example, five years into his career on the Supreme Court, Justice Clarence Thomas had established an approach to decision making. Christopher E. Smith, *Bent on* (continued)

Questions necessarily remain thereafter about whether the new justice's values and approach will change over time.<sup>7</sup>

Justice Sonia Sotomayor was appointed to the Supreme Court in 2009 by President Obama upon the retirement of Justice David Souter.<sup>8</sup> Although she came to the Supreme Court from service as a federal appellate judge, she had a unique breadth of experience with prior service as a prosecutor and a trial judge, as well as several years in private law practice.<sup>9</sup> She is the lone Supreme Court justice in recent years who previously served as a trial judge.<sup>10</sup> In addition, along with Justice Samuel Alito,<sup>11</sup> she is one of only two justices with experience as a prosecutor.<sup>12</sup> Thus, Sotomayor's depth of exposure to criminal justice issues is unsurpassed among contemporary Supreme Court justices.<sup>13</sup> As described by one commentator, "[o]nly Sotomayor has real experience with a local, day-to-day criminal justice system" because she was a local prosecutor, while Alito served solely as a federal prosecutor.<sup>14</sup> Has this "real experience" been evident in the performance and decisions of Justice

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*Original Intent*, 82 A.B.A. J. 48, 48 (1996). Many aspects of this approach still defined his role on the Court even after two decades on the high court. Christopher E. Smith, *Rights Behind Bars: The Distinctive Viewpoint of Justice Clarence Thomas*, 88 U. DET. MERCY L. REV., 829, 829-30 (2011).

<sup>7</sup> See generally LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005) (description of Justice Harry Blackmun's evolution as a decision maker during his career on the Supreme Court).

<sup>8</sup> Baker & Zeleny, *supra* note 3.

<sup>9</sup> *Id.*; Sheryl Gay Stolberg, *Sotomayor, a Trailblazer and a Dreamer*, N.Y. TIMES (May 26, 2009), <http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html> [<http://perma.cc/JS3Z-2FS4>].

<sup>10</sup> While serving as a judge on the United States Court of Appeals for the Seventh Circuit in Chicago, Justice John Paul Stevens served as substitute trial judge for several civil cases, but his experience as a trial judge lasted for only a few weeks. CHRISTOPHER E. SMITH, JOHN PAUL STEVENS: DEFENDER OF RIGHTS IN CRIMINAL JUSTICE 78 (2015).

<sup>11</sup> Daniel J. Wakin, *A Prosecutor Known for His Common Sense and Straightforward Style*, N.Y. TIMES (Nov. 2, 2005), <http://www.nytimes.com/2005/11/02/politics/politicsspecial1/a-prosecutor-known-for-his-common-sense-and.html> [<http://perma.cc/UC8C-MKE9>].

<sup>12</sup> Anthony S. Barkow, *Commentary: Sotomayor the Crime Fighter*, CNN (July 16, 2009), [http://www.cnn.com/2009/POLITICS/07/16/barkow.sotomayor.prosecutor/index.html?eref=rss\\_latest](http://www.cnn.com/2009/POLITICS/07/16/barkow.sotomayor.prosecutor/index.html?eref=rss_latest) [<http://perma.cc/MFU3-8FXX>]; Radley Balko, *The Supreme Court's Massive Blind Spot*, WASH. POST (Jan. 22, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/01/22/the-supreme-courts-massive-blind-spot> [<http://perma.cc/QJ25-REJB>].

<sup>13</sup> Barkow, *supra* note 12.

<sup>14</sup> Balko, *supra* note 12; Barkow, *supra* note 12.

Sotomayor in the first seven years of her service on the Supreme Court?<sup>15</sup> Now that Justice Sotomayor has served for a sufficient length of time to provide evidence about her approach and priorities,<sup>16</sup> there is a basis for examining her roles in criminal justice cases and any potential connections between her opinions and her prior experiences.<sup>17</sup>

Justice Scalia's death places the nation's highest court at the uncertain dawn of its next "natural court[] . . . period."<sup>18</sup> Justice Sotomayor has proven to be an assertive member of the Roberts Court.<sup>19</sup> If future changes in the Court's composition tip the Court's ideological balance in her favor,<sup>20</sup> Sotomayor has the potential to influence future directions in

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<sup>15</sup> Balko, *supra* note 12; Christopher E. Smith, *What If?: Human Experience and Supreme Court Decision Making on Criminal Justice*, 99 MARQ. L. REV. 813, 814–16 (2016) (discussing examples of plausible links between Supreme Court justices' life experiences and their decisions in criminal justice cases).

<sup>16</sup> *Cf. supra* notes 6–7 and accompanying text (analogizing Justice Sotomayor's time on the Court with Justices Thomas and Blackmun's time on the Court as it relates to the definition and evolution of their respective approaches to decision making).

<sup>17</sup> Supreme Court justices may play multiple roles in shaping decisions concerning particular legal topics. See Christopher E. Smith, *The Roles of Justice John Paul Stevens in Criminal Justice Cases*, 39 SUFFOLK U. L. REV. 719, 726–42 (2006) (examining the several different roles that Justice Stevens played in influencing Supreme Court decision making).

<sup>18</sup> "Natural courts" are time periods during which nine specific individuals serve on the Supreme Court together prior to the next change in the Court's composition. Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986-1991 Terms*, 48 POL. RES. Q. 837, 842 n.8 (1995).

<sup>19</sup> Justice Sotomayor has been assertive in asking questions and making statements during oral arguments. JOAN BISKUPIC, *BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE* 176 (2014). Justice Sotomayor has also been assertive in the "impassioned statements" in her opinions. *Id.* at 183.

<sup>20</sup> President Donald Trump's nomination of Judge Neil Gorsuch as Scalia's replacement is unlikely to provide Sotomayor with a like-minded colleague. See Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html> [<https://perma.cc/G5PH-6HUF>] (discussing the contrast between Gorsuch's record of conservatism and Sotomayor's liberal record). Sotomayor is in her early 60s and could potentially serve another two decades or more on the Supreme Court. See Tony Mauro, *Ages of Supreme Court Justices*, C-SPAN (Oct. 1, 2015) <https://www.c-span.org/video/?c4554048/ages-supreme-court-justices> [<https://perma.cc/Y82R-YNGE>] (showing Sotomayor's age in 2015 and the fact that other justices serve into their late seventies and eighties). Thus she may see further shifts in the Court's composition from appointments by subsequent presidents. Liptak, *supra* note 2.

Supreme Court decision making concerning specific issues, including those affecting criminal justice.<sup>21</sup>

## II. THE ROLES OF JUSTICE SOTOMAYOR

The concept of “role” can be useful in describing how an individual justice is notable or unique.<sup>22</sup> When used to describe the distinctiveness of a Supreme Court justice, a justice’s roles are functions that the justice serves for the Court, especially those that provide a source for potential contemporary or future influence.<sup>23</sup> These roles can be a formal component of the Court’s established process, such as the opinion-assignment authority of the senior justice in the majority when the Chief Justice is among the dissenters.<sup>24</sup> There can also be informal roles that emerge through a justice’s behavior and opinions, such as being a noted advocate for a particular theory of constitutional interpretation<sup>25</sup> or an

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<sup>21</sup> A justice with personal experience or expertise on an issue has the potential to educate and persuade other justices about that issue. See, e.g., Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES (Dec. 12, 2002), <http://www.nytimes.com/2002/12/12/us/an-intense-attack-by-justice-thomas-on-cross-burning.html> [<http://perma.cc/Q6ZR-9YJT>] (discussing the apparent impact of Justice Thomas’s personal insights on a decision concerning criminalization of cross burning).

<sup>22</sup> In judicial studies, “role” is a term borrowed from psychology that is used to describe how a judge’s normative expectations about proper behavior and responsibilities for judges can impact the judge’s decisions. See John T. Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239, 239 (1974); James L. Gibson, *Judges’ Role Orientations, Attitudes and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 911 (1978). However, the concept of role is also used from an outsider perspective to describe a judicial officer’s functions and distinctiveness for court operations and case processing. See CHRISTOPHER E. SMITH, UNITED STATES MAGISTRATES IN THE FEDERAL COURTS: SUBORDINATE JUDGES 128 (1990) (discussing the typology of U.S. magistrate judges’ roles).

<sup>23</sup> See, e.g., Joel B. Grossman, *Role-Playing and the Analysis of Judicial Behavior: The Case of Mr. Justice Frankfurter*, 11 J. PUB. L. 285, 298 (1962) (“[O]ther justices may fulfill roles as well, although different ones. For example, . . . Justices Douglas and Black appear to be playing a sort of ‘public defender’ role . . . . They believe justice and not law to be the primary concern of the Supreme Court.”).

<sup>24</sup> Charles F. Jacobs & Christopher E. Smith, *The Influence of Justice John Paul Stevens: Opinion Assignments by the Senior Associate Justice*, 51 SANTA CLARA L. REV. 743, 744–46 (2011).

<sup>25</sup> For example, Justice Scalia is remembered for his role as an advocate of constitutional interpretation by means of originalism. Mark Sherman, *Antonin Scalia Remembered as Tireless Advocate of Constitutional Originalism*, CHRISTIAN SCI. MONITOR (Feb. 13, 2016), <http://www.csmonitor.com/USA/USA-Update/2016/0213/Antonin-Scalia-remembered-as-tireless-advocate-of-Constitutional-originalism> [<http://perma.cc/9B2X-EMTE>].

approach to a legal issue.<sup>26</sup> For example, after the death of Justice Scalia, commentators and scholars characterized his role on the Court with such statements as, “Justice Scalia’s role on the Court was to press the lawyers with challenging questions at argument and to hold his judicial colleagues accountable to the law.”<sup>27</sup>

In the realm of criminal justice, Justice John Paul Stevens played important roles on the Supreme Court through his independence and advocacy for specific legal conclusions.<sup>28</sup> For example, he distinguished himself as a consistent advocate for the preservation of *Miranda* rights<sup>29</sup> and strengthened legal protections for incarcerated criminal offenders.<sup>30</sup> The timing of Justice Sotomayor’s arrival on the Court<sup>31</sup> one year prior to Stevens’s retirement in 2010,<sup>32</sup> as well as her outspokenness and independence,<sup>33</sup> have made her the de facto heir to Justice Stevens as an important, independent actor in criminal justice cases.<sup>34</sup> This is not to say

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<sup>26</sup> For example, Justices William Brennan and Thurgood Marshall assumed roles as critics of the death penalty who consistently advocated for the abolition of capital punishment. SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 428–29 (2010).

<sup>27</sup> Jack Nicholson & Kayla Solsbak, *What’s Up, Doc? Two Professors Discuss Justice Antonin Scalia’s Passing and Its Impact*, COLLEGIAN (Feb. 24, 2016, 12:01 PM), <http://www.thecollegianur.com/article/2016/02/justice-antonin-scalias-passing-and-its-impact> [<http://perma.cc/D8Q8-K8PK>] (quoting professor Kevin Walsh’s response to reporter’s question, “How would you describe Scalia’s approach to the Constitution and his role on the Supreme Court?”).

<sup>28</sup> Smith, *supra* note 17.

<sup>29</sup> Christopher E. Smith, *Justice John Paul Stevens: Staunch Defender of Miranda Rights*, 60 DEPAUL L. REV. 99, 139–40 (2010).

<sup>30</sup> SMITH, *supra* note 10, at 91–122.

<sup>31</sup> Baker & Zeleny, *supra* note 3.

<sup>32</sup> Sheryl Gay Stolberg & Charlie Savage, *Stevens’s Retirement is Political Test for Obama*, N.Y. TIMES (Apr. 9, 2010), <http://www.nytimes.com/2010/04/10/us/politics/10stevens.html> [<http://perma.cc/TJ7Z-UCE6>].

<sup>33</sup> BISKUPIC, *supra* note 19, at 187–89.

<sup>34</sup> Justice Sotomayor has generated attention for her independence and outspokenness on criminal justice issues. See, for example, Matt Ford, *Pleading for the Fourth*, ATLANTIC (Nov. 12, 2015), <http://www.theatlantic.com/politics/archive/2015/11/justice-sotomayor-fourth-amendment/414948> [<http://perma.cc/C8S2-J8HW>], for a description of Justice Sotomayor as the lone dissenter in a Fourth Amendment case, just as Justice Stevens generated similar attention for his distinctiveness and rights-protective orientation during the later decades of his 35-year career on the Court. See, e.g., Aram A. Schvey, *Human Rights Hero: Justice John Paul Stevens*, 36 HUM. RTS. MAG. (2009), [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol36\\_2\\_009/spring2009/human\\_rights\\_hero\\_justice\\_john\\_paul\\_stevens.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2_009/spring2009/human_rights_hero_justice_john_paul_stevens.html) [<http://perma.cc/>]

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that she is a follower of Stevens's priorities or approach.<sup>35</sup> Instead, she is emerging as the most distinctive defender of rights in criminal justice after the retirement of Stevens,<sup>36</sup> who previously assumed that role on the Court.<sup>37</sup>

#### A. *Advocate for Equal Protection*

Justice Sotomayor's life experience as a Hispanic woman whose parents came to the mainland from Puerto Rico gave her intimate familiarity with issues of prejudice and discrimination.<sup>38</sup> As she described in her autobiography:

Yes, I'd experienced prejudice aimed straight at me, from the blatant taunts of my street-fighting days to the cold shoulder of Kevin's mom, to the subtler barb from the school nurse more recently. Of course I knew that the painful consequences of bigotry—then so common, even endemic—went far beyond the sting of being called a spic, as I had often been.<sup>39</sup>

Justice Sotomayor's understanding of the world, as with other justices on the Court, has been shaped by her life experiences<sup>40</sup> and led to an

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ZE9M-ZAH3] (describing Justice Stevens as a unique defender of rights in criminal justice).

<sup>35</sup> For example, during their lone term serving together on the Supreme Court, reflecting Justice Stevens's distinctive defense of *Miranda* rights, see Smith, *supra* note 29, at 139–40, Justice Sotomayor declined to join Justice Stevens's dissent in a *Miranda* case as she joined Justice Ginsburg's majority opinion instead. See *Florida v. Powell*, 559 U.S. 50, 53 (2010).

<sup>36</sup> See, e.g., Adam Liptak, *Sotomayor Finds Her Voice Among Justices*, N.Y. TIMES (May 6, 2014), <http://www.nytimes.com/2014/05/07/us/politics/sotomayor-finds-her-voice-among-the-justices.html> [<http://perma.cc/DHT6-2MGR>] (discussing Justice Sotomayor's distinctiveness, including examples from criminal justice cases).

<sup>37</sup> See Smith, *supra* note 17, at 726–42. One example of Justice Sotomayor directly continuing a role that was unique to Justice Stevens is embodied in her solo dissent in *Kansas v. Carr*, 136 S. Ct. 633, 646 (2016) (Sotomayor, J., dissenting). She complained that the Court had reached out to accept a case solely to prevent a state from providing greater rights protections for criminal defendants than those provided by other states. *Id.* This was the precise complaint made two decades earlier by Justice Stevens in *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting).

<sup>38</sup> SONIA SOTOMAYOR, *MY BELOVED WORLD* 154, 241 (2013).

<sup>39</sup> *Id.* at 122.

<sup>40</sup> For example, Justice John Paul Stevens said that an influential element in his support for strong criminal justice rights was his experience as a pro bono attorney in the 1950s providing representation to an imprisoned man who was tortured by the Chicago police into

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outspoken concern about discrimination in the criminal justice system.<sup>41</sup> Justice Stevens previously took this role on the Court,<sup>42</sup> and Justice Thurgood Marshall before him was the most outspoken voice on these issues prior to his retirement in 1991.<sup>43</sup> Since the retirement of Justice Stevens, Justice Sotomayor has assumed this role.

Justice Sotomayor gained national attention in a non-criminal justice case for her explicit and assertive rejection of Chief Justice John Roberts's effort to downplay problems of racial inequality and discrimination in American society.<sup>44</sup> In a case prior to Justice Sotomayor's appointment to the Court that prohibited specific, locally-initiated school desegregation programs, Chief Justice Roberts wrote in his majority opinion that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>45</sup> Critics castigated Roberts's "simplistic tautology" as reflecting "his acontextual and ahistorical approach to and understanding of the issue" of racial discrimination in American society.<sup>46</sup> Even a

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confessing to a murder that he did not commit. SMITH, *supra* note 10, at 52–54; *see also* Smith, *supra* note 15, at 818–36 (discussing examples of potential influence of life experience on decision making by several Supreme Court justices).

<sup>41</sup> *See, e.g.*, Stephanie Mencimer, *Supreme Court Justice Sotomayor Invokes Jailed Relatives to Highlight Racism in Jury Selection*, MOTHER JONES (Nov. 3, 2015, 6:00 AM), <http://www.motherjones.com/politics/2015/11/sonia-sotomayor-invokes-jailed-relatives-jury-racism> [<http://perma.cc/GG3K-4TJG>]; *see also* Liptak, *supra* note 36.

<sup>42</sup> Smith, *supra* note 17, at 728–31.

<sup>43</sup> *See, e.g.*, Lee Ruffin Wilson & Ashlyn Kuersten, *William Brennan and Thurgood Marshall: The Mediator and the Absolutist*, in THE REHNQUIST COURT AND CRIMINAL JUSTICE 17, 33–35 (Christopher E. Smith et al., eds., 2011) (describing Justice Marshall's outspokenness with respect to racial discrimination in jury selection).

<sup>44</sup> BISKUPIC, *supra* note 19, at 210–12. For example, as a young attorney in the 1980s, Chief Justice Roberts did significant work for the Reagan administration in opposing efforts to strengthen and renew the Voting Rights Act. Jeffrey Rosen, "Give Us the Ballot" by Ari Berman, N.Y. TIMES (Aug. 25, 2015), <http://www.nytimes.com/2015/08/30/books/review/give-us-the-ballot-by-ari-berman.html> [<http://perma.cc/TV2X-FU62>]. As Chief Justice, he wrote the majority opinion in *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013), the decision invalidating a key section of the Voting Rights Act which critics claim "guts" the power of the anti-discrimination statute. Lawrence Hurley, *Supreme Court Guts Key Part of Landmark Voting Rights Act*, GUARDIAN (June 25, 2013, 5:12 PM), <http://www.reuters.com/article/us-usa-court-voting-idUSBRE95O0TU20130625> [<http://perma.cc/4E8M-YN2S>]. In the majority opinion, Roberts asserted that there was no demonstrated basis for continuing to impose such strong anti-discrimination measures because American society has "changed dramatically" with respect to problems of racial discrimination. *Holder*, 133 S. Ct. at 2625.

<sup>45</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 748 (2007).

<sup>46</sup> Ronald Turner, "The Way to Stop Discrimination on the Basis of Race . . .", 11 STAN J. C.R. & C.L. 45, 47, 78 (2015).

member of Chief Justice Roberts's majority in the case, Justice Anthony Kennedy, criticized Roberts in a concurring opinion by saying, "parts of the opinion by The Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account [for the development of education policies]." <sup>47</sup>

A few years later, Justice Sotomayor directly addressed Chief Justice Roberts's statement in the school desegregation decision when the Court considered a state ballot issue that forbade race-based affirmative action. <sup>48</sup> In a long dissenting opinion that traced constitutional history concerning matters of race, Justice Sotomayor, joined by Justice Ruth Bader Ginsburg, directly addressed and refuted the approach of Chief Justice Roberts:

Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process . . . .

Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities . . . .

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up . . . . Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."

In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of racial discrimination. As members of the judiciary tasked with intervening to carry out the

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<sup>47</sup> *Parents Involved in Cmty. Sch.*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in judgment).

<sup>48</sup> *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.<sup>49</sup>

Justice Sotomayor's exceptionally stark and strong statement on race was characterized as "clearly mocking"<sup>50</sup> Chief Justice Roberts's prior simplistic statement about merely "stop[ping] discrimination on the basis of race" as the means to end racial discrimination.<sup>51</sup>

Justice Sotomayor has begun to bring her assertiveness about matters of race into the realm of criminal justice.<sup>52</sup> For example, in *Calhoun v. United States*, Justice Sotomayor took the unusual step of writing a statement to accompany an order denying a writ of certiorari.<sup>53</sup> In the case, a prosecutor made an overt comment asserting that African-Americans and Hispanics who possess cash should be presumed to be drug dealers.<sup>54</sup> Justice Sotomayor said that she issued her statement to make sure that no one would mistakenly believe that the Court's refusal to accept the case indicated that the Court was willing to tolerate racially-prejudicial remarks by prosecutors.<sup>55</sup> Clearly, she wanted to emphasize publicly that the prosecutor's comment, in her words, "was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason."<sup>56</sup>

Another example is a case concerning prosecutors' exclusion of African-Americans from a criminal jury, including the overt act of circling the race of those jurors on jury information forms and writing "Definite NOs" in advance of jury selection.<sup>57</sup> During oral arguments, Justice Sotomayor aggressively challenged the state's attorney about automatically excluding an African-American from the jury for having a cousin with a criminal record, and for treating African-Americans in the jury pool differently than whites by the questions that were asked and assumptions

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<sup>49</sup> *Id.*

<sup>50</sup> BISKUPIC, *supra* note 19, at 211.

<sup>51</sup> *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

<sup>52</sup> See Mencimer, *supra* note 41; Liptak, *supra* note 36.

<sup>53</sup> *Calhoun v. United States*, 133 S. Ct. 1136, 1136 (2013).

<sup>54</sup> See *id.* ("You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you—a light bulb doesn't go off in your head and say, This is a drug deal?").

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1137.

<sup>57</sup> *Foster v. Chatman*, 136 S. Ct. 1737, 1740 (2016); Mencimer, *supra* note 41.

that were made about their qualifications to be jurors.<sup>58</sup> In the aftermath of the November 2015 oral argument, one commentator took note of Justice Sotomayor's important role in raising the issue of race:

Even if the [C]ourt follows Sotomayor's lead and finds that the prosecutors in Foster's case discriminated against African Americans in the jury selection, the justices didn't seem ready to do anything radical to fix the problems [of racial discrimination in jury selection generally] . . . . But they will be hard pressed to ignore Sotomayor's moral authority as they make their decision.<sup>59</sup>

*B. Assertive Illuminator of Criminal Justice Problems*

Justice Sotomayor's unique experiences as a trial judge and state prosecutor position her to provide illuminating insights for the other justices about how criminal justice processes operate and affect people's lives in the system's actual, day-to-day operations.<sup>60</sup> This "rich understanding" of the justice system combined with her "intensity" and independence lead her to shine a bright light on issues of concern.<sup>61</sup> During the 2015–2016 term alone, her dissents concerning criminal justice issues were characterized as a "remarkable body of work from an increasingly skeptical student of the criminal justice system, one who has concluded that [the system] is clouded by arrogance and machismo and warped by bad faith and racism."<sup>62</sup>

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<sup>58</sup> Mencimer, *supra* note 41.

<sup>59</sup> *Id.*

<sup>60</sup> Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, 123 *YALE L.J.F.* 409, 423 (2014).

<sup>61</sup> *Id.* at 409.

Sotomayor learned to be effective in setting herself apart. And now she had no trouble breaking away from colleagues to make uncomfortable assertions, whether regarding the possible injustice of shielding corporations from claims linked to human rights abuses or, as she did a year earlier, the likelihood that Alabama judges were swayed by politics in their death penalty decisions.

BISKUPIC, *supra* note 19, at 226.

<sup>62</sup> Adam Liptak, *In Dissents, Sonia Sotomayor Takes on the Criminal Justice System*, *N.Y. TIMES* (July 4, 2016), <http://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html> [<http://perma.cc/X6F4-LZ9Q>].

One form of her assertive illumination of issues comes, as described above in *Calhoun v. United States*, in her use of published statements in response to the Court's refusal to accept cases for hearings.<sup>63</sup> In her initial terms on the Court, Sotomayor wrote more statements respecting the denial of certiorari than any other justice.<sup>64</sup> Justice Sotomayor has spoken of feeling "compelled" to write these statements—despite the pressure that justices exert on each other to avoid issuing such statements—because she wants to raise her colleagues' sensitivity to issues, make people think, and, hopefully, encourage a decision on the bypassed issue in a future case.<sup>65</sup> Scholars believe this technique can be influential in some cases for persuading other justices to reconsider their positions on accepting an issue for hearing.<sup>66</sup>

A noteworthy example of Justice Sotomayor's use of a statement respecting denial of certiorari came in *Woodward v. Alabama* in 2013.<sup>67</sup> She wrote an extensive opinion dissenting from denial of certiorari in a case that challenged Alabama's death penalty sentencing procedures, which permitted a judge to override a jury's recommendation and thereby order an execution.<sup>68</sup> She pointed to the risk of arbitrary outcomes driven by elected state judges' desire to gain reelection.<sup>69</sup>

Did the dissent from denial of certiorari, joined only by Justice Stephen Breyer in part, have an impact in illuminating the issue for other justices? It is impossible to know with certainty whether, or how, the dissenting opinion criticizing Alabama's capital sentencing scheme had impact. However, three years later in 2016, Justice Sotomayor wrote the majority opinion in *Hurst v. Florida*, an 8-to-1 decision that ruled Florida's death penalty sentencing process to be unconstitutional for permitting the judge, rather than the jury, to make key determinations about whether to impose capital punishment.<sup>70</sup> As noted by commentators, because few

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<sup>63</sup> See, e.g., *Calhoun v. United States*, 133 S. Ct. 1136 (2013); see also *supra* notes 53–56 and accompanying text.

<sup>64</sup> Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J.F. 551, 553 (2014).

<sup>65</sup> Justice Sonia Sotomayor & Linda Greenhouse, *A Conversation with Justice Sotomayor*, 123 YALE L.J.F. 375, 376–77 (2014).

<sup>66</sup> STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 214 (3d ed. 1988).

<sup>67</sup> 134 S. Ct. 405 (2013) (Sotomayor, J., dissenting).

<sup>68</sup> *Id.* at 406.

<sup>69</sup> *Id.* at 408–09.

<sup>70</sup> *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016).

states shared Florida's approach, the decision was likely to have a limited impact elsewhere, except possibly in "Alabama, another state with a higher-than-average history of imposing the death penalty, [which] allows a judge to overrule a jury's findings . . . ."<sup>71</sup>

A second way that Justice Sotomayor illuminates issues for colleagues is through her very active and assertive participation in oral arguments.<sup>72</sup> Indeed, in a recent term, she stood out for asking more total questions than any other justice during oral arguments for an entire year.<sup>73</sup> In light of her assertiveness, the loss of the Court's most active conservative questioner, Justice Scalia,<sup>74</sup> may open opportunities for Justice Sotomayor to become an even more visible, influential presence during oral arguments.<sup>75</sup>

Justice Sotomayor's illuminating assertiveness was on display in the Court's February 2016 oral arguments in *Utah v. Strieff*.<sup>76</sup> This Fourth Amendment case enabled Sotomayor to highlight for her colleagues serious concerns about racially-biased policing, racial disparities, and the actual operations of the criminal justice system.<sup>77</sup> The case concerned whether—for exclusionary rule purposes—the illegality of a police officer's groundless stop of an individual is dissipated by the discovery that there is an outstanding arrest warrant for the individual.<sup>78</sup> During the

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<sup>71</sup> Robert Barnes, *Supreme Court Finds Florida's Capital Punishment Process Unconstitutional*, WASH. POST (Jan. 12, 2016), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-finds-floridas-capital-punishment-process-unconstitutional/2016/01/12/d5bed1b0-b93e-11e5-99f3-184bc379b12d\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-finds-floridas-capital-punishment-process-unconstitutional/2016/01/12/d5bed1b0-b93e-11e5-99f3-184bc379b12d_story.html) [http://perma.cc/M9XB-K7CQ]; see also LDF Explains Hurst v. Florida, U.S. Supreme Court's Ruling Against Florida's Capital Punishment System, NAACP LDF (Jan. 20, 2016), <http://www.naacpldf.org/update/ldf-explains-hurst-v-florida-us-supreme-court%E2%80%99s-ruling-against-florida%E2%80%99s-capital-punishment> [http://perma.cc/53MB-F5JY] ("The Court's ruling may also affect Alabama's death penalty system, which has a similar provision that allows a trial judge to override a jury's life verdict and, instead, impose the death penalty.").

<sup>72</sup> BISKUPIC, *supra* note 19, at 176–77.

<sup>73</sup> Liptak, *supra* note 36.

<sup>74</sup> Erin Fuchs, *Lawyer Who's Argued 73 Cases in Supreme Court Says Oral Arguments 'Changed Completely' After Scalia*, BUS. INSIDER (Feb. 13, 2016, 8:24 PM), <http://www.businessinsider.com/scalia-death-oral-argument-supreme-court-2016-2> [http://perma.cc/9TQQ-C6EQ].

<sup>75</sup> See Mark Joseph Stern, *The First Day of the New Supreme Court*, SLATE (Feb. 23, 2016, 7:30 AM), [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2016/02/in\\_the\\_oral\\_arguments\\_for\\_utah\\_v\\_strieff\\_the\\_supreme\\_court\\_s\\_liberal\\_spoke.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/02/in_the_oral_arguments_for_utah_v_strieff_the_supreme_court_s_liberal_spoke.html) [http://perma.cc/7SHH-MW9M].

<sup>76</sup> *Id.*; *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

<sup>77</sup> Stern, *supra* note 75.

<sup>78</sup> *Id.*

oral argument, Chief Justice Roberts and Justice Alito sought to reject the respondent's argument that permitting police officers' improper conduct to be washed away by the discovery of an existing search warrant would encourage police to violate people's rights.<sup>79</sup> Justice Sotomayor's intervention to challenge Utah's position—the position that appeared to be supported by Roberts and Alito—was sharp and illuminating.<sup>80</sup>

Justice Sotomayor: What's going to stop police officers— if we announce your rule, and your rule seems to be, once we have your name, if there's a warrant out on you, that's an attenuating circumstance under every circumstance. What stops us from becoming a police state and just having the police stand on the corner down here and stop every person, ask them for identification, and put it through, and if a warrant comes up, searching them?

[Attorney for the State of Utah]: I think—Justice Sotomayor, I think there are two answers to that question. First, I think that our rule—an officer can never count, under our rule, on finding a warrant. So there is no incentive for him to make that stop. If there's no warrant and the stop is lawful . . . .

Justice Sotomayor: If you have a town like Ferguson [Missouri], where 80 percent of the residents have minor[] traffic warrants out, there may be a very good incentive for just standing on the street corner in Ferguson and asking every citizen, give me your ID; let me see your name. And let me hope, because I have an 80 percent chance that you're going to have a warrant.<sup>81</sup>

Justice Sotomayor referred to Ferguson, Missouri, site of the controversial police shooting of unarmed teenager Michael Brown.<sup>82</sup> In so doing, she starkly illuminated the connection between police practices and controversies about racial bias that generated public protests throughout the country in the aftermath of police killings of unarmed African-

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Transcript of Oral Argument at 5–6, *Streiff*, 136 S. Ct. 2056 (2016) (No. 14-1373).

<sup>82</sup> Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [<http://perma.cc/5E8E-E6GK>].

American men.<sup>83</sup> Her specific reference was to the U.S. Department of Justice’s investigative report on the Ferguson police department that found, among other egregious practices, that police officers targeted poor African-American residents with pre-textual minor citations that led to frequent arrest warrants, jailing, and drastic multiplying of fine amounts in order to provide funding for local government.<sup>84</sup> Thus, for example, something as simple as parking violation fine for \$151 became, for one low-income woman, a horrific odyssey of multiple jailings and escalating fees until she owed more than \$500 to the city *after* already paying more than \$500 on the original \$151 fine.<sup>85</sup> Moreover, friends of white city officials had their tickets “fixed” and erased from the system without facing any fines—a form of race-based favoritism which is contrary to the ideal of equal justice when compared to the discriminatory and illegal arrest warrants and jailings directed at African-Americans.<sup>86</sup>

Later in the oral argument, Justice Alito, in the description of one commentator, “attempt[ed] to ridicule” the respondent attorney’s argument and Justice Sotomayor “says acidly” an informational retort to educate Alito about how trial courts and police actually operate:<sup>87</sup>

Justice Alito: Do you think the judges in the traffic—in the traffic courts are going to start issuing lots of warrants because they want to provide a basis for—for randomly stopping people?

[Attorney for Respondent]: My point is only that it—it creates an incentive to not be as careful. It creates—

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<sup>83</sup> See, e.g., Diantha Parker, *Protests Around the Country Mark the Moment of Ferguson Shooting*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/us/protests-around-the-country-mark-the-moment-of-ferguson-shooting.html> [<http://perma.cc/ZEB5-YT6J>] (discussing an example of national protest action that was triggered by police shooting in Ferguson, Missouri, and other police shootings around the country).

<sup>84</sup> For example, the Justice Department’s report found First Amendment violations through arrests and citations for exercising free speech rights and many instances of excessive use of force directed at African-Americans by the police. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 24, 28 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<http://perma.cc/X2VB-YHXZ>].

<sup>85</sup> *Id.* at 42.

<sup>86</sup> *Id.* at 42–70, 74–75.

<sup>87</sup> Stern, *supra* note 75.

Justice Sotomayor: I'm very surprised that Justice Alito doesn't know that most of these warrants are automatic. If you don't pay your fine within a certain amount of days, they're issued virtually automatically.<sup>88</sup>

A critical observer of the exchange described a “searing and uncomfortable” moment as Sotomayor was “calling out Alit[o]” for his lack of connection to the actual workings of the criminal justice system.<sup>89</sup> This included his failure to recognize the elements of corruption and racism that were evident in the investigative report on Ferguson,<sup>90</sup> which place people in poor, minority communities at greater risk of intrusions and violations of their rights by the police.<sup>91</sup> Although Justice Alito shares the experience of being a prosecutor with Justice Sotomayor, the knowledge—or lack thereof—that he gained from that experience was quite different in the federal context than what Sotomayor learned from working in New York City's local courts.<sup>92</sup> Thus, Justice Sotomayor can use her

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<sup>88</sup> Transcript of Oral Argument at 52–53, *Utah v. Streiff*, 136 S. Ct. 2056 (2016) (No. 14-1373).

<sup>89</sup> Stern, *supra* note 75.

<sup>90</sup> CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 84, at 42–75.

<sup>91</sup> *See* Stern, *supra* note 75.

It is one of those knockout moments so ruthless that you aren't sure whether to cringe or cheer. Sotomayor is essentially calling out Alito's privilege—why would *he* know about corrupt, scammy, racist policing?—and Alito doesn't even attempt to respond. Instead, he wears an embarrassed smirk throughout the remainder of the arguments, appearing appropriately shamed.

*Id.*

<sup>92</sup> Justice Sotomayor has described her perceptions about the limits of Justice Alito's prosecutorial experience:

[H]e headed the [U.S. Attorney's] offices . . . . [From his position,] [y]ou really only get to see the best in people. You're working with the top echelon, most of whom you've handpicked. You're not in the courtroom day to day. You really don't get to experience the challenges to ethics that everyday prosecutors have to deal with. And you don't get to deal with witnesses who are not terribly sophisticated . . . . You can have more lofty views about the basic good in the system if you come to it at the top. If you're someone like me who worked in the trenches, what you have experienced gives you a wider breadth of expectations.

(continued)

assertiveness in oral argument, as well as written opinions, to illuminate practical issues and consequences that are insufficiently understood by the other justices.<sup>93</sup> As Justice Sotomayor has said about her experience as a local prosecutor, “[i]f you’re someone like me who worked in the trenches, what you have experienced gives you a wider breadth of expectations” about the justice system’s actual operations and flaws.<sup>94</sup>

When the majority ultimately issued its decision permitting the use of evidence after an unjustified stop led to the discovery of an outstanding warrant, Justice Sotomayor issued a ringing dissent.<sup>95</sup> In an opinion that was described as “extraordinary for its breadth and intensity,”<sup>96</sup> Justice Sotomayor predicted that the majority opinion would virtually invite police to make illegal, investigatory stops.<sup>97</sup> In addition, she alluded to the systemic, discriminatory problems evident in Ferguson, Missouri’s justice system<sup>98</sup> and concluded her dissenting opinion dramatically with vivid words that effectively served as an indictment of the American justice system for its discriminatory operations and impacts:

[The decision] says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.<sup>99</sup>

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Sotomayor & Greenhouse, *supra* note 65, at 378–79.

<sup>93</sup> *Id.* at 388.

<sup>94</sup> *Id.* at 379.

<sup>95</sup> See Matt Ford, *Justice Sotomayor’s Ringing Dissent*, ATLANTIC (June 20, 2016), <http://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922> [<http://perma.cc/DRA2-P8WB>] (“But in a thundering dissent, Justice Sonia Sotomayor was less forgiving.”).

<sup>96</sup> *Id.*

<sup>97</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2067–68 (2016) (Sotomayor, J., dissenting).

<sup>98</sup> See *supra* notes 75–90 and accompanying text.

<sup>99</sup> *Streiff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting) (citations omitted).

Importantly, Justice Sotomayor's decision to use the phrase "no one can breathe in this atmosphere" resonated as an apparent endorsement of protests against the justice system by echoing the "I Can't Breathe" slogan of protesters after Eric Garner died from a police officer's chokehold in New York City.<sup>100</sup> Presumably, future opinions about problems in the justice system will similarly reflect her empathetic understanding of unequal treatment in American society.<sup>101</sup>

### C. Advocate for Prisoners' Rights

Justice Stevens was an especially strong advocate for prisoners' rights, beginning with his very first term on the Supreme Court and continuing throughout his 35-year career.<sup>102</sup> Among the justices serving since Stevens's retirement in 2010, Justice Sotomayor shows signs of potentially assuming the mantle of the Court's conscience regarding the constitutional rights of those held in jails and prisons.<sup>103</sup> She has provided clues of this role through the techniques of assertiveness discussed in the foregoing section. During oral arguments for a major case concerning the health care consequences of prison overcrowding in California, Justice Sotomayor's questioning of the state's attorney was especially attention-grabbing and stark when she said:

So when are you going to get to that? When are you going to avoid the needless deaths that were reported in this record? When are you going to avoid or get around [to] people sitting in their feces for days in a dazed state? When are you going to get to a point where you're going to deliver care that is going to be adequate?<sup>104</sup>

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<sup>100</sup> *Id.*; see also Oliver Laughland et al., "We Can't Breathe": Eric Garner's Last Words Become Protesters' Rallying Cry, *GUARDIAN* (Dec. 4, 2014, 12:16 PM), <https://www.theguardian.com/us-news/2014/dec/04/we-cant-breathe-eric-garner-protesters-chant-last-words> [http://perma.cc/9GEJ-UUZH].

<sup>101</sup> See SOTOMAYOR, *supra* note 38, at 154.

<sup>102</sup> SMITH, *supra* note 10, at 91–122.

<sup>103</sup> Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 *IND. L. REV.* 853, 885 (2011). However, Justice Ruth Bader Ginsburg is also sensitive to issues of prisoners' rights and, indeed, was the only justice to support a broader opportunity for prisoners who file Eighth Amendment lawsuits against private prisons in *Minneeci v. Pollard*, 565 U.S. 118, 132–133 (2012) (Ginsburg, J., dissenting).

<sup>104</sup> Transcript of Oral Argument at 15, *Brown v. Plata*, 563 U.S. 493 (2011) (No. 09-1233).

She also used a dissent from denial of certiorari to call attention to punitive treatment imposed on a prisoner undergoing treatment for HIV.<sup>105</sup> In addition, during her second term on the Court, she wrote a dissenting opinion arguing that prisoners should be able to obtain money damages in lawsuits for violations of their right to free exercise of religion.<sup>106</sup> Although Justice Sotomayor has not yet had opportunities to write law-defining opinions for this area of law affecting criminal justice, she has demonstrated her willingness to call attention to these issues.<sup>107</sup>

#### *D. Solo Dissenter*

Although Justice Sotomayor has high inter-agreement rates with Justices Ginsburg and Kagan in criminal justice cases,<sup>108</sup> she also asserts herself independently for cases in which she takes a unique view of the issue at hand.<sup>109</sup> In writing opinions as the lone dissenter in criminal justice cases decided by the Court, Justice Sotomayor is arguably employing yet another technique to assertively illuminate issues; much as she uses her aggressive participation in oral arguments and dissents from denials of certiorari.<sup>110</sup> However, complete dissenting opinions are different because they respond to the law-establishing details of the majority opinion and provide a completely-reasoned position that remains as a basis for an alternative path of action if the Supreme Court revisits an issue in a future case.<sup>111</sup>

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<sup>105</sup> *Pitre v. Cain*, 562 U.S. 992, 992 (2010) (Sotomayor, J., dissenting) (Mem.).

<sup>106</sup> *Sossamon v. Texas*, 563 U.S. 277, 293 (2011) (Sotomayor, J., dissenting).

<sup>107</sup> Justice Sotomayor was not an opinion author in recent cases affecting prisons and jails, including *Bruce v. Samuels*, 136 S. Ct. 627 (2016) (analyzing prisoners' payment of court fees under the Prison Litigation Reform Act); *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (scrutinizing free exercise of religion in prisons); *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (examining the use of force in jails); and *Millbrook v. United States*, 133 S. Ct. 1441 (2013) (addressing sexual assault in prison). See also *supra* notes 96–99 and accompanying text.

<sup>108</sup> See, e.g., Madhavi M. McCall et al., *Criminal Justice and the 2013–2014 United States Supreme Court Term*, 38 *HAMLIN L. REV.* 361, 371 tbl. 3 (2015) (Sotomayor agreed with Kagan in 85.7% of criminal justice decisions and agreed with Ginsburg in 90.5% of such cases).

<sup>109</sup> See BISKUPIC, *supra* note 19, at 226 (“She operated in her own world, . . . increasingly with solo dissenting and concurring opinions.”).

<sup>110</sup> See *supra* notes 62–94 and accompanying text.

<sup>111</sup> The dissenting opinions of Justice John Paul Stevens, for example, provided the foundation for influential changes on constitutional doctrine that developed in later Supreme Court decisions. SMITH, *supra* note 10, at 245–50.

Justice Sotomayor's first solo dissent in a criminal justice case argued strongly for greater protections against the risk of suggestiveness in procedures used for witnesses to identify the alleged perpetrator of a crime.<sup>112</sup> Another solo dissent saw Justice Sotomayor argue for close adherence to a statute that she saw as reflecting congressional intent to impose full restitution costs upon possessors of child pornography for the harms inflicted on the children victimized by production of the specific illegal, obscene images in their possession.<sup>113</sup> In another case, she was the lone justice to object to the Court's approval of a traffic stop based on a police officer's mistaken understanding of state law.<sup>114</sup> She alone saw "nothing to be gained . . . and much to be lost" from "hold[ing] that a reasonable mistake of law can justify a seizure under the Fourth Amendment."<sup>115</sup> Another solo dissent demonstrated her concern about the nation's highest court interfering with state courts' decisions that provide more generous protections of rights than those mandated nationally.<sup>116</sup> An additional solo dissent concerned a per curiam opinion in which the Court granted qualified immunity to a police officer who fired at a moving vehicle and killed a driver who was fleeing from the police.<sup>117</sup> Justice Sotomayor objected to this decision because she saw the Court supporting a "[police] culture" that permits "use [of] deadly force for no discernible gain and over a supervisor's express order to 'stand by.'"<sup>118</sup> According to Justice Sotomayor, "[b]y sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow."<sup>119</sup>

The cases in which Justice Sotomayor issued solo dissenting opinions concerning criminal justice represent a disparate mix of issues.<sup>120</sup> The fact that two of them led her to take a more rights-protective approach than any other justice on aspects of the Fourth Amendment may mean that her future constitutional jurisprudence bears watching for the potential development of a consistently distinctive role with respect to scrutiny of

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<sup>112</sup> *Perry v. New Hampshire*, 565 U.S. 228, 253 (2012) (Sotomayor, J., dissenting).

<sup>113</sup> *Paroline v. United States*, 134 S. Ct. 1710, 1735–37 (2014) (Sotomayor, J., dissenting).

<sup>114</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 542 (2014) (Sotomayor, J., dissenting).

<sup>115</sup> *Id.* at 545 (Sotomayor, J., dissenting).

<sup>116</sup> *Kansas v. Carr*, 136 S. Ct. 633, 646 (2016) (Sotomayor, J., dissenting).

<sup>117</sup> *Mullenix v. Luna*, 136 S. Ct. 305, 313 (2015) (Sotomayor, J., dissenting).

<sup>118</sup> *Id.* at 316.

<sup>119</sup> *Id.*

<sup>120</sup> See *supra* notes 105–113 and accompanying text.

police practices.<sup>121</sup> Such scrutiny could reflect her unique knowledge gained from experience as a local prosecutor; experience which she distinguished from Justice Alito's federal prosecution experience, in part, by saying, "[w]hen you're dealing with state police officers, . . . their training is not comparable" to that of federal law enforcement officials.<sup>122</sup> Moreover, in light of her February 2016 reference during oral argument to racially-biased policing in Ferguson, Missouri,<sup>123</sup> these solo dissents may reflect Justice Sotomayor's concerns about contemporary problems with these particular Fourth Amendment decisions that, respectively, enhance risks of pretextual stops and searches<sup>124</sup> and invite needless fatalities from police use of firearms.<sup>125</sup>

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<sup>121</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 545 (2014) (Sotomayor, J., dissenting); *Mullenix*, 136 S. Ct. at 314 (Sotomayor, J., dissenting). In another example concerning the Fourth Amendment that was not a solo dissent as she was joined by Justice Ginsburg, Justice Sotomayor wrote:

But I dissent from the Court's disposition of *Bernard v. Minnesota*, No. 14-140, in which the Court holds that the same [search-incident-to-arrest] exception permits warrantless breath tests. Because no governmental interest categorically makes it impractical for an officer to obtain a warrant before measuring a driver's alcohol level, the Fourth Amendment prohibits such searches without a warrant, unless exigent circumstances exist in a particular case.

*Birchfield v. North Dakota*, 136 S. Ct. 2160, 2187 (2016) (Sotomayor, J., concurring in part and dissenting in part).

<sup>122</sup> Sotomayor & Greenhouse, *supra* note 65, at 378.

<sup>123</sup> See *supra* notes 75–94 and accompanying text.

<sup>124</sup> Because police officers can justify improper searches with claims that they did not have sufficient knowledge of relevant state laws after *Heien*, 135 S. Ct. 530, anyone can be stopped without a legal basis for the intrusion on Fourth Amendment protections. As Justice Sotomayor observed in her dissenting opinion, "One is left to wonder, however, why an innocent citizen should be made to shoulder the burden of being seized whenever the law may be susceptible to an interpretive question." *Id.* at 546 (Sotomayor, J., dissenting).

<sup>125</sup> As Justice Sotomayor said in her dissenting opinion:

In this case, by contrast, neither petitioner nor the majority can point to any possible marginal gain in shooting at the car over using the spike strips already in place. It is clearly established that there must be some governmental interest that necessitates deadly force, even if it is not always clearly established what level of governmental interest is sufficient.

Under the circumstances known to him at the time, [Officer] Mullenix puts forth no plausible reason to choose shooting at Leija's

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In addition, Justice Sotomayor has acknowledged that she “followed . . . very closely”<sup>126</sup> the controversies about the New York City police department’s race-based targeting of young African-American and Hispanic men<sup>127</sup> for hundreds of thousands of stop-and-frisk searches<sup>128</sup> that a federal judge found to be legally unjustified and constitutionally improper.<sup>129</sup> Given her awareness of contemporary controversies, her opinions may reflect greater knowledge than her colleagues about current reform efforts,<sup>130</sup> including a nationally-publicized proposal to eliminate the police practice of firing on moving vehicles<sup>131</sup>—the very act for which the other justices granted an officer immunity from liability for the resulting death of a driver.<sup>132</sup>

### III. CONCLUSION

In one decade on the Supreme Court, Justice Sonia Sotomayor has established herself as a justice who bears watching for her assertive and

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engine block over waiting for the results of the spike strips. I would thus hold that Mullenix violated Leija’s clearly established right to be free of intrusion absent some governmental interest.

*Mullenix*, 136 S. Ct. at 315 (Sotomayor, J., dissenting).

<sup>126</sup> Sotomayor & Greenhouse, *supra* note 65, at 382.

<sup>127</sup> See Marina Carver, *NYPD Officers Say They Had Stop-and-Frisk Quotas*, CNN (Mar. 26, 2013, 12:15 PM), <http://www.cnn.com/2013/03/22/justice/new-york-stop-and-frisk-trial> [<http://perma.cc/BG3T-7C7K>]; Christopher E. Smith, *What I Learned About Stop-and-Frisk from Watching My Black Son*, ATLANTIC (Apr. 1, 2014), <http://www.theatlantic.com/national/archive/2014/04/what-i-learned-about-stop-and-frisk-from-watching-my-black-son/359962> [<http://perma.cc/VJ8Z-SBM5>].

<sup>128</sup> *Stop-and-Frisk Data*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> [<http://perma.cc/D38X-YYEH>].

<sup>129</sup> Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> [<http://perma.cc/VK33-2AGD>].

<sup>130</sup> See U.S. DEP’T OF JUSTICE’S OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 1–4 (2015), [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [<http://perma.cc/Y7GR-B8E9>].

<sup>131</sup> See, e.g., Chuck Wexford & Scott Thomson, *Making Policing Safer for Everyone*, N.Y. TIMES (Mar. 2, 2016), <http://www.nytimes.com/2016/03/02/opinion/making-policing-safer-for-everyone.html> [<http://perma.cc/Y2P8-9M7A>] (“Shooting at vehicles should be prohibited.”); POLICE EXECUTIVE RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES: GUIDING PRINCIPLES ON USE OF FORCE 44–47 (2016) (“Shooting at vehicles must be prohibited.”).

<sup>132</sup> *Mullenix v. Luna*, 136 S. Ct. 305, 307, 312 (2015).

distinctive contributions to decision making affecting criminal justice.<sup>133</sup> She has brought to the Court insights and perspective from her unique professional background as both a former state prosecutor and a federal trial judge.<sup>134</sup> Her practical knowledge about the daily operations of the criminal justice system and its impacts on the lives of regular people is arguably unsurpassed among current justices.<sup>135</sup> Moreover, as a Puerto Rican woman who experienced discrimination and social slights based on her ethnicity,<sup>136</sup> she is keenly aware of the ways in which the justice system falls short of the constitutional aspiration for equal justice.<sup>137</sup> Justice Sotomayor's experience-based insights will presumably inform her future decisions as she displays her "common sense" understanding of society and careful attention to the facts of each criminal justice case.<sup>138</sup> As one commentator observed, "Justice Sotomayor fills several key roles on the Court. Without her, it would be a Court far less in touch with the vast criminal justice system that operates in America today."<sup>139</sup>

This article's list of Justice Sotomayor's identifiable roles in criminal justice cases does not purport to be exhaustive. It would be possible to argue for the potential identification of additional roles, such as a specialist for issues such as double jeopardy for which she has written important opinions.<sup>140</sup> Indeed, additional roles may become clearer over time, either from writing multiple opinions concerning specific issues<sup>141</sup> or from changes in her approach that may emerge over time, just as it has for many other justices.<sup>142</sup> Yet, even without the identification of additional roles or

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<sup>133</sup> See Barkow, *supra* note 60, at 409.

<sup>134</sup> See Sotomayor & Greenhouse, *supra* note 65, at 377–79.

<sup>135</sup> See Barkow, *supra* note 60, at 409–10.

<sup>136</sup> SOTOMAYOR, *supra* note 38, at 154.

<sup>137</sup> See *supra* notes 52–59 and accompanying text.

<sup>138</sup> Barkow, *supra* note 60, at 411.

<sup>139</sup> *Id.* at 425.

<sup>140</sup> Justice Sotomayor wrote notable opinions addressing the Fifth Amendment protection against double jeopardy in *Blueford v. Arkansas*, 566 U.S. 599, 610–11 (2012) (Sotomayor, J., dissenting), and *Evans v. Michigan*, 133 S. Ct. 1069, 1073 (2013).

<sup>141</sup> For example, Justice Stevens's important role as an advocate for the importance of the jury in sentencing decisions arguably developed over the course of his career. This role was not apparent in his first half-dozen years on the Supreme Court because the Court's most important jury cases of his career arose at a later point in time. See SMITH, *supra* note 10, at 163–72.

<sup>142</sup> Systematic social science research on Supreme Court decision making has demonstrated that many justices changed their approaches to decision making over time. See, e.g., Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1504–14 (2007) (discussing a study of  
(continued)

the emergence of future role changes, Justice Sotomayor has established herself as important because of her unique position to assess issues of equal protection,<sup>143</sup> her assertive efforts to illuminate issues for her colleagues,<sup>144</sup> her attention to prisoners' issues,<sup>145</sup> and her willingness to speak independently in opposition to all of her colleagues.<sup>146</sup> As the Court inevitably faces new criminal justice issues in each annual term, there is good reason to expect Justice Sotomayor to be uniquely influential in educating and challenging her colleagues, even when she does not determine the outcomes of cases.<sup>147</sup>

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changes in decision making trends for justices who served from the Warren Court era through the Roberts Court era).

<sup>143</sup> See *supra* Section II.A.

<sup>144</sup> See *supra* Section II.B.

<sup>145</sup> See *supra* Section II.C.

<sup>146</sup> See *supra* Section II.D.

<sup>147</sup> See, e.g., Barkow, *supra* note 60 ("It is often remarked that the Justices pay more attention to a colleague's view when it comes from his or her experience or expertise on the topic. As a result, one might expect that Justice Sotomayor will have an outsized influence on her colleagues in criminal cases.").



