

Justice Sotomayor and Criminal Justice in the Real World

Rachel E. Barkow

As part of the symposium to reflect on Justice Sotomayor's first five years on the Supreme Court, this Essay explores Justice Sotomayor's contributions to the Court's criminal law jurisprudence. Professor Rachel Barkow argues that Justice Sotomayor's prior experience working on criminal law cases as a prosecutor and trial judge have influenced her Supreme Court opinions, which focus on how things actually work in practice, pay close attention to the specific facts of cases, and show sensitivity to the need for checks on government power. These commitments often lead Justice Sotomayor to reject formal rules that would promote predictability at the expense of accurately reflecting the world in which the rules must operate.

When Justice Sonia Sotomayor joined her colleagues on the Court, she brought with her a wealth of front-line experience with criminal law cases. She had served for five years as an assistant district attorney in Manhattan and had seen numerous criminal trials up close in her six years as a trial court judge.¹

Before she joined the Court, however, commentators debated which way this would cut. Some predicted that her vast experience with the criminal justice system would mean she would have greater awareness of the potential for government abuses and overreaching, because she would have a rich understanding of police practices, an appreciation of the challenges criminal justice lawyers face given limited resources, and a deep knowledge of the range of cases in the system and the individual stories those cases represent.² Others

-
1. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 238-39, 295 (2009), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56940/html/CHRG-111shrg56940.htm> [hereinafter *Confirmation Hearing*]; see also Press Release, The White House, Judge Sonia Sotomayor (May 26, 2009), http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor.
 2. See, e.g., Anthony S. Barkow, *Commentary: Sotomayor the Crime Fighter*, CNN (July 16, 2009, 9:11 AM), <http://www.cnn.com/2009/POLITICS/07/16/barkow.sotomayor.prosecutor> (arguing that "Sotomayor's experience on the front lines in a big city's fight against crime

observed that she would be prone to favor the government because she herself represented the state as a prosecutor.³

Five years later, we can take stock of how her direct experience working on criminal law cases has influenced her jurisprudence on the Court. Justice Sotomayor's view in criminal cases is firmly grounded in how things actually work in practice, and she pays close attention to the specific facts of cases before her. Her experience as an assistant district attorney and trial judge also seems to have made her attuned to the need for checks on government power. Obviously, not all state prosecutors who go on to become trial judges will bring

will bring a much-needed perspective to the court" and a "much-needed dose of reality when it comes to criminal law issues"); Jess Bravin & Nathan Koppel, *Nominee's Criminal Rulings Tilt to Right of Souter*, WALL ST. J., June 5, 2009, <http://online.wsj.com/news/articles/SB124415867263187033> (quoting a lawyer involved in trials before Sotomayor, who contrasted Sotomayor's toughness on "white-collar defendants from privileged backgrounds" with her greater "understanding of individuals who grew up in a tougher circumstance").

3. See, e.g., Bravin & Koppel, *supra* note 2 (citing Stanford Law School's Jeffrey Fisher, who stated that Sotomayor's ruling in a 1999 Fourth Amendment case illustrated a "willingness to give police the benefit of the doubt"); Ed Brayton, *Sotomayor and Criminal Justice Law . . . Again*, SCIENCEBLOGS (July 20, 2009), <http://scienceblogs.com/dispatches/2009/07/20/sotomayor-and-criminal-justice> (worrying that "Sotomayor will push the [C]ourt to the right when it comes to criminal justice issues"); Scott H. Greenfield, *Saving Sonia*, SIMPLE JUSTICE: A CRIMINAL DEFENSE BLOG (July 17, 2009), <http://blog.simplejustice.us/2009/07/17/saving-sonia> (noting that "Justice Sotomayor may well become the Supreme Court's reality check on criminal law cases," but fearing that result because her experience was "that of a person who enforced order against the people"); David Lightman & Michael Doyle, *Sotomayor Hearings Offer Lessons for Future Nominees*, MCCLATCHY (July 17, 2009), <http://www.mcclatchydc.com/2009/07/17/72057/sotomayor-hearings-offer-lessons.html> (asserting that one lesson from Sotomayor's hearings is that "[n]o matter how liberal or conservative in general, be able to show you're tough on crime," and citing Sotomayor's prosecutor background as being "immensely helpful in softening Republican fears"); James Ridgeway, *The Progressive Case Against Sotomayor*, MOTHER JONES (July 16, 2009, 6:26 AM), <http://www.motherjones.com/politics/2009/07/progressive-case-against-sotomayor>; Joe Stephens & Del Quentin Wilber, *Gritty First Job Shaped Nominee*, WASH. POST, June 4, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/03/AR2009060304054_pf.html (citing Stetson University law professor Ellen S. Podgor, who reviewed around 100 of Sotomayor's appellate rulings in white-collar cases and concluded that then-Judge Sotomayor "toes the line in terms of following what the law is, and in that respect [her opinions] come out as more pro-government"); Jeffrey Toobin, *Analysis: Sotomayor a Cautious, Careful Liberal*, CNN (July 17, 2009, 12:59 PM), <http://www.cnn.com/2009/POLITICS/07/13/toobin.sotomayor> (arguing that "Sotomayor appears to feel disinclined to overturn criminal convictions" and may "lean more to the conservative side" on criminal law). In making the case for Sotomayor during her confirmation hearing, Senator Schumer emphasized that Sotomayor was "in the mainstream" and cited as one example the fact that "she has ruled for the government in 92 percent of criminal cases." *Confirmation Hearing*, *supra* note 1, at 24-25.

CRIMINAL JUSTICE IN THE REAL WORLD

the same perspective. Justice Sotomayor's views are likely also influenced by her personal life history and general perspective on the role of a judge in a system of separated powers. But the combination of Justice Sotomayor's background, outlook, and professional experience have given the Court a perspective on criminal justice that it has been lacking: one that is fully informed by how things work on the ground and how real people interact with criminal justice policies in the vast majority of cases in the system. Justice Sotomayor's rich knowledge of the criminal justice system, coupled with her meticulous reading of the record below and attention to empirical studies, often leads her to reject bright-line rules that would promote predictability but at the expense of accurately reflecting what is happening on the ground. She has been a strong voice in favor of making sure that the Court's rules never lose sight of the real world in which they need to apply.

The *New York Times* recently published an editorial calling for more diversity on the federal bench. It observed that traditionally this focus has been on "race, ethnicity and gender" but noted that "[e]qually important is the diversity of professional experience, which gets less attention."⁴ Justice Sotomayor's contribution to the Supreme Court's criminal justice jurisprudence is a vivid illustration of why diversity in professional experience matters.

I. A JUSTICE FIRMLY ROOTED IN THE ACTUAL ADMINISTRATION OF CRIMINAL LAW

Justice Sotomayor has already established herself as a powerful voice in criminal law cases. Justice Sotomayor authored seventy-two total opinions during the period between the start of the 2009 Term and the end of the 2012 Term, and thirty-six percent of them were in criminal law.⁵ She has written

4. Editorial, *The Homogenous Federal Bench*, N.Y. TIMES, Feb. 6, 2014, <http://www.nytimes.com/2014/02/07/opinion/the-homogeneous-federal-bench.html>.

5. *Stat Pack Archive*, SCOTUSBLOG, <http://www.scotusblog.com/reference/stat-pack> (last visited Jan. 3, 2014) (accessed by clicking "Final Stat Pack" for each Term and then clicking "Total Opinion Authorship"). The "total opinions" statistic was drawn from SCOTUSBlog's calculations from October Term 2009 through October Term 2012. Whether or not to classify a case as "criminal" is not a straightforward exercise, particularly in cases brought on habeas. Compare, for example, the different classification decisions regarding *United States v. Comstock*, 560 U.S. 126 (2010), which was classified as a criminal case by SCOTUSBlog, *Super Stat Pack OT09* (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-070710-19-21.pdf>, and as a civil case by the *Harvard Law Review*, *The Statistics*, 124 HARV. L. REV. 411, 422 (2010). To arrive at the

major opinions for the Court as well as important concurrences and dissents, including dissents from the denial of certiorari.⁶ While she often votes for greater defendant protections, she sometimes sides with the government even when the Court is divided.⁷ She frequently calls upon “common sense” to help guide the Court in criminal cases. Common sense is obviously a vague term that may vary from person to person, but when Justice Sotomayor uses this term, she seems to mean knowledge of what is actually happening on the ground, informed by the trial record, empirical studies, and, in Justice Sotomayor’s case, a deep knowledge of the criminal justice system and the participants in it from her own experience. This core approach can be seen across a range of criminal law areas.

For example, she has been a staunch protector of the role *Miranda* plays in creating a more balanced relationship between police and suspects. She has observed that “*Miranda* and our subsequent cases are premised on the idea that custodial interrogation is inherently coercive.”⁸ Her opinions reveal her commitment to protecting a defendant’s ability to maintain his or her rights against what could otherwise be an intimidating police presence. She dissented from the majority’s decision in *Berghuis v. Thompkins* that a defendant’s silence

numbers listed here, a case was characterized as criminal even if it was a habeas case if it implicated a broader criminal law issue.

6. See Andrew Pincus, Remarks at the Institutional Supreme Court Panel at the Yale Law Journal Symposium on Justice Sotomayor’s Early Jurisprudence (Feb. 3, 2014).
7. For example, she wrote the majority opinion in *Dillon v. United States*, 130 S. Ct. 2683 (2010), concluding that the Sentencing Commission’s policy statement governing retroactive sentence adjustments remains binding after *Booker*. Justice Stevens dissented because of his view that “[n]either the interests of justice nor common sense lends any support to the decision to preserve the single sliver of the Commission’s lawmaking power that the Court resurrects today.” *Id.* at 2705 (Stevens, J., dissenting). She has also taken a narrower view of what is covered by the Confrontation Clause than some of the other Justices. See, e.g., *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2721-22 (2011) (Sotomayor, J., concurring in part) (agreeing that a blood alcohol concentration report was testimonial under the facts of the case but highlighting instances that would be distinguishable and present no Confrontation Clause issues); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (holding, in a majority opinion authored by Justice Sotomayor, that police questioning of a victim had the primary purpose of meeting an ongoing emergency over a strong dissent by Justice Scalia that accused the majority’s reading of the facts as being “so transparently false that professing to believe it demeans this institution,” *id.* at 1168 (Scalia, J., dissenting), and that criticized the majority for bringing reliability back into the Confrontation Clause calculus, *id.* at 1174).
8. *Berghuis v. Thompkins*, 560 U.S. 370, 403 (2010) (Sotomayor, J., dissenting).

is insufficient to invoke his or her right to remain silent under *Miranda* and that a defendant must instead unambiguously invoke the right.⁹

In doing so, Justice Sotomayor's dissent shows a detailed appreciation for the reality of how the police and suspects are likely to behave in this setting. While the majority worried that allowing ambiguous invocations would make it hard for police to ascertain a suspect's intent,¹⁰ Justice Sotomayor pointed out this concern is easily remedied because the police "can simply ask for clarification."¹¹ In contrast, she argued, it will be far harder for an accused to figure out how to unambiguously invoke the right to remain silent. She noted that "*Miranda* warnings give no hint that a suspect should use . . . magic words" to cut off interrogations and that the police have no incentive to provide suspects with help.¹² And she provided powerful examples of suspects using "equivocal or colloquial language in attempting to invoke their right to silence" that were rejected by courts even though their "meaning might otherwise be thought plain."¹³ For example, the Seventh Circuit rejected "I'm not going to talk about nothin'" as an invocation of the right to remain silent; the Fourth Circuit found "I just don't think that I should say anything" insufficiently clear; and a Louisiana court thought it was ambiguous when a defendant said "Okay, if you're implying that I've done it, I wish to not say anymore. I'd like to be done with this. Cause that's just ridiculous."¹⁴

While Justice Sotomayor put these examples in a footnote, they are in many ways the heart of the opinion. They provide real world examples of what discussions between the police and suspects actually sound like. Real world suspects who use "colloquial language"—as Justice Sotomayor knows well from her own experience as a Manhattan prosecutor—are not going to know "the magic words" to make questioning stop. Justice Sotomayor's dissent rejected the majority's rule because of an appreciation of the reality of the interactions between the police and suspects. The majority's rule may create a bright line that makes it easier for the police to know when they can proceed, but it comes at a cost that suspects who wish to remain silent may not be able

9. *Id.* at 396-400 (majority opinion).

10. *Id.* at 382 (suggesting that "police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong'").

11. *Id.* at 410 (Sotomayor, J., dissenting).

12. *Id.* at 409.

13. *Id.* at 411.

14. *Id.* at 411 n.9 (citing *United States v. Sherrod*, 445 F.3d 980, 982 (7th Cir. 2006); *Burket v. Angelone*, 208 F.3d 172, 200 (4th Cir. 2000); *State v. Deen*, 953 So.2d 1057, 1058-1060 (La. Ct. App. 2007)).

to effectuate that right in the coercive setting of police custody. The dissent came out the other way because, given the reality of these interactions and the people participating in them, the police are better situated to clarify whether a suspect is waiving.

*J.D.B. v. North Carolina*¹⁵ similarly demonstrates Justice Sotomayor's attention to the actual circumstances of police interactions with suspects and her rejection of formal rules that do not reflect that reality. Justice Sotomayor's opinion for the majority holds that the age of a child subject to police questioning is a relevant factor in determining whether an individual is in custody for the purpose of triggering the need to give *Miranda* warnings, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer."¹⁶ As she put it, "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."¹⁷

The dissent did not deny the relevance of age.¹⁸ Rather, the dispute was over the question of whether considering it would come at too great a cost to clarity. Whereas Justice Alito wrote in his dissent that he would not consider age as part of the custody inquiry in *Miranda* because he places a high value on "clarity and certainty,"¹⁹ Justice Sotomayor saw the lines he draws as "artificial."²⁰ She offered the oddity of the question one would ask of J.D.B.'s case without considering age:

[H]ow would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to "do the right thing"; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker?²¹

15. 131 S. Ct. 2394 (2011).

16. *Id.* at 2406.

17. *Id.* at 2398-99.

18. This explains why the first line of the dissent begins "The Court's decision in this case may seem on first consideration to be modest and sensible . . ." *Id.* at 2408 (Alito, J., dissenting).

19. *Id.* at 2408.

20. *Id.* at 2407 (majority opinion).

21. *Id.* at 2405.

In Justice Sotomayor’s words, “[t]o describe such an inquiry is to demonstrate its absurdity.”²²

She dismissed the idea that one can exclude a relevant factor from the custody analysis “simply to make the fault line between custodial and noncustodial ‘brighter.’”²³ Ease of administration cannot, in other words, trump the reality on the ground. The reality is that age undeniably affects whether one feels free to leave a situation. Justice Sotomayor’s opinion for the majority stated this as common knowledge, but also relies on empirical evidence—in this case, evidence of false confessions by juvenile defendants.²⁴

The use of empirical evidence to better understand the way things actually operate in practice is another hallmark of Justice Sotomayor’s opinions. In *Perry v. New Hampshire*, the Court faced the question of whether, under the Due Process Clause, judges must subject witness identification under suggestive circumstances to pretrial screening for reliability when the suggestive circumstances were not created through law enforcement activity.²⁵ The majority rejected the defendant’s argument, concluding that its prior cases requiring such pretrial screening were based on a concern with improper state action. Justice Sotomayor filed a lone dissent and rejected the majority’s view that the due process concern was about “the *act* of suggestion” rather than “the corrosive *effects* of suggestion on the reliability of the resulting identification.”²⁶

Just as she labeled the dissent’s failure to consider age in *J.D.B.* as “artificial,” here, too, she criticized the majority’s “artificially narrow conception of the dangers of suggestive identifications.”²⁷ She highlighted the concern throughout the Court’s previous due process cases with misidentification—a concern she noted was not predicated on the source of the suggestiveness.²⁸ Her dissent cataloged the “vast body of scientific literature” and “more than two thousand studies” that show that “eyewitness misidentification is the single greatest cause of wrongful convictions in this country.”²⁹ Whereas this state of knowledge “merits barely a parenthetical

22. *Id.*

23. *Id.* at 2407.

24. *Id.* at 2401 (citing empirical studies that demonstrate a heightened risk of false confessions from juvenile suspects).

25. 132 S. Ct. 716 (2012).

26. *Id.* at 731 (Sotomayor, J., dissenting) (emphasis added).

27. *Id.* at 739.

28. *Id.* at 735.

29. *Id.* at 738 (internal quotation marks and citations omitted).

mention in the majority opinion,³⁰ it is at the core of Justice Sotomayor's conclusion that the concern with misidentification expressed in the Court's precedents should be even deeper today.³¹

Justice Sotomayor also turned to empirical evidence in *Peugh v. United States*, in which the Court confronted the question of whether "there is an *ex post facto* violation when a defendant is sentenced under [U.S. Sentencing] Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense."³² The wrinkle of the case was that the Guidelines are now advisory and not binding on judges. For the dissent, that settled the matter because the Guidelines "do not constrain the discretion of district courts and, thus, have no legal effect on a defendant's sentence. . . . [T]o the extent that [they] create a *risk* that a defendant might receive a harsher punishment, that risk results from the Guidelines' persuasive force, not any legal effect."³³

Justice Sotomayor's majority opinion pointed out the checks on discretion that remain in place even under the advisory Guidelines scheme. District courts must begin their sentencing process by calculating the Guidelines, and if the judge is considering a non-Guideline sentence, he or she "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."³⁴ And, she noted, appellate courts review district court sentencing determinations for reasonableness. Justice Sotomayor then looked to the empirical data of how judges were actually sentencing defendants under the advisory Guidelines to see how these checks were functioning. She cited evidence that, absent a government motion, district courts imposed sentences outside the Guidelines in "less than one-fifth of the cases since 2007" and that "when a Guidelines range moves up or down, offenders' sentences move with it."³⁵ Thus, looking at how things were actually working in the system, she could readily conclude that "[i]t is simply not the case that the Sentencing Guidelines are merely a volume that the district court reads with academic interest in the course of sentencing."³⁶

30. *Id.*

31. *Id.* at 739.

32. 133 S. Ct. 2072, 2078 (2013).

33. *Id.* at 2089 (Thomas, J., dissenting).

34. *Id.* at 2083 (citing *Gall v. United States*, 552 U.S. 38 (2007)).

35. *Id.* at 2084. (citing U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 63 (16th ed. 2011)).

36. *Id.* at 2087.

Not every empirical reality will be established in a study. Justice Sotomayor has demonstrated a willingness to look elsewhere to make sure the Court's cases are addressing what is going on in the world, rather than being abstracted from it. Often, that means a careful analysis of the record below, a skill she honed as both a state prosecutor and a trial judge.³⁷

For instance, in *Skilling v. United States*, she dissented from the Court's decision that Jeffrey Skilling of Enron "received a fair trial before an impartial jury."³⁸ In a lengthy dissent, Justice Sotomayor first combed the public record to show the sweep of the community's hostility to Enron in general and Skilling in particular.³⁹ She turned to the district court's jury selection process to "determine whether it instills confidence in the impartiality of the jury actually selected,"⁴⁰ noting that two-thirds of the prospective juror responses to written questionnaires gave answers suggesting a bias against Skilling.⁴¹ Her reading of the record was close and detailed, leading her to the conclusion that the district court's "5-hour voir dire was manifestly insufficient to identify and remove biased jurors."⁴² She criticized the district court for failing to pursue critical lines of inquiry with jurors, such as whether they had personal interactions related to Enron or if they would have difficulty avoiding talking about the case during the trial with family, friends or coworkers.⁴³ She worried that the district court failed to discuss with jurors whether they felt pressure to convict because of community sentiment.⁴⁴ Justice Sotomayor's dissent also closely examined the way the district court did pursue certain lines of inquiry and found it came up short because of a failure to ask open-ended questions that would explore in greater depth juror impressions of Enron and Skilling or to ask follow-up questions to probe more deeply troubling answers jurors gave. As she summed it up, "the *voir dire* transcript indicates that the District Court essentially took jurors at their word when they promised to be fair."⁴⁵ As long as a juror ultimately said he or she could be impartial, the district court

37. Kathleen Sullivan, Remarks at the Institutional Supreme Court panel at the Yale Law Journal Symposium on Justice Sotomayor's Early Jurisprudence (Feb. 3, 2014).

38. 130 S. Ct. 2896, 2942 (2010) (Sotomayor, J., concurring in part and dissenting in part).

39. *Id.* at 2942-46, 2954-56.

40. *Id.* at 2953.

41. *Id.* at 2956.

42. *Id.* at 2956.

43. *Id.* at 2957.

44. *Id.*

45. *Id.* at 2959.

accepted the answer. But Justice Sotomayor looked closely at answers that preceded these assurances and came away with greater doubts.⁴⁶

The opinion, in text and footnotes, was replete with examples of troublesome juror answers—including from those seated as jurors and alternates⁴⁷—that the district judge’s “anemic questioning” did little to probe.⁴⁸ Although the majority took heart that, of the seated jurors and alternates, eleven out of sixteen had no Enron connection, Justice Sotomayor focused on the fact that five of them did, a fact that did “not strike [her] as particularly reassuring.”⁴⁹ She interpreted this information differently because of her close reading of the record of what actually went on in the trial court.

Justice Sotomayor’s dissenting opinion in *Messerschmidt v. Millender*⁵⁰ is another case that reflects her meticulous reading of the record. Police officers in this case obtained a warrant to search the home of the former foster mother of a gang member, Bowen, in search of guns and gang-related material after Bowen had a domestic dispute with his ex-girlfriend. The majority concluded that the warrant was “not so obviously lacking in probable cause” that a reasonable officer would have recognized its shortcomings.⁵¹ The majority theorized that a reasonable officer could have viewed the altercation between Bowen and his girlfriend not as a mere domestic dispute but as gang-related because Bowen might have wanted to prevent the ex-girlfriend “from disclosing details of his gang activity to the police.”⁵² Justice Sotomayor demonstrated that this theory was at odds with the actual evidence in the record. She pointed to Detective Messerschmidt’s deposition, in which he admitted he had no reason to believe the assault was a gang crime.⁵³ She looked at police “Crime Analysis” forms to find that the officers did “not check off

46. *Id.*

47. *Id.* at 2960-63 and nn.23-24.

48. *Id.* at 2961.

49. *Id.* at n.21.

50. 132 S. Ct. 1235 (2012).

51. *Id.* at 1250. Justice Kagan concurred in part and dissented in part. She agreed with the majority “that a reasonably competent police officer could have thought this warrant valid in authorizing a search for all firearms and related items” but disagreed that such a reasonable officer could think it “valid in approving a search for evidence of ‘street gang membership.’” *Id.* at 1251 (Kagan, J., concurring in part and dissenting in part).

52. *Id.* at 1247 (majority opinion).

53. *Id.* at 1254 (Sotomayor, J., dissenting).

‘gang-related’ as a motive for the attack.”⁵⁴ She turned to interviews of the victim that also made clear that the crime was one of domestic violence.

In disagreeing with the majority that the officers could have reasonably concluded that they had probable cause to search for all firearms, she again turned to the record. She rejected the majority’s leap in assuming that, because Bowen had a gun in the apartment he shared with his ex-girlfriend, he must have other weapons and “be storing these other weapons at his 73-year-old former foster mother’s home.”⁵⁵ Again turning to Detective Messerschmidt’s deposition, she found that he did not share that belief.⁵⁶ Instead, the police searched for a gun at the foster mother’s home because of their view that the victim of the domestic assault may have been mistaken in her description of the gun used. But, as Justice Sotomayor highlighted, that argument flies in the face of the fact that the ex-girlfriend gave the police a photograph of Bowen holding the sawed-off shotgun used in the crime.⁵⁷

Justice Sotomayor’s dissent in *Messerschmidt* is heavily focused on institutional competence and the comparative advantage of the police officers and lower court judges over the Supreme Court in assessing the facts of the case.⁵⁸ She noted that, “[u]nlike the Members of this Court, Detective Messerschmidt alone had 14 years of experience as a peace officer, ‘hundreds of hours of instruction on the dynamics of gangs and gang trends,’ received ‘specialized training in the field of gang related crimes,’ and had been ‘involved in hundreds of gang related incidents, contacts, and or arrests.’”⁵⁹ In other words, she suggested that he knew what he was talking about in a way the Court’s majority did not. She also criticized the majority for second-guessing the facts as found by the trial court, noting that the majority’s decision is inconsistent with the Supreme Court’s own admonitions in other cases that appellate courts should not second-guess police judgments or facts as found by

54. *Id.*

55. *Id.* at 1258.

56. *Id.* (quoting the portion of the deposition where Detective Messerschmidt stated he did not have reason to believe there would be automatic weapons or handguns at the former foster mother’s home).

57. She also disagreed that “the warrant provided probable cause to believe any weapon possessed in a home in which 10 persons regularly lived—none of them a suspect in this case—was either ‘contraband or evidence of a crime.’” *Id.* (citing *Ornelas v. United States*, 517 U.S. 690 (1996)).

58. Sullivan, *supra* note 37.

59. *Id.* at 1255 (quoting Joint App. 53-54).

district courts.⁶⁰ She further observed that “[a]ll 13 federal judges who previously considered this case had little difficulty concluding that the police officers’ search for any gang-related material violated the Fourth Amendment” and that “a substantial majority agreed that the police’s search for both gang-related material and all firearms not only violated the Fourth Amendment, but was objectively unreasonable.”⁶¹

Often, Justice Sotomayor’s decisions are rooted in what she calls “common sense.” Indeed, it is a phrase that appears time and again in her criminal law decisions. In *Peugh*, she noted that “[c]ommon sense indicates that in general, the system will steer district courts to more within-Guidelines sentences.”⁶² In *J.D.B.*, she noted that “common sense” would allow officers and judges to take age into account even without a bright line rule.⁶³ In *Skilling*, she observed that the “commonsense understanding [is] that as the tide of public enmity rises, so too does the danger that the prejudices of the community will infiltrate the jury.”⁶⁴ In *Moncrieffe v. Holder*,⁶⁵ she wrote a majority opinion concluding that a non-citizen’s state conviction for possession with intent to distribute marijuana after police found an amount of marijuana in his car that was equivalent to about two or three marijuana cigarettes was not an “aggravated felony” under the Immigration and Nationality Act.⁶⁶ Her opinion criticized the government for staking out a view that his low-level drug offense amounted to “illicit trafficking in a controlled substance” that amounted to an “aggravated felony” because it defied “commonsense.”⁶⁷

Her sensitivity to how regular people view the world—to common sense—was on display in her concurring opinion in *United States v. Jones*.⁶⁸ She joined Justice Scalia’s opinion holding that the placement of a GPS tracking device by the government and the use of that device to monitor the vehicle’s movements was a search under the Fourth Amendment because the government

60. *Id.*

61. *Id.* at 1253.

62. *Peugh v. United States*, 133 S. Ct. 2072, 2084 (2013).

63. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2407 (2011) (noting that officers and judges “simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult”).

64. *Skilling v. United States*, 130 S. Ct. 2896, 2948 (2010) (Sotomayor, J., concurring in part and dissenting in part).

65. 133 S. Ct. 1678 (2013).

66. *Id.* at 1683.

67. *Id.* at 1693 (internal quotations and citations omitted).

68. 132 S. Ct. 945 (2012).

“physically occupied private property for the purpose of obtaining information.”⁶⁹ But her concurring opinion noted that the Court’s Fourth Amendment case law might need to be revised in light of the modern digital age. In particular, she observed that “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties” when “people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”⁷⁰

Another example of her attention to how average citizens approach the world and their relationship with the law comes from *Blueford v. Arkansas*.⁷¹ In *Blueford*, the Court considered a defendant’s double jeopardy challenge to being retried on charges of capital and first-degree murder after the jury foreperson in his first case told the judge in open court that the jury had unanimously agreed that the defendant was not guilty of capital or first-degree murder but were deadlocked on whether he was guilty of manslaughter.⁷² The jury did not reach the question of whether the defendant was guilty of negligent homicide because it followed the court’s instructions that before it could consider a lesser charge, it had to reach a unanimous conclusion on the greater charge. Because the jury could not reach a verdict on manslaughter, the court declared a mistrial. The majority concluded that the foreperson’s report of the jury’s deliberations on capital and first-degree murder were not a final resolution because the jury was free to revisit those decisions when it was still deliberating about manslaughter.⁷³

Justice Sotomayor disagreed in dissent, noting that “[t]he jury heard instructions and argument that it was required unanimously to acquit on capital and first-degree murder before it could reach manslaughter.”⁷⁴ The foreperson explained to the judge that “the jury followed those instructions scrupulously.”⁷⁵ Thus, even if the foreperson’s explanation of the jury’s votes on capital and first-degree murder was not an official verdict, it was in Justice

69. *Id.* at 949.

70. *Id.* at 957 (Sotomayor, J., concurring).

71. 132 S. Ct. 2044 (2012).

72. *Id.* at 2049.

73. *Id.* at 2051.

74. *Id.* at 2056 (Sotomayor, J., dissenting).

75. *Id.*

Sotomayor's view "a verdict in substance" that deserved double jeopardy protection.⁷⁶

The common theme in all these cases is Justice Sotomayor's focus on substance over formalism, on how actors on the ground actually behave as opposed to artificial presumptions.

II. THE VIRTUE OF DIVERSITY OF EXPERIENCE

The discussion in Part I emphasized cases in which Justice Sotomayor's vote was grounded in common sense and her deep knowledge of criminal law's operation on the ground. But those examples should not be read to suggest that Justice Sotomayor is willing to have common sense trump law. As other contributions to this symposium have made clear, she aims to be a faithful adherent to statutory text and not displace her views for those of the legislature.⁷⁷ But in those many areas of law where there is necessarily a gray area—for example, where a reasonableness standard governs or where the Court's creation of a test, such as *Miranda*, requires what is essentially common-law-like development of the boundaries of that test—Justice Sotomayor has shown that she is interested in making sure her decision is based on common sense. What she calls "common sense" comes from her life experience interacting with people from all walks of life, her deep knowledge of the criminal justice system, her meticulous attention to the record and the facts, her reading of empirical studies and expert assessments, and her observations of the real world and how average citizens behave in it.

And all of this is informed by her professional experience as a state prosecutor in a large urban area, which adds particular value to a Court that hears so many cases related to criminal law. Her prosecutorial experience was with the huge and varied caseload of the New York City district attorney's office. She was working in the core of America's criminal justice system, where the states handle more than ninety-nine percent of all criminal cases.⁷⁸ She saw

76. *Id.*

77. See Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. F. 499 (2014), <http://yalelawjournal.org/forum/uniformity-and-integrity-in-immigration-law>.

78. In 2010, for example, 20,437,849 (99.6%) criminal cases were filed in state courts; 77,287 (0.4%) were filed in federal courts. *Criminal Caseloads Continue to Decline: Criminal Graphics 1*, CT. STAT. PROJECT, (Sept. 24, 2012), <http://www.courtstatistics.org/Criminal/20121Criminal.aspx> (providing state case data under the "Get Data" hyperlink); *Table D: U.S. District Courts—Criminal Cases Commenced, Terminated, and Pending (Including Transfers) During the 12-Month Periods Ending March 31, 2009 and 2010*, U.S. CTS., <http://>

violent crimes, petty misdemeanors, and everything in between. The range of defendants and victims with whom she interacted reflect the broad spectrum of individuals who end up in the criminal justice system. She undoubtedly had a similarly sweeping range of experiences with the police officers who worked on her cases and the jurors who heard them, both in state court when she was a prosecutor and in federal court where she sat as a trial judge.

She was in the thick of things, which meant she saw the system, warts and all. And most critically, she met the people who participate in that system, so she could see firsthand how rules operated when applied by and to those people.

It is an experience with the criminal justice system that no other Justice on the current Court can match. No other Justice sat on a trial court, and only Justice Alito has on-the-ground criminal law experience, having served as an Assistant United States Attorney from 1977 to 1981 and as the United States Attorney for the District of New Jersey from 1987 to 1990. But the federal government handles a much smaller share of criminal cases, and the docket is not nearly as varied. Federal prosecutors “do not typically see the day-to-day carnage in neighborhoods from murders, rapes, burglaries, robberies and assault, or interact with the victims of those crimes.”⁷⁹ A large majority of the federal docket consists of drug and immigration cases.⁸⁰ The relevant investigators on a case are likely to be FBI agents, not local police officers, so their training and experience is quite different.⁸¹ Federal prosecutors usually have fewer jury trials than their state counterparts,⁸² another reason that federal

www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/DooCMario.pdf (last visited Feb. 18, 2014) (showing 77,287 cases filed in U.S. district courts between April 1, 2009 and March 31, 2010).

79. Barkow, *supra* note 2.

80. Department of Justice statistics for financial year 2012 show that, for the federal criminal docket, 41.8% of the filed cases were immigration and 22.1% were drug cases. *Fiscal Year 2012 Annual Statistical Report*, U.S. ATT’YS 10 (2012), http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf. Violent crimes made up 17.2% of the cases and 9.5% of the cases were white collar. *Id.*

81. See, e.g., Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81 (Nat’l Inst. of Justice ed., 2000), https://www.ncjrs.gov/criminal_justice2000/vol_2/o2d2.pdf (observing that “[w]hen [federal] agents seek to investigate ‘more episodic criminal activity,’ however, like murders, rapes, and street robberies, they generally must rely on help from local police departments, ‘the only entities whose tentacles reach every street corner’” (citations omitted)).

82. Guilty plea rates are high in both federal and state courts, but state prosecutors typically handle a much larger caseload. For example, in 2012, there were 15,107 pending cases in the

prosecutors tend to have less interaction with local communities and their direct experience with crime.⁸³

Justice Sotomayor's criminal law experience thus reflects the reality of criminal law administration in a way that Justice Alito's time in the federal system does not. That may help explain why her votes in these cases often put her in opposition to, rather than in alignment with, the views of Justice Alito.⁸⁴ While that can, of course, be attributed to the more traditional liberal/conservative divide in their outlook, the analysis in several criminal cases also suggests that this divergence stems from the different criminal justice experiences they bring. Justice Sotomayor's experience as both a trial judge and a state prosecutor in a large urban jurisdiction means that she saw the entirety of the criminal justice system and she is particularly attuned to how things play out on the ground in that system. Facts were the focus of her work for eleven years, and her opinions as a Justice make clear that she is still

criminal courts of New York County, 2,410 of which were pending felony cases. *Annual Report 2012*, CRIM. CT. OF CITY OF N.Y. 16 (2013), <http://www.nycourts.gov/COURTS/nyc/criminal/AnnualReport2012.pdf>. There were 257 trial verdicts in New York County in 2012. *Id.* at 51. These cases would have been divided among the roughly 500 prosecutors working in the Manhattan DA's Office. *Annual Report: Highlights From 2012*, N.Y. CNTY. DIST. ATT'Y'S OFF. 1 (2013), <http://manhattanda.org/sites/default/files/2012%20Annual%20Report%20Full.pdf>. In addition, state prosecutors handle a huge misdemeanor docket. There were 11,477 misdemeanors, infractions, violations, and other low-level offenses in New York County in 2012. *Annual Report 2012*, *supra*. By contrast, there were a total of 62 criminal cases disposed of by trial in the Southern District of New York in 2012. *Fiscal Year 2012 Annual Statistical Report*, *supra* note 80, at 31. Those would be divided among the "more than 220 Assistant United States Attorneys." *About the Southern District Office*, U.S. DEP'T JUST., <http://www.justice.gov/usao/nys/aboutsdny.html> (last visited Feb. 18, 2014).

83. Justice Alito's own experience reflects this. While he appeared in district court "in a number of proceedings," it does not appear that he had a great deal of trial experience before joining the Court. He stated in his response to a Senate questionnaire that as a practicing attorney he "focused almost exclusively on appellate matters," but did "serve as lead trial counsel in two criminal cases tried to verdict or judgment, one jury and one non-jury." He was also associate counsel in one jury trial. *Confirmation Hearing on the Nomination of Samuel A. Alito to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 78-79 (2006), <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg25429/html/CHRG-109shrg25429.htm>.
84. Of the 90 criminal and habeas cases decided since Justice Sotomayor joined the Court, she and Justice Alito have disagreed 40 times (44% disagreement rate). Sotomayor and Alito disagreed on 32 out of 66 criminal law cases (48%) and 8 out of 24 habeas cases (33%). These figures exclude summary reversals and cases where either Justices Sotomayor or Alito took no part. *Skilling v. United States*, 561 U.S. 358 (2010), is coded for these purposes as a disagreement because, while Sotomayor agreed with the Court in part, she dissented from its fair trial holding. For further explanation of the methodology used to calculate these figures, see *supra* note 5.

CRIMINAL JUSTICE IN THE REAL WORLD

just as interested in what happened as she is with the abstract legal issue or drawing formal lines that are divorced from the reality on the ground.

This focus on real-life actors and events is a particularly important perspective for the Court in criminal cases because the Court's legal rulings must operate in a complicated world and be carried out by regular people. These rulings are far from abstract once they hit the ground. In an ever-growing criminal justice system, these decisions interact with real people every day. Justice Sotomayor's opinions demonstrate that she is constantly alert to those real world impacts, and whether one agrees or disagrees with her conclusions in particular cases, it is hard to deny the benefit her vantage point brings to the Court's jurisprudence.

The influence of her background on how cases are decided and on which cases the Court hears⁸⁵ shows the value of professional experience diversity on the Court. A Court comprised exclusively of those with experience in federal government or appellate litigation would be a Court lacking critically important perspectives. Given the Court's docket, it is crucial that it have the perspective of individuals like Justice Sotomayor who have trial court and state-level experience. To be sure, the current Court is still missing important viewpoints, including those of individuals with experience as defense lawyers. But 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.

CONCLUSION

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.⁸⁶ As a

85. Her dissents from the denial of certiorari have predominantly been in criminal cases, which likely reflects her particular attention to key issues in that area. One can thus reasonably assume she plays a key role in influencing her colleagues on which cases to take, even if the dissents from the denial of certiorari shows those instances where her arguments were not successful. See Pincus, *supra* note 6.

86. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 309-10 (2013); *see also* Timothy R. Johnson et al., *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457, 512 (2007) (drawing on notes taken by Justice Blackmun at oral argument to suggest that he "may have been slightly more likely to note comments of those [Justices] he believed were experts in a particular area of law"). During Justice Sotomayor's nomination, Jonathan Adler predicted that Justice Sotomayor's criminal justice experience and "practical experience with sentencing defendants and trying to implement the Court's criminal law opinions in the context of actual trials and actual

result, one might expect that Justice Sotomayor will have an outsized influence on her colleagues in criminal cases. If her first five years on the Court are any indication, she is already well on her way, and the criminal justice system is improved as a result.

Rachel Barkow is the Segal Family Professor of Regulatory Law and Policy and Faculty Director of the Center on the Administration of Criminal Law at NYU School of Law. She is grateful to Billy Freeland for exceptional research assistance and to the Ford Foundation and to the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund at NYU for generous support.

Preferred citation: Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, 123 YALE L.J. F. 409 (2014), <http://yalelawjournal.org/forum/justice-sotomayor-and-criminal-justice-in-the-real-world>.

cases . . . will affect the way the Court writes about and explains . . . the criminal law area.” *Sotomayor Seen as Moderate on Criminal Justice*, NAT’L PUB. RADIO (July 7, 2009), <http://www.npr.org/templates/story/story.php?storyId=106358266>.