

## Reading *Michigan v. Bryant*, “Reading” Justice Sotomayor

I. Bennett Capers

*What are we to make of Justice Sotomayor’s criminal procedure jurisprudence? In this Essay, Professor I. Bennett Capers attempts to answer that question by offering three readings of her Confrontation Clause decision in Michigan v. Bryant. All three close readings, coupled with details from her memoir, serve as the basis for a “reading” of Justice Sotomayor. In toto, these readings reveal Justice Sotomayor to be precedent-bound, except when she’s not, and to be progressive, but not above using conservative methodologies to get her way. Ultimately, Professor Capers suggests that her approach offers some heartening signals and some possible dangers, but also reasons to hope.*

### INTRODUCTION

Almost daily, people ask me what I hope my legacy will be, as if the story were winding down, when really it has just begun. . . . My highest aspiration for my work on the Court is to grow in understanding beyond what I can foresee, beyond any borders visible from this vantage.

— Justice Sonia Sotomayor<sup>1</sup>

Five years into her tenure as a Supreme Court Justice, there is at least one thing that is beyond dispute: Justice Sotomayor is a rock star.<sup>2</sup> Much of this has to do with her background and the difference she brings to the Court, a difference she celebrates in her memoir, *My Beloved World*. How often does one

---

1. SONIA SOTOMAYOR, *MY BELOVED WORLD* 299 (2013).

2. See, e.g., Rebecca K. Lee, *Sonia Sotomayor: Role Model of Empathy and Purposeful Ambition*, 98 MINN. L. REV. 73 (2013) (reviewing SOTOMAYOR, *supra* note 1); Andrea Grossman, *The Judge and the Housewife: U.S. Justice Sonia Sotomayor and Eva Longoria in L.A.*, HUFFINGTON POST, Jan. 10, 2013, [http://www.huffingtonpost.com/andrea-grossman/the-judge-and-the-housewife\\_b\\_2443741.html](http://www.huffingtonpost.com/andrea-grossman/the-judge-and-the-housewife_b_2443741.html) (“United States Justice Sonia Sotomayor is a rock star.”); Jodi Kantor, *On Book-Tour Circuit, Sotomayor Sees a New Niche for a Justice*, N.Y. TIMES, Feb. 3, 2013, <http://www.nytimes.com/2013/02/04/us/politics/book-tour-rock-star-sotomayor-sees-an-even-higher-calling.html> (describing celebrity-like status of Justice Sotomayor as first Hispanic justice).

read a memoir from a Justice and find a Spanish language glossary at the end? For that matter, how often does one see, listed under the “family status” of a Supreme Court Justice, the word “lower”?<sup>3</sup>

But what of her jurisprudence, and specifically her criminal procedure jurisprudence? This Essay attempts to answer that question by focusing on one of her more well-known decisions, *Michigan v. Bryant*,<sup>4</sup> and to a lesser extent on her memoir. The argument I want to make is straightforward: That Justice Sotomayor is precedent-bound, except when she’s not. That she’s progressive, but not above using conservative methodologies to get her way. And while there’s much to applaud in her jurisprudence, there are dangers too. And hope.

This Essay proceeds as follows. Part I provides background to Justice Sotomayor’s decision in *Bryant* by describing the recent Confrontation Clause cases that preceded it. Part II then offers a “straight” reading of *Bryant*. Part III, the heart of this Essay, delves deeper to offer two additional readings of *Bryant*, one that reads “left” (focusing on the decision’s progressive agenda) and another that reads “right” (focusing on the decision’s conservative methodology). All three close readings, coupled with excerpts from her memoir, serve as the basis for my “reading” Justice Sotomayor. Some years ago, I described a Critical Race Theory practice of “reading back, reading black.”<sup>5</sup> Here, my use of the term “reading” is again grounded in Critical Race Theory, but this time with a touch of black gay culture as well.<sup>6</sup> So again, I end by “reading” Justice Sotomayor. In doing so, I note potential dangers. I note too my hope and expectations for Justice Sotomayor’s jurisprudence going forward.

## I. FIRST, THE SEA CHANGE

In 2004 the Supreme Court decided *Crawford v. Washington*,<sup>7</sup> and “set Confrontation doctrine on an entirely new footing.”<sup>8</sup> To borrow from Dan Capra, *Crawford* threw “a boulder into the placid waters of Confrontation Clause jurisprudence.”<sup>9</sup> The “placid waters” existed because in the twenty-five

---

3. See *Sonia Sotomayor*, OYEZ, [http://www.oyez.org/justices/sonia\\_sotomayor](http://www.oyez.org/justices/sonia_sotomayor) (last updated Mar. 10, 2014).

4. 131 S. Ct. 1143 (2011).

5. See I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 10 (2006).

6. See *Read*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=read> (last visited Mar. 12, 2014) (“To tell someone about themselves, mostly used by gay black men.”).

7. 541 U.S. 36 (2004).

8. GEORGE FISHER, *EVIDENCE* 589 (3d ed. 2013).

9. Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409, 2410 (2005).

years leading up to *Crawford*, the Confrontation Clause did very little independent gatekeeping. Indeed, under *Ohio v. Roberts*,<sup>10</sup> Confrontation Clause analysis essentially tracked the provisions governing hearsay in the Rules of Evidence.<sup>11</sup> In other words, if the out-of-court statement was relevant and fell under a hearsay exception, then in all likelihood admitting the statement did not offend the Sixth Amendment.<sup>12</sup> In this way, *Ohio v. Roberts* “virtually wrote the Confrontation Clause out of the Constitution.”<sup>13</sup>

This all changed with *Crawford*, a case involving the admission of a hearsay statement from an absent witness (a recorded interview, at the police precinct, with the defendant’s wife). Writing for a unanimous Court, Justice Scalia invoked the trial of Sir Walter Raleigh for treason, and the resulting statutory and judicial reforms, to conclude that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.”<sup>14</sup> In short, hearsay statements that were testimonial in form or function triggered Confrontation Clause concerns and thus normally required the presence at trial of the declarant. The Court accordingly held that the admission of Crawford’s wife’s hearsay statements against him, obtained as they were during a formal, recorded interview at the police precinct, were testimonial in nature. Thus, their admission violated the defendant’s confrontation rights.<sup>15</sup>

The impact of *Crawford* was immediate and particularly acute in domestic violence trials, which often relied on the initial out-of-court statements of

---

10. 448 U.S. 56 (1980).

11. Under *Roberts*, the Sixth Amendment did not bar admission of statements of an unavailable witness if the statements bore adequate “indicia of reliability,” which could be established if the evidence fell “within a firmly rooted hearsay exception” or otherwise bore “particularized guarantees of trustworthiness.” *Id.* at 66.

12. The *Ohio v. Roberts* approach itself was not without its critics and detractors. See, e.g., AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 125-31 (1997); John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191 (1999); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988).

13. Jason Widdison, Comment, *Michigan v. Bryant: The Ghost of Roberts and the Return of Reliability*, 47 GONZ. L. REV. 219, 225 (2011). Justice Marshall made a similar observation: “If ‘indicia of reliability’ are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all . . . .” *Dutton v. Evans*, 400 U.S. 74, 110 (1970) (Marshall, J., dissenting).

14. *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

15. *Id.*

victims now unwilling or too afraid to testify.<sup>16</sup> As such, it was perhaps not surprising that the next significant cases testing the contours of *Crawford*, the companion cases *Davis v. Washington* and *Hammon v. Indiana*,<sup>17</sup> involved domestic violence. In *Davis*, the defendant was convicted based in part on the admission of a frantic 911 call placed by his ex-girlfriend, Michelle McCottry.<sup>18</sup> (“He’s here jumpin’ on me again,” the ex-girlfriend cries on the tape. “He’s usin’ his fists.”<sup>19</sup>) In *Hammon*, the defendant was convicted based on oral and written statements his wife Amy made to the police during a response to a domestic violence call. (She told the police, and repeated in a battery affidavit, “Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn’t leave the house. Attacked my daughter.”<sup>20</sup>)

Justice Scalia again wrote on behalf of the Court, this time articulating a primary purpose test to determine “more precisely which interrogations produce testimony”<sup>21</sup> within the meaning of the Confrontation Clause:

Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>22</sup>

Applying this test, the Court held that the 911 statements at issue in *Davis* reflected an ongoing emergency, and as such were nontestimonial.<sup>23</sup> In contrast, the Court concluded that *Hammon* presented “no emergency in progress”;<sup>24</sup> because the wife’s statements “were neither a cry for help nor the provision of information enabling officers immediately to end a threatening

---

16. See, e.g., Robert Tharp, *Domestic Violence Cases Face New Test: Ruling that Suspects Can Confront Accusers Scares Some Victims from Court*, DALL. MORNING NEWS, July 6, 2004, at 1A.

17. 547 U.S. 813 (2006).

18. *Id.* at 817-18.

19. *Id.* at 817.

20. *Id.* at 820.

21. *Id.* at 822.

22. *Id.* (emphases added).

23. *Id.* at 828.

24. *Id.* at 829.

## READING MICHIGAN V. BRYANT

situation,”<sup>25</sup> they were testimonial.<sup>26</sup> The Court accordingly affirmed Davis’s conviction, and reversed Hammon’s.

All of this was before Justice Sotomayor was sworn onto the Court in August 2009, and presented with her own opportunity to weigh in on the Confrontation Clause in *Michigan v. Bryant*.

### II. MICHIGAN V. BRYANT

In March 2010, the Supreme Court granted certiorari in *Michigan v. Bryant*, a case involving the admission of out-of-court statements made to the police and accusing Bryant of murder.<sup>27</sup> For many observers, it seemed likely that the Court would find a Confrontation Clause violation, given the test articulated in *Crawford* and expounded upon in *Davis* and *Hammon*. Instead, the Court reached the opposite conclusion. The opinion, which received considerable media attention,<sup>28</sup> was authored by Justice Sotomayor.

Instead of domestic violence, *Bryant* involved the almost proverbial dying declaration.<sup>29</sup> At around 3:25 in the morning, police responding to a radio dispatch found Anthony Covington with a gunshot wound to his abdomen, dying in the parking lot of a gas station.<sup>30</sup> In response to questions about “[w]hat had happened, who had shot him, and where the shooting had occurred,” Covington disclosed that he had gone to Bryant’s house, and that Bryant had shot him through the back door.<sup>31</sup> Covington then fled, making it to the gas station.<sup>32</sup> The questioning continued for approximately five to ten

---

25. *Id.* at 832.

26. *Id.*

27. 599 U.S. 970 (2010) (mem.) (granting certiorari).

28. See, e.g., Adam Liptak, *Jury Can Hear Dying Man’s Words, Justices Say*, N.Y. TIMES, Feb. 28, 2011, <http://www.nytimes.com/2011/03/01/us/01scotus.html>.

29. Not only are dying declarations generally excluded from the ban against hearsay, see FED. R. EVID. 804(b)(2), but the Court had also intimated in *Crawford* that dying declarations, even if testimonial, were sui generis and would possibly be admissible as a historical exception to the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004); see also *Giles v. California*, 554 U.S. 353, 358 (2008) (noting an exception at common law for dying declarations); Peter Nicolas, “*I’m Dying to Tell You What Happened*”: *The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS CONST. L.Q. 487, 492 (2010) (observing that the *Giles* Court “effectively assumes that a dying declaration exception to the Confrontation Clause exists”). The *Bryant* Court declined to decide whether the victim’s statement would fall under a dying declaration historical exception to the Confrontation Clause since the State did not press that exception below, and instead relied entirely on the excited utterance exception. *Michigan v. Bryant*, 131 S. Ct. 1143, 1151 n.1 (2011).

30. *Bryant*, 131 S. Ct. at 1150.

31. *Id.*

32. *Id.*

minutes, until emergency medical services arrived and transported Covington to the hospital, where he died within hours.<sup>33</sup>

Although there was strong circumstantial evidence pointing to Bryant's guilt—a police search of Bryant's back porch revealed a bullet hole in the back door, a bullet on the porch, blood stains, and Covington's wallet nearby<sup>34</sup>—the most damning evidence was from the officers who repeated Covington's accusations.<sup>35</sup> And it was the admission of this testimony that Bryant challenged on appeal as a violation of his confrontation rights.

Reading “straight,” *Michigan v. Bryant* did not break with precedent, but rather faithfully applied the “primary purpose” test of *Crawford* and *Davis*. The law remained the same; the Court was simply applying it to a new context. As Justice Sotomayor, writing for the Court, observed:

Because *Davis* and *Hammon* arose in the domestic violence context, that was the situation “we had immediately in mind (for that was the case before us).” We now face a new context: a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim. Thus, we confront for the first time circumstances in which the “ongoing emergency” discussed in *Davis* extends beyond an initial victim to a potential threat to the responding police and the public at large.<sup>36</sup>

In this conventional telling, the majority mostly applied its existing “primary purpose/ongoing emergency” test to new facts, emphasizing that “whether an emergency exists and is ongoing is a highly context-dependent inquiry.”<sup>37</sup> Engaging in this inquiry, the majority concluded that here—because the suspect was still at large,<sup>38</sup> had used a firearm,<sup>39</sup> and posed a threat to first responders and the public in the way that those suspected of domestic violence

---

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1156 (internal citation omitted). Of course, that the Court found it necessary to clarify what it meant by “primary purpose” and “ongoing emergency” also reveals a larger problem with the process of interpretation, and specifically with the notion of original intent. The import of Justice Scalia's vigorous dissent in *Michigan v. Bryant* is that, “When we said X in *Crawford* and *Davis* (both opinions I authored) we meant X, not Y as the majority now claims.” But if the Court has difficulty determining what all nine Justices meant when they signed onto Justice Scalia's “primary purpose” test, how can the Court possibly determine what each of the Framers of the Constitution meant by a particular provision?

37. *Id.* at 1158.

38. *Id.*

39. *Id.* at 1158-59.

## READING *MICHIGAN V. BRYANT*

do not,<sup>40</sup> and because the victim’s medical state (here, he was fatally injured) could indicate the victim had “no purpose at all in answering the questions posed”<sup>41</sup>—the statements made by the victim were nontestimonial, and thus their admission at trial did not violate Bryant’s confrontation rights.<sup>42</sup>

There is nothing wrong with this conventional reading of *Michigan v. Bryant*. That said, it is rather conventional. And delving deeper reveals much more.

### III. RE-READING *MICHIGAN V. BRYANT*

This Part offers a second and third reading. The second reading suggests *Bryant* is subversive in two ways. First, it suggests that *Bryant*’s purported adherence to *Crawford* is deceptive: in fact *Bryant* is merely paying lip service to *Crawford* while laying the groundwork for its demise. Under this reading, *Bryant* may be *Crawford*’s direct progeny, but *Bryant*’s allegiance is to its predecessor, *Ohio v. Roberts*. Second, this reading suggests that *Bryant* is subversive insofar as it quietly neutralizes *Hammon*, the one post-*Crawford* decision to side with the defendant in a domestic violence case. For those who care about domestic violence and giving voice to those who are often voiceless, this reading of *Michigan v. Bryant* will likely be cheered. For some, this reading might even seem like reading “left,” at least in terms of what it accomplished substantively.<sup>43</sup>

The third reading responds to the second and says, “Not so fast.” This third reading argues that, while *Michigan v. Bryant* is progressive in terms of its substance, it relies heavily, if unintentionally, on conservative rhetoric, and in doing so potentially opens the door to arguments that many, including Justice Sotomayor, might find troubling. Its rhetoric is of a piece with the “culture of fear” that Jonathan Simon has written so eloquently about,<sup>44</sup> adds currency to

---

40. *Id.* at 1158.

41. *Id.* at 1161. Later, when the Court applies this standard, it is a bit more circumspect:

When he made the statements, Covington was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen. . . . From this description of his condition and report of his statements, we cannot say that a person in Covington’s situation would have had a “primary purpose” “to establish or prove past events potentially relevant to later criminal prosecution.”

*Id.* at 1165 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

42. *Id.* at 1167.

43. This is a generalization, of course. Still, I think it safe to say that if one were marking decisions along ideological lines, and if the concern for domestic violence victims takes precedence over the concern for their abusers, this reading would mark *Bryant* as a win for the “left.”

44. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

the problematic notion of the home as a private space shielded from criminal intervention, and provides weight to arguments that favor preventive detention and mass incarceration. Read this way, *Michigan v. Bryant* is not left at all—far from it.

#### A. Reading Left

Read “left,” *Bryant* pays lip service to *Crawford* while in fact laying the groundwork for *Crawford*’s demise and for the reinstatement of the reliability test of *Ohio v. Roberts*. It is on par with a recurring theme in Critical Race Theory: that of dismantling the master’s house using the master’s tools.<sup>45</sup> To be clear, one does not have dig very deep for support of this. The pro-*Ohio v. Roberts* references are explicit, and Justice Scalia spends much of his dissent attacking the majority for their apparently unsubtle attempt to revive *Roberts*.

Still, I think there is something subversive about how *Bryant* accomplishes this, a point I will get to shortly. But first, I want to offer another contribution and suggest that Justice Sotomayor’s opinion in *Bryant* was likely informed by her experience as a state prosecutor.<sup>46</sup> In particular, Justice Sotomayor had firsthand experience to call on in thinking through what *Crawford* meant on the ground—especially in domestic violence cases. As she states in her memoir, her second trial was a domestic violence case involving a fact pattern very similar to *Crawford*’s: a battered wife who had described her battering to the police, but

---

45. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995) (“Through jury nullification, I want to dismantle the master’s house with the master’s tools.”); Richard Delgado, *Derrick Bell’s Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 285 & n.11 (2000) (describing “how marginalized groups may sometimes, jiu-jitsu fashion, turn the master’s tools into a device for dismantling that famous house”); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1611 (1997) (“We use the master’s tools to try to dismantle the master’s house . . . .”); Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113 (2005). Scholars in other disciplines have also embraced this mantra. “Only the master’s tools,” says Henry Louis Gates, “will ever dismantle the master’s house.” Henry Gates, Jr., *Critical Remarks*, in ANATOMY OF RACISM 319, 326 (David Theo Goldberg ed., 1990). The “master’s tools” adage itself is a famous line from feminist and civil rights activist Audre Lorde. See AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in SISTER OUTSIDER: ESSAYS AND SPEECHES BY AUDRE LORDE 110, 112 (1984).

46. I am certainly not the first observer to identify certain episodes in a Justice’s life and speculate about how those episodes shaped his or her jurisprudence. See, e.g., LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* (2006); Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723 (1992).



was now “unwilling to testify against her husband” and who, on the first day of trial, “didn’t show.”<sup>47</sup>

Justice Sotomayor is certainly practical, and I do not think it a stretch to suggest that *Crawford*’s impact on prosecutors would have particular resonance for her. Simply put, Justice Sotomayor was likely acutely aware that *Crawford* made cases like the one prosecuted by Assistant District Attorney (ADA) Sotomayor very difficult, if not impossible.<sup>48</sup> To be clear, *Michigan v. Bryant* was not a domestic violence case. But it did present Justice Sotomayor with an opportunity to walk back some of the language in *Crawford* and *Davis*. Allow me another play on black gay vernacular here: *Bryant* presented Justice Sotomayor with an opportunity to bring some criminal procedure “realness” to the discussion.

What is interesting is that *Bryant* accomplishes this while purporting to apply *Crawford*. For example, Justice Sotomayor repeatedly uses reassuring, precedent-following language—e.g., “our recent Confrontation Clause cases have explained,”<sup>49</sup> “[i]mplicit in *Davis*,”<sup>50</sup> “[a]s we suggested in *Davis*,”<sup>51</sup> the “Michigan Supreme Court correctly understood,”<sup>52</sup> and “[f]ollowing our precedents, the court below correctly began its analysis”<sup>53</sup>—to suggest that the only task before the Court is the correct application of *Crawford* to the facts at hand, a task at which the lower court failed. Justice Sotomayor repeatedly suggests that the lower court’s mistake was its failure to recognize the unique facts before it.<sup>54</sup>

---

47. SOTOMAYOR, *supra* note 1, at 201.

48. Imagine ADA Sotomayor’s case. In that case, occurring as it did under the *Ohio v. Roberts* regime, the initial statements made by the wife to the police would likely have been admissible, even if she refused to testify, under the excited utterance or present sense impression exceptions to the ban against hearsay. Furthermore, as “firmly rooted” hearsay exceptions, the admission of these statements would not have offended the husband’s confrontation rights under the then-applicable constitutional rule. But post-*Crawford*, the result would likely be far different. The wife’s statements to the police, especially if her husband was already restrained, would more likely be considered testimonial and hence inadmissible at trial unless she herself testified. Securing a conviction would be significantly more difficult.

49. 131 S. Ct. 1143, 1157 (2011).

50. *Id.*

51. *Id.* at 1162.

52. *Id.* at 1156.

53. *Id.* at 1158.

54. Her one concession is related to this new context. She states that this “new context requires us to provide additional clarification as to what *Davis* meant by ‘the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.’” *Id.* at 1156 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). But beyond this concession, Justice Sotomayor implies that the majority is merely following precedent.

Against this backdrop, Justice Sotomayor found that the statements Covington made to the police as he was dying from a gunshot wound were nontestimonial. It was not that the Michigan Supreme Court applied the wrong law. It's that they failed to apprehend fully the particular facts of the case before them. Here, there was an ongoing emergency because the shooter was unknown and thus potentially posed a continuing threat to first responders and to the public. Here, because the assailant used a gun, the threat to the public was great. Here, the victim's injuries were so debilitating that, objectively speaking, his statements may not have been made with the purpose of future prosecution. And here, the informality of the interview – taking place as it did at the scene rather than, say, in an interview room at a precinct – could also support the conclusion that these statements were nontestimonial.<sup>55</sup>

But then Justice Sotomayor invokes, as if in passing, hearsay reliability:

Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such examinations to be subject to the crucible of cross-examination.

This logic [of focusing on whether there is an ongoing emergency such as to render a statement nontestimonial] is not unlike that justifying the excited utterance exception in hearsay law. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” Fed. Rule Evid. 803(2); see also Mich. Rule Evid. 803(2) (2010), are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood. An ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency.<sup>56</sup>

In short, Justice Sotomayor subtly shifts doctrine. And this shift – back to the reliability test of *Ohio v. Roberts* – was not lost on Justice Scalia, who shot back in dissent:

The Court announces that in future cases it will look to “standard rules of hearsay, designed to identify some statements as reliable,” when deciding whether a statement is testimonial. *Ohio v. Roberts* said something remarkably similar: An out-of-court statement is admissible if it “falls within a firmly rooted hearsay exception” or otherwise “bears adequate ‘indicia of reliability.’” . . . [D]oes [the Court] intend, by

---

55. See *id.* at 1158-62.

56. *Id.* at 1157 (citations omitted).

following today's illogical roadmap, to resurrect *Roberts* by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*?<sup>57</sup>

All of this is relatively straightforward, uncontroversial, and consistent with the view that places Justice Sotomayor, the former prosecutor, in the pragmatist camp.<sup>58</sup> What is less obvious, I think, is how *Bryant* operates not only to undermine *Crawford*'s broad reach, but also to undermine *Hammon*, the one domestic violence case in which the post-*Crawford* Supreme Court found a victim's statements to the police to be testimonial, and thus concluded that their admission at trial, through the testimony of the responding officers, was a violation of the defendant's Confrontation Clause rights.

Recall that in *Hammon*, police responding to a radio dispatch found Amy Hammon alone on her front porch. She told the police that her husband Hershel Hammon had broken furniture and shoved her on the floor into broken glass and hit her in the chest and threw her down again. He had attacked her daughter. Things were sufficiently fraught that the police restrained Hershel from intervening and kept him separate from Amy. With Hershel still visibly "angry," Amy repeated her statements in a battery affidavit at the scene.

What is interesting about these facts is how similar they are to the facts in *Bryant*, notwithstanding Justice Sotomayor's repeated claims to the contrary. In both cases the police respond to a radio dispatch and find a distraught and injured victim. In both cases, the distraught victims tell the police what happened. And in both cases the interviews are quick and informal. And yet in one, the Court concluded the statements were testimonial, and in the other not. The *Bryant* Court concentrated on the differences, to be sure, but these differences seem inconsequential in the grand scheme of things. The Court, through Justice Sotomayor, asserts that *Hammon* presented a "narrower zone of potential victims" than *Bryant*, which involved "threats to public safety."<sup>59</sup> But this can't be right. We know, for example, that individuals who engage in domestic violence often pose threats not only to their spouses and partners, but also to other occupants of the home (including children), to neighbors and strangers who attempt to intervene, and to police officers and social service workers.<sup>60</sup>

---

57. *Id.* at 1174-75 (Scalia, J., dissenting) (citations omitted).

58. See David Alan Sklansky, *Confrontation and Fairness*, 45 TEX. TECH L. REV. 103, 106 (2012) (arguing that Justice Sotomayor privileges reliability in Confrontation Clause analysis).

59. *Bryant*, 131 S. Ct. at 1158.

60. As Donna Wills observes, domestic violence "impacts everyone: children, neighbors, extended family, the workplace, hospital emergency rooms, good samaritans who were killed while trying to intervene." Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 174 (1997). Statistics from a Washington State study support this point. The study found that 313 domestic violence fatality cases involved a total

Similarly, the Court, through Justice Sotomayor, asserts that because Hammon used only his fists when he attacked his wife, removing his wife to a separate room was “sufficient to end the emergency.”<sup>61</sup> But this can’t be right either, and this interpretation seems to ignore patterns of abuse that escalate to homicide.<sup>62</sup> Justice Sotomayor also intimates that the medical state of Bryant’s victim could suggest that he had “no purpose at all in answering the questions posed; the answers may be simply reflexive.”<sup>63</sup> But this too is true of domestic violence victims like Amy, who may have had no purpose at all. Even more likely, she may have simply wanted her attacker “incapacitated temporarily,”<sup>64</sup> another possibility that Justice Sotomayor recognizes would take a statement out of the category of “testimonial.”<sup>65</sup>

My point here is not that Justice Sotomayor was unaware that the contexts in *Bryant* and *Hammon* were more similar than she was letting on. In fact, I suspect she was well aware.<sup>66</sup> After all, from her years as an ADA, she had personal experience with domestic violence offenders posing a threat not just to their spouses, but to complete strangers. Recall that ADA Sotomayor’s second trial was a domestic violence case. Her memoir discloses another detail relevant

---

of 416 deaths. The deaths included 23 children, 33 friends or family members of the primary victim, 19 current boyfriends of the primary victim, one co-worker of the primary victim, and three responding officers. See Kelly Starr et al., *Every Life Lost Is a Call for Change: Findings and Recommendations from the Washington State Domestic Violence Fatality Review*, WASH. ST. COAL. AGAINST DOMESTIC VIOLENCE 17-18 (Dec. 2004), <http://www.markwynn.com/wp-content/uploads/Washington-State-Fatality-Report.pdf>. A national study of officers murdered in the line of duty between 1996 and 2009 reported in *Police Chief Magazine* is equally revealing. Of the 771 law enforcement officers killed in the line of duty during this period, 14% were murdered responding to a domestic violence call for service. Shannon Meyer, *When Officers Die: Understanding Deadly Domestic Violence Calls for Service*, POLICE CHIEF MAG., May 2011, [http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=2378&issue\\_id=52011](http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2378&issue_id=52011).

61. *Bryant*, 131 S. Ct. at 1159.

62. See sources cited *supra* note 60.

63. *Bryant*, 131 S. Ct. at 1161.

64. *Id.*

65. *Id.* Indeed, that Amy Hammon was unwilling to testify at trial supports the notion that she never intended her statement to be “testimonial.”

66. As others have noted, Justice Sotomayor is particularly attentive to the facts and the record below. See, e.g., ANNA C. HENNING & KENNETH R. THOMAS, CONG. RESEARCH SERV., R40649, JUDGE SONIA SOTOMAYOR: ANALYSIS OF SELECTED OPINIONS 19 (2009), <http://www.fas.org/sgp/crs/misc/R40649.pdf> (commenting on Justice Sotomayor’s “meticulous evaluation of the particular facts at issue in a case”); Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, 123 YALE L.J. F. 409, 410 (2014), <http://yalelawjournal.org/forum/justice-sotomayor-and-criminal-justice-in-the-real-world> (“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.”). My point here is that Justice Sotomayor is not beyond emphasizing particular facts and de-emphasizing others as a means to an end.

here: the domestic abuser also assaulted a Good Samaritan who tried to intervene.<sup>67</sup> As such, Justice Sotomayor was likely aware that there can be ongoing threats in both domestic violence and homicide cases.

Rather, I suspect that Justice Sotomayor was up to something far more subversive, at least with respect to the substance of her decision: I suspect that she was laying the groundwork for lower courts to reconsider *Hammon* in light of *Bryant*. Stated differently, her “weak” distinction of *Hammon* (or what Justice Scalia would describe as her “transparently false” tale)<sup>68</sup> allows lower courts to literally re-read *Hammon* as, in fact, a case involving nontestimonial statements. In short, without expressly overruling *Hammon*, *Bryant* does the next best thing: it provides lower courts with the ammunition to neutralize it.<sup>69</sup>

Because some will interpret this as a bold claim, let me say it again. I think what Justice Sotomayor has done in *Bryant* is quietly subversive: on the surface, she claims that the statements at issue in *Bryant* are nontestimonial because they were made in a context different from that in *Hammon*; but beneath the surface, her real message seems to be that the contexts are not so different after all, that we should view the statements at issue in both cases as nontestimonial. Since I have already used the expression “paying lip service,” allow me to invoke another speech-related expression: Justice Sotomayor is speaking out of both sides of her mouth. To be clear, I am not using this term to be critical of Justice Sotomayor. Far from it. For those of us who care about domestic violence and giving voice to those who are often voiceless, Justice Sotomayor has provided hope through a non-domestic-violence case, *Michigan v. Bryant*. Justice Sotomayor has set the groundwork—through her invocation of *Ohio v. Roberts*’s reliability test, through her weak distinction of *Bryant* and *Hammon*—to treat more statements describing domestic abuse, made in response to on-the-scene police questioning, as admissible even when victims are too afraid to testify at trial. Under this reading, even the victim in ADA Sotomayor’s early trial would likely be allowed a voice.

### B. Reading Right

But there is yet a third way to read *Michigan v. Bryant*. This reading focuses less on Justice Sotomayor’s endgame—the revivification of *Roberts* and neutralization of *Hammon*—and more on the rhetoric Justice Sotomayor deploys to secure this outcome. Though the outcome is “left,” much of the

---

67. SOTOMAYOR, *supra* note 1, at 201; *see also supra* note **Error! Bookmark not defined.** and accompanying text.

68. *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting).

69. For discussion of some of the leeway lower courts have had in applying *Crawford*, see Dylan O. Keenan, Note, *Confronting Crawford v. Washington in the Lower Courts*, 122 YALE L.J. 782 (2012).

rhetoric is in fact “right-friendly.” My concern here, in this brief section, is that Justice Sotomayor’s majority opinion can easily be read, or rather misread, as of a piece with larger efforts to perpetuate a “culture of fear.” The danger is that her language is ripe for being co-opted by the right.

Perhaps nowhere is this more obvious than in Justice Sotomayor’s assertion that because Bryant had used a firearm, and because nothing the victim said to the police in the first few minutes “indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended,” the “potential scope of the dispute and therefore the emergency” stretched broadly, rendering this an ongoing emergency and the statements nontestimonial.<sup>70</sup> This does more than simply downplay what the police did know—that the victim had gone to Bryant’s house and knew Bryant by name, which does suggest a private dispute. It conveniently but troublingly casts every armed defendant as a potential mass shooter, another James Holmes, Adam Lanza, or Jared Loughner, at least until he is “disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public.”<sup>71</sup> To be clear, I am not suggesting here that Bryant presented no danger at all. But I doubt that he presented anything approaching the danger Justice Sotomayor described. As Justice Scalia observed in dissent, none of the officers’ actions “indicated that they perceived an imminent threat. They did not draw their weapons, [nor did they] search the gas station for potential shooters.”<sup>72</sup>

So the question must be asked: what does it do to the culture when the Supreme Court suggests that every shooter at large presents an ongoing threat to the public, especially when about a third of all homicides in the United States currently go unsolved? How does Justice Sotomayor’s repeated linkage of danger and public spaces (“We now face a new context: a nondomestic dispute, involving a victim found in a public location”<sup>73</sup>) fit into notions that not only designate the home as a private sphere, but also a less serious one for criminal law intervention?<sup>74</sup> How does this narrative of ongoing danger play

---

70. *Bryant*, 131 S. Ct. at 1163-64.

71. *Id.* at 1159.

72. *Id.* at 1171 (Scalia, J., dissenting).

73. *Id.* at 1156 (majority opinion).

74. For discussion of these issues, see JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* (2009); and I. Bennett Capers, *Home Is Where the Crime Is*, 109 MICH. L. REV. 979 (2011). Particularly troubling is the assertion, taken from *Hammon* but repeated in *Bryant*, that although a husband had minutes earlier shoved his wife down on the floor into broken glass, hit her in the chest, thrown her down again, and attacked her daughter, there was “no emergency in progress.” *Bryant*, 131 S. Ct. at 1154 (quoting *Hammon v. Indiana*, 547 U.S. 813, 829 (2006)). I suspect we may one day view this language with the same discomfit with which we view Justice White’s assertion in *Coker v. Georgia*, a case in which a woman was forcibly raped at knifepoint, that the victim was “unharmd.” *Coker v. Georgia*, 433 U.S. 584, 587 (1977).

into police uses of excessive force, or the ratcheting up of stop-and-frisks in cities like New York, purportedly to ensure officer safety? How does this narrative play into public fears about increasing crime rates, even in the face of evidence to the contrary? At a time when so many of us are concerned about the normalization of mass incarceration—when we live in a country that, between 1970 and 2005, increased its prison population by 628%, and now incarcerates 25% of all of the prisoners in the world—what does Justice Sotomayor’s language about ongoing danger to the public do?<sup>75</sup> And how does it fit into the NRA’s argument—yes, I’m simplifying here, but still—that we all should be armed?

And here is my ultimate concern. I mentioned earlier that it is not uncommon for Critical Race Theorists to invoke the notion of using the master’s tools to dismantle the master’s house, and that my second reading of *Michigan v. Bryant* is consistent with this notion. In truth, the actual expression, which comes from the poet Audre Lorde, is that the master’s tools can *never* destroy the master’s house.<sup>76</sup> The master’s tools can only provide fleeting victories. Rather, what is needed to effect real change is new tools. All of which raises the question: Justice Sotomayor may have been successful in designing a return to *Roberts* and the neutralization of *Hammon*—but in doing so, has she left the house intact? And by using the master’s tools—legal precedent and law-and-order rhetoric—is it possible, really, to do otherwise?

### C. “Reading” Justice Sotomayor

I have now offered three readings of *Michigan v. Bryant*. The first, rather conventional reading takes *Bryant* at its word: that it is staying true to *Crawford*. The second reads *Bryant* as subversively undermining both *Crawford* and *Hammon* in a way that gestures towards the resuscitation of *Ohio v. Roberts* and will further justice, especially in domestic violence cases.<sup>77</sup> The third cautions that *Bryant*, though “left” in result, accomplished this result by deploying “right-friendly” rhetoric; rhetoric that can easily be (mis)read or co-

---

75. Some years ago, Stephanos Bibas queried whether Justice Scalia had positioned himself as an “unlikely friend” of criminal defendants in *Crawford*. See Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005). Linda Greenhouse made a similar observation. See Linda Greenhouse, *Supreme Court Roundup; Court Alters Rule on Statements of Unavailable Witnesses*, N.Y. TIMES, March 9, 2004, <http://www.nytimes.com/2004/03/09/us/supreme-court-roundup-court-alters-rule-on-statements-of-unavailable-witnesses.html>. My questions here ask how Justice Sotomayor has positioned herself, not just for criminal defendants, but for us all.

76. See LORDE, *supra* note 45, at 112.

77. Presumably this would be the case if trustworthy out-of-court statements were admissible against criminal defendants.

opted to a culture of fear and the kind of policing that follows such a culture. In a way, all three readings are part of my way of “reading” Justice Sotomayor. Put differently, all three readings are part of my saying, “I think I know what you’re up to.”<sup>78</sup> Part of me likes it. But part of me worries about the unintended consequences.” But there is more to “reading” someone than simply knowing “exactly where another person is ‘coming from’ and telling the person about it esp[ecially] in front of the crowd if any.”<sup>79</sup> To read someone can also be to inform someone, to share input, to offer friendly advice, “no tea, no shade.”<sup>80</sup> To read someone can include, “Girl, I know you think X, but have you considered Y?”

I believe this constructive aspect of reading segues nicely into the question of just how the Confrontation Clause should be interpreted. It is here that I advance an argument put forward by David Alan Sklansky.<sup>81</sup> I advance his argument here for two reasons. One, I think it is sensible. And two, if it is true, as Chief Justice Roberts has suggested, that legal scholarship is increasingly irrelevant to judicial decisionmaking,<sup>82</sup> then maybe I can do my bit to change that by taking advantage of this opportunity to have a potential audience in Justice Sotomayor. Sklansky’s suggestion is wonderfully straightforward: that in muddling through what the Confrontation Clause means and how it should be applied, we should not lose sight of the primary reason we have the Sixth Amendment and more broadly the Bill of Rights: to safeguard the fairness of criminal proceedings.<sup>83</sup> In short, beyond the goal of fidelity to the literal text with questionable citations to Webster’s dictionary, beyond the goal of

---

78. An example of this is the way Justice Sotomayor, known for her commitment to the facts, see *supra* note 66, is more than capable of “massaging” the facts when it serves her purpose. As my readings suggest, she is also sensitive to *other* facts, i.e., the realities of most domestic violence cases.

79. The quoted definition is from the Online Slang Dictionary. See *Definition of Read*, ONLINE SLANG DICTIONARY, <http://onlineslangdictionary.com/meaning-definition-of/read> (last visited Mar. 9, 2014). A similar definition appears in the Urban Dictionary. See *Read*, *supra* note 6.

80. “No tea, no shade” can be translated as, “No disrespect, but I need to tell you how it really is.” A similar definition appears in the Urban Dictionary. See *No Tea No Shade*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=No+Tea+No+Shade> (last visited Mar. 12, 2014) (“A phrase you add at the beginning or the end of a sentence that can be seen as negative to somebody, but its not supposed to be, and just stating the obvious.”).

81. See Sklansky, *supra* note 58.

82. Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J.: LAW BLOG (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more>; cf. Daniel Solove, *Chief Justice Roberts and Legal Scholarship*, CONCURRING OPINIONS (Apr. 8, 2010, 12:26 PM), <http://www.concurringopinions.com/archives/2010/04/chief-justice-roberts-and-legal-scholarship.html> (finding Chief Justice Roberts’s view “kind of glib and dismissive”).

83. Sklansky, *supra* note 58, at 103.



practicality or pragmatism that seems to inform the outcome of recent Confrontation Clause decisions—think not just of *Bryant*, but also of *Giles v. California*<sup>84</sup> and *Melendez-Diaz v. Massachusetts*<sup>85</sup>—there should also be the goal of providing a fair trial and securing justice.

After all, as Sklansky reminds us, when the Court unanimously ruled in *Pointer v. Texas*<sup>86</sup> that the Sixth Amendment’s Confrontation Clause had been incorporated by the Due Process Clause of the Fourteenth Amendment, and thus was binding on the states, the Court offered a reason that bears repeating: the right of an accused to confront and cross-examine the witnesses against him is “essential” and “fundamental . . . for the kind of fair trial which is this country’s constitutional goal.”<sup>87</sup> To again borrow from Sklansky: “The ordinary, working assumption of the law is that ambiguous language should be interpreted with an eye to its underlying aims. Interpreting the Confrontation Clause without regard for its purpose seems like a bad idea. It seems like a good way to allow the purpose to get lost.”<sup>88</sup> Of course, to say that the Confrontation Clause should be interpreted in light of its underlying goal of fairness does not necessarily answer what test or rule should emerge. But it does set a starting point.<sup>89</sup> And an ending point. The task is simply to heed it.

---

84. 554 U.S. 353 (2008). In *Giles*, the Court announced a strict standard for determining when a defendant has forfeited his Confrontation Clause rights, but then applied that standard liberally to the domestic violence case at hand. As George Fisher put it:

At least in the context of *Giles*, then, the Justices’ long originalist debate was neither here nor there. In the modern realm of domestic-violence prosecutions, the Justices seemed prepared in many cases to infer from the course of abuse the defendant’s purpose to keep his victim from the witness stand.

FISHER, *supra* note 8, at 624.

85. 557 U.S. 305 (2009). In *Melendez-Diaz*, the Court hinted at a pragmatic solution to the confrontation problem by introducing lab reports created by non-testifying witnesses at trial. That solution is now being incorporated into the Federal Rules of Evidence. See FED. R. EVID. 803(10) (proposed amendment) (allowing for a certification and waiver process).

86. 380 U.S. 400 (1965).

87. *Id.* at 405.

88. Sklansky, *supra* note 58, at 108.

89. Sklansky observes that we:

could start from the proposition that [the Confrontation Clause] was aimed at making trials fair and could use that aim as guidance in fleshing out the content of the right to confrontation—not by assuming anything fair counts as adequate confrontation, but by interpreting the right in ways that promote the underlying objective of fairness.

*Id.* at 106.

**CONCLUSION**

In the foregoing, I have offered three readings of *Michigan v. Bryant*. But still, I am left with questions. As a critical race theorist, I am reminded of those questions Margaret Montoya had as a student of criminal law, wanting to know about the lives of the people in the cases.<sup>90</sup> I am reminded too of Mari Matsuda's admonishment that we remember to "look to the bottom"<sup>91</sup> and "ask the other question."<sup>92</sup> These are the questions I find myself still asking. What happened to Amy Hammon? What happened to Michelle McCottry? Are they okay, and have we protected them?

Although my goal in this Essay has been to assess Justice Sotomayor's legacy thus far, I also want to express my hope. My hope is that Justice Sotomayor will always remember to ask the other question and look to the bottom, that she will remember that the Bill of Rights is about fairness. And that in cases before her, she will not lose sight of the lives that, literally, come before the law. One passage from her memoir gives me this hope, and I accordingly end with it. The passage appears in the middle of the book, and at the start of her legal career. The passage is so brief that to many, it may seem inconsequential, mere filler. In the passage, she recounts being approached by a Legal Aid lawyer about a defendant who was facing reincarceration on a parole violation. Justice Sotomayor writes:

Her client had lived his entire life in institutions, foster care followed by twenty years in prison for killing a man in a fight. Then, released on lifetime parole, he had been given no support but a bus token. Without life skills, unable to find a job, he survived by selling copper pipes that he stripped from a derelict building, not fully aware that this was theft. The terms of his parole were such that a single violation, even a plea to a reduced charge of disorderly conduct, would have sent him back to state prison. There was something about this man that made [the Legal Aid attorney] trust him. All things considered, he wasn't doing so badly. He hadn't been dealing drugs; he hadn't robbed anyone. He wouldn't have been stealing pipes if he'd had any help finding a job. He had even met a girl and was in love . . . . [The Legal Aid attorney] talked me into accepting an ACD, an adjournment in contemplation of

---

90. See Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/making the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994).

91. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

92. See Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (proposing "asking the other question" as a method of uncovering and understanding how different forms of subordination interact).

dismissal, and she got him into a job program. If he stayed out of trouble for six months the charge would be dismissed.<sup>93</sup>

Already, the passage speaks of compassion, of her trusting “the voice in my own head that occasionally whispered: how about exercising a little discretion; having a little faith in human nature.”<sup>94</sup> It speaks too of her faith in the “enduring potential for redemption.”<sup>95</sup> But the passage doesn’t end there. It continues:

One day, two years later, he would be waiting for me outside the courtroom. He introduced himself, shook my hand. “You don’t remember me,” he said. “I’m the guy who was stealing the pipes.” He had found a job and been promoted to supervisor. He had also married his girlfriend. By now, they had one child and were expecting another.<sup>96</sup>

My hope is that Justice Sotomayor’s decision to include this exchange speaks volumes, and bodes well not just for Justice Sotomayor, or the future of criminal procedure, but the future of criminal justice as well.

*I. Bennett Capers is a Professor of Law at Brooklyn Law School. He holds a B.A. from Princeton University and J.D. from Columbia Law School, and was an Assistant U.S. Attorney for the Southern District of New York from 1995-2004. For quick research help, he is indebted to his research assistants, Janeen Hall, Tobias Schad, and Samantha Simchowit, and to his librarian, Kathleen Darvil.*

Preferred citation: I. Bennett Capers, *Reading Michigan v. Bryant*, “Reading” *Justice Sotomayor*, 123 YALE L.J. F. 427 (2014), <http://yalelawjournal.org/forum/reading-michigan-v-bryant-reading-justice-sotomayor>.

---

93. SOTOMAYOR, *supra* note 1, at 299.

94. *Id.* at 205.

95. *Id.* at 237.

96. *Id.* at 299.