ESSAYS

THE GROWING DIVIDE OVER CRIMINAL JUSTICE BETWEEN PRESIDENT OBAMA'S SUPREME COURT APPOINTEES

DANIEL HARRIS*

ABSTRACT

Three U.S. Supreme Court cases from 2020, together with similar cases from earlier years, illustrate a striking difference between President Obama's two appointees to the Court. In cases involving the administration of criminal justice by State and local governments, Justice Sotomayor is willing to vote against law enforcement even when no one else on the Court agrees with her. Justice Kagan is willing to vote for law enforcement even if her only allies are Republican appointees. In the local criminal justice cases in which the two Justices disagree, they differ in perspective and philosophy as well as result. Justice Sotomayor is apt to see issues through the eyes of those subjected to governmental power while Justice Kagan has more the perspective of those entrusted with the responsibility of protecting the community. Justice Sotomayor sees clear rules and fixed principles that must be strictly enforced whereas Justice Kagan is more inclined to see indeterminate standards that give government officials substantial discretion.

INTRODUCTION

In the Supreme Court's recently completed October 2019 term, Justice Elena Kagan voted for law enforcement in three out of six cases involving the administration of criminal justice by State or local governments. Justice Sonia Sotomayor voted against law enforcement in all six cases.[1]

Empirical studies published in 2015, 2016, and 2017 also found Justice Kagan more likely than Justice Sotomayor to side with law enforcement. More specifically, in the Supreme Court's October 2013 term, Justice Kagan voted for the government in 57.1% of the criminal justice cases while Justice

* Adjunct Professor of Agency Law, Chicago-Kent College of Law.

1. The three cases in which the two Justices disagreed are Kahler v. Kansas, 140 S. Ct. 1021 (2020); Kansas v. Glover, 140 S. Ct. 1183 (2020); and Ramos v. Louisiana, 140 S. Ct. 1390 (2020). The three cases in which they agreed are Kansas v. Garcia, 140 S. Ct. 791 (2020) (both Justices dissented from holding that Kansas statutes regulating fraudulent use of Social Security numbers are not preempted); McKinney v. Arizona, 140 S. Ct. 702 (2020) (both Justices dissented from ruling for the government in a death penalty case); and Andrus v. Texas, 140 S. Ct. 1875 (2020) (both Justices concurred in ruling against the government in a death penalty case).

Sotomayor was on the government side 42.9% of the time.[2] In the October 2014 term, the comparable percentages were 25% for Justice Kagan compared to 20% for Justice Sotomayor.[3] In the October 2015 term, the pro-law enforcement percentages were 48% for Justice Kagan and 32% for Justice Sotomayor.[4]

A close look at the criminal justice cases in which the two Justices disagreed and one or both wrote opinions indicates their systematic disagreements have been concentrated in cases involving State or local governments. In federal prosecutions, Justice Kagan has been about as likely as Justice Sotomayor to vote against the government.[5] By contrast, as will be shown below, in the local criminal justice cases in which the two Justices differed and one or both wrote, Justice Sotomayor almost always voted against law enforcement.

So why would two Justices who normally agree with each other[6] be more apt to disagree in cases involving local criminal justice? Why would their disagreements be systematic rather than random? One explanation is that they approach local criminal justice cases from different perspectives and with different empathies.

Justice Kagan is a veteran of the Clinton White House who wrote in support of Presidential power when she was a law professor, arguing executive officials need to be trusted with reasonable discretion.[7] Justice Kagan strives to be balanced in her empathies.[8] That includes empathy for government, the side she knows best.

Justice Sotomayor grew up in a public housing project in the South Bronx and identifies with the community of her youth.[9] She is attuned to the perspective of those who distrust the police[10] and shares the concerns of minority communities about the real world dangers posed by local law

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2. *See* Madhavi M. McCall et al., *Criminal Justice and the 2013–2014 United States Supreme Court Term*, 38 HAMLINE L. REV. 361, 365, 368 (2015).

3. *See* Michael A. McCall et al., *Criminal Justice and the 2014–2015 United States Supreme Court Term*, 61 S.D. L. REV. 242, 245, 249 (2016).

4. *See* Michael A. McCall et al., *Criminal Justice and the 2015–16 United States Supreme Court Term*, 53 WILLAMETTE L. REV. 185, 189, 193, 199 (2017).

5. *See, e.g.*, Lockhart v. United States, 136 S. Ct. 958 (2016) (Justice Sotomayor majority opinion for the government; Justice Kagan dissent siding with the accused).

6. *See* Adam Feldman, *Final Stat Pack for October Term 2019*, SCOTUSBLOG (July 20, 2020), https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf (88% agreement in the 2019 term).

7. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

8. *See* Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J. L. & POL. 123, 135–38 (2011) (analyzing Justice Kagan's confirmation hearing testimony).

9. *See* Veronica Couzo, Note, *Sotomayor's Empathy Moves the Court a Step Closer to Equitable Adjudication*, 89 NOTRE DAME L. REV. 403, 412 (2013).

10. *See generally* David Fontana, *The People's Justice?*, 123 YALE L.J. F. 447 (2014); *accord* Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002).

enforcement.[11] A 2017 article described her position in the Court in criminal justice cases: "Justice Sotomayor ranked as the most dependable supporter of claims by the criminally accused or convicted for the fourth consecutive year."[12] The article called Justice Sotomayor's dissents in criminal justice cases "a remarkable body of work from an increasingly skeptical student of the criminal justice system, one who has concluded that it is clouded by arrogance and machismo and warped by bad faith and racism."[13]

Interestingly, the substantive disagreements between Justice Sotomayor and Justice Kagan have been accompanied by jurisprudential differences. To set a frame, consider the distinction between formalism and realism set forth in a 2019 article by Gillian Metzger: "The classical image of law as fixed, determinate, and categorically distinct from policy is highly formalist, whereas the view of law as indeterminate and inevitably entailing policy choice typifies legal realism."[14] Measured by these poles in the local criminal justice cases in which they disagreed and one or both wrote, Justice Sotomayor tended toward formalism while Justice Kagan inclined toward the realist (or pragmatic) approach. Justice Sotomayor was apt to find clear, fixed constitutional rules that must be strictly followed. Justice Kagan was more likely to treat law as largely indeterminate, subject to practical considerations and affording reasonable discretion to today's decision-makers.

These differences are striking. Justice Sotomayor is generally at least as pragmatic as Justice Kagan.[15] Justice Sotomayor's formalism in local criminal justice cases suggests that jurisprudential preferences may depend on context and that formalism, despite its association with the political Right,[16] may be used by those on the Left who want to restrain prosecutors and police.[17]

To explore these issues, this Essay examines nine local criminal justice cases in which Justice Sotomayor and Justice Kagan were on opposite sides and

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11. *See* Fontana, *supra* note 10; *see also* Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 610 (2011) (citations omitted) (President Obama said that one of the reasons he nominated Justice Sotomayor was that her life experiences gave her "an understanding of how the world works and how ordinary people live.").

12. McCall et al., *supra* note 4, at 199.

13. *Id.* at 189–90 (quoting Adam Liptak, *Sotomayor, in Dissents, Tackles Criminal Justice*, N.Y. TIMES (July 5, 2016), https://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html).

14. Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 41 (2020).

15. *See* Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1674–75 (2016).

16. *See* Margaret H. Lemos, *The Politics of Statutory Construction*, 89 NOTRE DAME L. REV. 849, 901 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)).

17. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 410 (1991) ("Formalism . . . embodies a relatively antigovernmental philosophy.").

one or both wrote opinions. Part I examines three cases from 2020. Part II looks at six earlier cases. In all of these cases, Justice Sotomayor took the side of the individual and Justice Kagan sided, in whole or in part, with the government.[18] The final Part draws conclusions about the differences between the two Justices in these cases.

I. RECENT CASES

A. Kahler v. Kansas *(2020)*[19]

In Kansas, on Thanksgiving weekend of 2009, James Kahler shot and killed his estranged wife, his mother-in-law and his two daughters. He surrendered to the police the next day and was charged with capital murder.[20] Before his trial, Kahler filed a motion challenging the constitutionality of a Kansas statute that modified the insanity defense.[21] Under the Kansas law, the defendant's mental illness was a defense only if the illness prevented the defendant from forming the intent necessary to commit the crime, such as when the defendant did not know what he or she was doing. Insanity was not a defense (although it could be considered at sentencing) if the mental illness only prevented the defendant from appreciating the moral culpability of his or her conduct.[22] The trial court denied Kahler's motion, leaving Kahler to attempt to show that his severe depression prevented him from forming the necessary criminal intent. The jury found Kahler guilty. At the penalty phase, the trial judge allowed Kahler to offer evidence of his mental illness and to argue in "whatever way he liked that it should mitigate his sentence. The jury still decided to impose the death penalty."[23]

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18. In the interests of brevity and focus, this Essay does not cover all of the local criminal justice cases in which Justice Sotomayor and Justice Kagan have differed and one or both wrote opinions. This Essay omits two older cases in which Justice Kagan did not write opinions, *see* Perry v. New Hampshire, 565 U.S. 228 (2012), *and* Cullen v. Pinholster, 563 U.S. 170 (2011); a case in which Justice Sotomayor would have dismissed certiorari as improvidently granted and not reached the merits, *see* Kansas v. Carr, 136 S. Ct. 633, 646 (2016) (Sotomayor, J., dissenting); and three cases presenting tangential issues: a case about whether a state court denial of a habeas petition was subject to de novo review under the federal habeas corpus statute, *see* Kernan v. Hinojosa, 136 S. Ct. 1603 (2016); a case about the statute of limitations in cases brought under 42 U.S.C. § 1983, *see* McDonough v. Smith, 139 S. Ct. 2149 (2019); and a case about whether Puerto Rico is a separate sovereign for purposes of being able to prosecute individuals who have already been prosecuted by the federal government, *see* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016). In all but one of these cases, Justice Sotomayor voted against law enforcement. The one exception was the case involving Puerto Rico's sovereignty.

19. Kahler v. Kansas, 140 S. Ct. 1021 (2020).

20. *See id.* at 1026–27.

21. *See id.* at 1027.

22. *See id.* at 1024.

23. *Id.* at 1027.

In the Supreme Court, Kahler argued that the defense of not guilty by reason of insanity because of mental incapacity to appreciate the moral wrongfulness of one's conduct was so deeply imbedded in our jurisprudence at the time of the nation's founding that the Kansas statute violated the Due Process Clause of the Fourteenth Amendment. The Supreme Court rejected that argument by a vote of six to three. The majority opinion by Justice Kagan reviewed the traditional common law's treatment of the insanity defense and found that it was unclear. Some authorities said that defendants should be considered insane if they were incapable of telling moral right from wrong, while other authorities indicated that the insanity defense was for defendants who did not understand what they were doing.[24] Justice Kagan concluded: "Taken as a whole, the common-law cases reveal no settled consensus favoring Kahler's preferred insanity rule. And without that, they cannot support his proposed constitutional baseline."[25]

Justice Kagan went on to note that the proper scope of the insanity defense continued to be a question upon which reasonable people disagree. Therefore, the Supreme Court should not decide the issue. Justice Kagan said:

> Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law.[26]

The choice was, therefore, for "Kansas to make—and, if it wishes, to remake and remake again as the future unfolds."[27]

Justice Breyer dissented in an opinion joined by Justice Ginsburg and Justice Sotomayor. His dissent argued that the Kansas law violated a principle that had been part of the law for centuries: that defendants who, due to mental illness, cannot tell moral right from wrong lack the mental capacity necessary for their "conduct to be considered morally blameworthy."[28] Justice Breyer rejected the argument by Kansas "that the insane, provided they are capable of intentional action, are culpable and should be held liable for their antisocial conduct."[29] That view, Justice Breyer said, "runs contrary to a legal tradition

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24. *See id.* at 1032–34.
25. *Id.* at 1034.
26. *Id.* at 1037.
27. *Id.*
28. *Id.* at 1038 (Breyer, J., dissenting).
29. *Id.* at 1050.

that embodies a fundamental precept of our criminal law and that stretches back, at least, to the origins of our Nation."[30]

The *Kahler* case illustrates a theme that appears again and again. Justice Kagan tends to see history as ambiguous and imposing only loose constraints on the present, so that today's decision-makers have broad discretion to do what they think is reasonable to protect the community. Justice Sotomayor is much more apt to find clear messages in history: time-honored principles protecting individual rights that governments must respect and courts must enforce.

B. Kansas v. Glover *(2020)*[31]

While on patrol in Douglas County, Kansas in April 2016, Deputy Mark Mehrer noticed a pickup truck, ran its license plate number through a database, and found that the State had revoked the driver's license of the truck's registered owner, Charles Glover.[32] Mehrer stopped the vehicle and, just as he suspected, Charles Glover was the driver.[33] When Glover was prosecuted, he moved to suppress the evidence derived from the stop on the ground that Mehrer lacked the reasonable suspicion needed under the Fourth Amendment. The Kansas Supreme Court accepted this argument.[34] The Supreme Court reversed by a vote of eight to one.

The majority opinion by Justice Thomas held the revocation of the driver's license of a vehicle's registered owner was enough to justify a stop of that vehicle as long as the officer making the stop lacked information that the owner of the vehicle was not the driver.[35] Justice Kagan added a concurring opinion that explained why Deputy Mehrer's actions were sensible. Because "Kansas almost never revokes a license except for serious or repeated driving offenses[,] . . . a person with a revoked license has already shown a willingness to flout driving restrictions."[36] "That fact . . . provides a 'reason[] to infer' that such a person will drive without a license—at least often enough to warrant an investigatory stop."[37] Justice Kagan went on to say that the case would be different if the license had only been suspended because license suspensions are often based on failure to pay parking tickets or fines and do not indicate a tendency to disregard driving laws.[38]

Justice Sotomayor dissented, arguing the government did not meet its burden of proof because there was no showing Deputy Mehrer's actual observations or expertise supported individualized suspicion that Charles

30. *Id.*
31. Kansas v. Glover, 140 S. Ct. 1183 (2020).
32. *Id.* at 1187.
33. *Id.*
34. *See id.*
35. *See id.* at 1186.
36. *Id.* at 1192 (Kagan, J., concurring).
37. *Id.* (quoting United States v. Arvizu, 534 U.S. 266, 277 (2002)).
38. *See id.*

Glover was the person driving his truck. Instead, the government relied on an unsupported generalization about the class of people to which Glover belonged.[39] Justice Sotomayor argued that traffic stops must be subject to strict review because they interfere with freedom and "'may create substantial anxiety' through an 'unsettling show of authority.'"[40] That review must be individualized because "[i]f courts do not scrutinize officer observation or expertise in the reasonable-suspicion analysis, then seizures may be made on large-scale data alone—data that say[s] nothing about the individual save for the class to which [that individual] belongs."[41] Justice Sotomayor warned that by approving the stop of the Glover truck, "[t]he majority . . . paved the road to finding reasonable suspicion based on nothing more than a demographic profile."[42]

The differences between Justice Kagan and Justice Sotomayor are striking. Looking at traffic stops from the perspective of the government; Justice Kagan saw in the facts of *Glover* a legitimate inference consistent with the reasonableness standard of the Fourth Amendment. Looking at traffic stops from the perspective of those on the receiving end of governmental authority, Justice Sotomayor saw a hasty generalization akin to demographic profiling that did not satisfy the strict burden of proof the Constitution required.

C. Ramos v. Louisiana *(2020)*[43]

Evangelisto Ramos was convicted in Louisiana state court by a jury verdict of ten to two and sentenced to life in prison.[44] He argued in the Supreme Court that the Constitution requires unanimous verdicts in state court criminal cases. As a matter of logic, his case was clear. The Sixth Amendment of the Constitution guarantees those accused of a crime the right to trial by jury.[45] Following several hundred years of common law precedent, the Supreme Court had repeatedly said that in federal cases the Sixth Amendment jury trial right includes the right to a unanimous verdict. Because the Sixth Amendment has been made applicable to the States through the Fourteenth Amendment and the Bill of Rights normally means the same thing in state prosecutions as it does in federal prosecutions, the Louisiana statute allowing convictions by a vote of ten to two seemed to be in violation of the Constitution.[46]

What made the *Ramos* case difficult was practicality. In 1972, the Court had held that jury verdicts in state court criminal trials did not have to be unanimous.[47] Overruling that precedent could require Louisiana and Oregon

39. *See id.* at 1196 (Sotomayor, J., dissenting).
40. *Id.* at 1198 (quoting Delaware v. Prouse, 440 U.S. 648, 657 (1979)).
41. *Id.* at 1197.
42. *Id.*
43. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).
44. *See id.* at 1394, 1408.
45. U.S. CONST. amend. VI.
46. *See id.* at 1395–99.
47. Apodaca v. Oregon, 406 U.S. 404 (1972).

(the only States with non-unanimous verdicts) to retry or free thousands of convicts.[48]

Despite these practical difficulties, the Supreme Court ruled for Ramos by a vote of six to three. The majority opinion by Justice Neil Gorsuch took a formalist and originalist approach: the law is the law and must be followed, regardless of the practical impact. Justice Gorsuch explained that from its inception:

> [the Sixth Amendment's] right to trial by jury *included* a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed.[49]

Therefore, Justice Gorsuch concluded, the Supreme Court was "entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics."[50] The reliance of Louisiana and Oregon in the 1972 precedent cannot outweigh "the reliance the American people place in their constitutionally protected liberties . . . ."[51]

Justice Sotomayor wrote a concurring opinion, which discussed the doctrine of *stare decisis*: the general judicial preference for following precedents even if they were mistakenly decided. Justice Sotomayor said that *stare decisis* was at its maximum in "cases involving property and contract rights."[52] By contrast, "[t]he force of *stare decisis* is at its nadir in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections."[53] That was particularly true in the *Ramos* case, Justice Sotomayor went on, because "the constitutional protection here ranks among the most essential: the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment."[54] Justice Sotomayor concluded that "[w]hile overruling precedent must be rare, this Court should not shy away from correcting its errors where the right to avoid imprisonment pursuant to unconstitutional procedures hangs in the balance."[55]

Justice Alito wrote a dissent that was joined in whole by Chief Justice Roberts and in part by Justice Kagan. In the portion of the dissent Justice Kagan joined, Justice Alito said that, "[u]nless one is willing to freeze in place late

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48. *See Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting).

49. *Id.* at 1402.

50. *Id.*

51. *Id.* at 1408.

52. *Id.* at 1409 (Sotomayor, J., concurring) (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

53. *Id.* (quoting Alleyne v. United States, 570 U.S. 99, 116 n.5 (2013)).

54. *Id.*

55. *Id.* at 1410.

18th-century practice,"[56] the 1972 precedent was a plausible reading of the Constitution. More important than correcting the decision's possible error, Justice Alito said, were considerations of *stare decisis*. Louisiana and Texas had relied on the precedent to conduct "thousands and thousands of trials under rules allowing non-unanimous verdicts. Now, those States face a potential tsunami of litigation on the jury unanimity issue."[57] The dissent noted the practical difficulty of retrials: "In some cases, key witnesses may not be available, and it remains to be seen whether the criminal justice systems of Oregon and Louisiana have the resources to handle the volume of cases in which convictions will be reversed."[58] Justice Alito went on to minimize the practical benefits of changing the law: "It is impossible to believe that all these cases would have resulted in mistrials if unanimity had been demanded. Instead, after a vote of 11 to 1 or 10 to 2, it is likely that deliberations would have continued and unanimity would have been achieved."[59]

The *Ramos* case illustrates how Justice Sotomayor and Justice Kagan follow different philosophies of the Constitution in local criminal justice cases. In order to protect the rights of the accused, Justice Sotomayor agreed with Justice Gorsuch's formalist and originalist view that rights of the individual enshrined in the Constitution are not to be balanced away based on practical considerations. Justice Kagan agreed with Justice Alito's pragmatic approach that the Constitution does not mandate late eighteenth-century practice, but instead allows for change based on practical considerations, such as the government's interest in being able to rely on Supreme Court precedents and avoid the burden of thousands of retrials.

II. CASES FROM EARLIER YEARS

The differences between Justice Sotomayor and Justice Kagan in 2020 accentuate a trend that can be seen in earlier years. In local criminal justice cases, Justice Sotomayor has tended to see clear rules based on enduring principles that protect individuals from government. Justice Kagan has been increasingly apt to see indeterminate standards that give government officials substantial discretion. Here are six illustrative cases presented in chronological order.

A. Messerschmidt v. Millender *(2012)*[60]

Shelly Kelly decided to end her relationship with Jerry Ray Bowen and move out of her apartment that Bowen sometimes shared with her and to which he had a key. Because Bowen was a gang member who had previously assaulted her, Kelly asked the Los Angeles County Sheriff's Department to supervise her

56. *Id.* at 1434 (Alito, J., dissenting).

57. *Id.* at 1436.

58. *Id.* at 1437.

59. *Id.* at 1438.

60. Messerschmidt v. Millender, 565 U.S. 535 (2012).

departure. During the move, however, the officers were called away for an emergency. After the officers left, Bowen emerged from the apartment, yelled at Kelly for calling the police, threatened to kill her, and shot at her with a pistol-gripped sawed-off shotgun as she drove away.[61] Kelly later told the officers what happened and that she thought Bowen was staying "at his foster mother's home at 2234 East 120th Street."[62] After confirming from a database Bowen's connection to that address and that Bowen had "been arrested and convicted for numerous violent and firearm-related offenses,"[63] and after reviewing the warrant application with superiors, Detective Curt Messerschmidt obtained a warrant to search the 120th Street address for all and any firearms and gang paraphernalia.[64]

After the warrant was executed, the foster mother, Augusta Millender, and other residents of the house sued Messerschmidt and another officer for conducting an overbroad search in violation of the Fourth Amendment.[65] The U.S. Court of Appeals for the Ninth Circuit held that "the warrant was invalid, and that the officers were not entitled to immunity from personal liability because this invalidity was so obvious that any reasonable officer would have recognized it, despite the Magistrate's approval."[66]

The Supreme Court reversed by a vote of six to three, holding that the police officers had acted reasonably enough to avoid personal liability. As for the search for "any firearms," the majority opinion by Chief Justice Roberts said the officers could have reasonably concluded "that there would be additional illegal guns among others that Bowen owned," or that "seizure of the firearms was necessary to prevent further assaults on Kelly."[67] As to the search for gang paraphernalia, the majority said that because Kelly had earlier given information to the police about Bowen's gang ties, it would not have been unreasonable "to believe that evidence regarding Bowen's gang affiliation would prove helpful in prosecuting him for the attack on Kelly."[68]

Justice Kagan wrote an opinion concurring in part and dissenting in part. Justice Kagan agreed with the Ninth Circuit that the police did not have a reasonable basis to search for gang paraphernalia because that was not relevant to the crime being investigated.[69] However, Justice Kagan agreed with the majority opinion that "a reasonably competent police officer could have thought" that this search warrant was "valid in authorizing a search for all

61. *See id.* at 539–40.
62. *Id.* at 540–41.
63. *Id.* at 541.
64. *See id.* at 541–43.
65. *See id.* at 544.
66. *Id.* at 539.
67. *Id.* at 549.
68. *Id.* at 551.
69. *See id.* at 558 (Kagan, J., concurring in part and dissenting in part).

firearms and related items."[70] Justice Kagan noted that the "warrant application recounted that a known gang member had used a sawed-off shotgun—an illegal weapon under California law . . . —to try to kill another person."[71] The opinion went on: "[p]erhaps gang ties plus possession of an unlawful gun plus use of that gun to commit a violent assault do not add up to what was needed for this search . . . . But because our and the Ninth Circuit's decisions leave that conclusion debatable" the police officers "should receive qualified immunity for their search for firearms."[72]

Justice Sotomayor dissented, joined by Justice Ginsburg. Her opinion said that the "fundamental purpose" of the Fourth Amendment warrant clause was "to protect against all general searches,"[73] and that to achieve this goal "the Framers established the inviolable principle that should resolve this case: '[N]o Warrants shall issue, but upon probable cause . . . and particularly describing the . . . things to be seized.'"[74] "That is, the police must articulate an adequate reason to search for specific items related to specific crimes."[75]

Applying this test, Justice Sotomayor said there was no basis to search the foster mother's home for all gang-related paraphernalia because those items "would have done nothing to establish that Bowen had committed the non-gang-related crime specified in the warrant."[76] Similarly, there was no basis for searching the Millender home ("in which 10 persons regularly lived") for "any weapon" because the warrant application "set forth no specific facts or particularized explanation establishing probable cause to believe that other guns found in the home were connected to the crime specified in the warrant or were otherwise illegal."[77] Focusing on the evidence, Justice Sotomayor noted that "Bowen retrieved the shotgun that he fired from the apartment he shared with Kelly, not the Millenders' home. Kelly provided no indication that Bowen possessed other guns or that he stored them at his former foster mother's home."[78] Justice Sotomayor also said it did not matter that Detective Messerschmidt had cleared his proposed warrant application with three superiors because the warrant was objectively unreasonable and "four wrongs" did not make a right.[79]

Justice Kagan's agreement with Justice Sotomayor that the police could be sued for their search for gang paraphernalia suggests the two Justices were closer on these issues in 2012 than they seem to be now. Even so, key

70. *Id.* at 557.

71. *Id.*

72. *Id.* at 557–58.

73. *Id.* at 560 (Sotomayor, J., dissenting) (quoting Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)).

74. *Id.* (quoting U.S. CONST. amend. IV).

75. *Id.*

76. *Id.* at 567.

77. *Id.* at 570.

78. *Id.* at 569 n.9.

79. *See id.* at 574.

differences between the two Justices may be seen in the *Messerschmidt* decision. Justice Sotomayor started her analysis with first principles; Justice Kagan focused on reasonableness in the here and now. Justice Sotomayor looked at the situation primarily through the eyes of Augusta Millender; Justice Kagan seemed more attuned to the perspective of Detective Messerschmidt. Justice Sotomayor regarded the police conduct as right or wrong; Justice Kagan recognized a middle category of "debatable."

B. Chaidez v. United States *(2013)*[80]

In *Chaidez v. United States*, the Supreme Court considered whether an earlier decision in *Padilla v. Kentucky*[81]—holding that the Sixth Amendment required defense counsel to warn criminal defendants about the collateral consequences of a guilty plea—should be given retroactive effect so as to apply to convictions that had already become final. The question turned on whether *Padilla* was an application of existing law (in which case there would be retroactivity) or whether the decision broke new ground (in which case there would be no retroactivity). The Court decided seven to two that *Padilla* broke new ground and therefore should not be given retroactive effect. The majority opinion by Justice Kagan analyzed the development of the law, noted disagreement about whether the effective assistance of counsel required advice about the collateral consequences of conviction, then concluded: "So when we decided *Padilla*, we answered a question about the Sixth Amendment's reach that we had left open, in a way that altered the law of most jurisdictions . . . ."[82] "If that does not count as 'break[ing] new ground' or 'impos[ing] a new obligation,' we are hard pressed to know what would."[83]

Justice Sotomayor wrote a dissent that was joined by Justice Ginsburg. She argued:

> *Padilla* did nothing more than apply the existing rule . . . in a new setting, the same way the Court has done repeatedly in the past: by surveying the relevant professional norms and concluding that they unequivocally required attorneys to provide advice about the immigration consequences of a guilty plea.[84]

Chaidez shows that Justice Kagan treats law as indeterminate if a case outcome was uncertain, while Justice Sotomayor treats law as determinate if the governing principle was known. Because of this difference, Justice Kagan is less likely to give decisions retroactive effect for the benefit of defendants (as in *Chaidez*) and more likely to rule for the police in qualified immunity cases (as in *Messerschmidt*).

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80. Chaidez v. United States, 568 U.S. 342 (2013).

81. Padilla v. Kentucky, 559 U.S. 356 (2010).

82. *Chaidez*, 568 U.S. at 352.

83. *Id.* at 353 (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

84. *Id.* at 359 (Sotomayor, J., dissenting).

C. Heien v. North Carolina *(2014)*[85]

In *Heien v. North Carolina*, a police officer stopped a suspicious vehicle after noticing its left brake light was not working, in apparent violation of a state statute that required cars to have a working "stop lamp." A subsequent consensual search revealed cocaine.[86] The North Carolina Court of Appeals held that the stop of the vehicle (and, therefore, the subsequent search) violated the Fourth Amendment because, properly interpreted, the state statute was satisfied by a single working brake light.[87] The Supreme Court held by a vote of eight to one that the officer had reasonable cause to stop the car because his interpretation of the state statute was objectively reasonable, even though mistaken.[88]

Justice Kagan wrote a concurring opinion that emphasized the Court was only excusing objectively reasonable mistakes of law. "If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not."[89] Applying that standard, Justice Kagan analyzed the ambiguities in the North Carolina law then concluded the officer acted reasonably: "[t]he critical point is that the statute poses a quite difficult question of interpretation, and Sergeant Darisse's judgment, although overturned, had much to recommend it."[90]

Justice Sotomayor was the only dissenter. She argued that the Fourth Amendment required "evaluating an officer's understanding of the facts against the actual state of the law," not against what the officer reasonably believed the law to be.[91] "After all, the meaning of the law is not probabilistic in the same way that factual determinations are. Rather, 'the notion that the law is definite and knowable' sits at the foundation of our legal system."[92] Justice Sotomayor went on to argue that "[g]iving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation) that suggests a law has been violated significantly expands" their authority to stop motorists.[93] "One wonders how a citizen seeking to be law abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters could do so."[94]

Heien illustrates the jurisprudential split between the two Obama appointees. Justice Kagan, looking at the problem from the perspective of a police officer, took the legal realist attitude that the meaning of a law can be

85. Heien v. North Carolina, 574 U.S. 54 (2014).

86. *See id.* at 57–59.

87. *See id.* at 58–59.

88. *See id.* at 68.

89. *Id.* at 70 (Kagan, J., concurring).

90. *Id.* at 71.

91. *Id.* at 71 (Sotomayor, J., dissenting).

92. *Id.* at 73 (quoting Cheek v. United States, 498 U.S. 192, 199 (1991)).

93. *Id.* at 74.

94. *Id.*

indeterminate. Justice Sotomayor, looking at the situation from the perspective of an innocent motorist, took the formalist attitude that the meaning of a law is definite and knowable, so ignorance of the law cannot expand the authority of the police.

D. Birchfield v. North Dakota *(2016)*[95]

In *Birchfield v. North Dakota*, the Supreme Court held that state laws that require motorists stopped for drunk driving to submit to a breath test do not violate the Fourth Amendment's warrant requirement.[96] Justice Kagan joined the majority opinion by Justice Alito, which began by noting that the case could not be decided through originalist analysis. The Fourth Amendment permits some warrantless searches incident to arrest,[97] but the "founding era does not provide any definitive guidance" as to whether breath tests for drunk driving "should be allowed" under that exception to the warrant requirement.[98]

The majority opinion then balanced the competing interests. On the one hand, Justice Alito said, "breath tests do not 'implicat[e] significant privacy concerns.'"[99] On the other hand, the government has "a compelling interest in creating effective 'deterrent[s] to drunken driving'" so that those who might be inclined to drink and drive "make responsible decisions and do not become a threat to others in the first place."[100] Moreover, Justice Alito went on, requiring judicial officers to issue warrants for every breath test would be very time-consuming and unlikely to provide any intelligent screening since the magistrate "would be in a poor position to challenge" the officer's characterization of the driver's conduct.[101] Given that balance, the majority opinion concluded, "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for [such] testing is great."[102]

Justice Sotomayor dissented, joined by Justice Ginsburg. Starting her analysis with a statement of the governing principle, she said that the Fourth Amendment's "warrant requirement is 'subject only to a few specifically established and well-delineated exceptions.'"[103] Justice Sotomayor went on to reason that breath tests did not fit the exception allowing warrantless searches in emergency or exigent circumstances "'because an officer can take steps to

95. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).

96. *See id.* at 2186.

97. *See id.* at 2175–76.

98. *Id.* at 2176.

99. *Id.* (quoting Skinner v. Ry. Lab. Exec.'s Ass'n, 489 U.S. 602, 626 (1989)).

100. *Id.* at 2179 (quoting Mackey v. Montrym, 443 U.S. 1, 16 (1979)).

101. *See id.* at 2181.

102. *Id.* at 2184.

103. *Id.* at 2188 (Sotomayor, J., dissenting) (quoting Katz v. United States, 389 U.S. 347, 357, (1967)).

secure a warrant' while the subject is being prepared for the test . . . ."[104] Moreover, "[b]ecause the person is already in custody prior to the administration of the breath test, there can be no serious claim that the time it takes to obtain a warrant would increase the danger that drunk driver poses to fellow citizens."[105] Justice Sotomayor condemned the majority's pragmatic approach as subversive of precedent and principle. "This Court has never said that mere convenience in gathering evidence justifies an exception to the warrant requirement."[106] Justice Sotomayor went on to highlight a "fear that if the Court continues down this road, the Fourth Amendment's warrant requirement will become nothing more than a suggestion."[107]

The *Birchfield* decision illustrates the gap between Justice Kagan and Justice Sotomayor as to whether police conduct should be evaluated pragmatically, through the balancing of costs against benefits, or by taking legal principles that were (supposedly) established in the past and following them through to their logical conclusions.

E. Kisela v. Hughes *(2018)*[108]

One day in May 2010, Amy Hughes was speaking to her roommate, Sharon Chadwick, outside of their home in Tucson, Arizona. As she stood about six feet away from Chadwick, Hughes held a large kitchen knife at her side with the blade facing away from Chadwick. Two police officers, summoned to the scene by a 911 call of someone hacking at a tree with a knife, twice commanded Hughes to drop the knife. Chadwick said "take it easy" to both Hughes and the officers. Hughes did not respond. Within a minute of the commands, a third officer, Andrew Kisela, shot Hughes four times.[109]

Hughes sued Kisela. The U.S. Court of Appeals for the Ninth Circuit held Kisela's conduct was not protected by good faith immunity.[110] The Supreme Court reversed by a vote of seven to two. The majority opinion, joined by Justice Kagan, held Kisela immune from suit because, given the circumstances, "[t]his is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment."[111]

Justice Sotomayor dissented, joined by Justice Ginsburg. Her dissent argued that the Court was wrong to treat the governing law as indeterminate. "This Court's precedents make clear that a police officer may only deploy deadly force against an individual if the officer 'has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or

104. *Id.* at 2190 (quoting Missouri v. McNeely, 569 U.S. 141 (2013)).

105. *Id.* at 2191.

106. *Id.* at 2194.

107. *Id.* at 2196.

108. Kisela v. Hughes, 138 S. Ct. 1148 (2018).

109. *See id.* at 1150–51; *see id.* at 1155 (Sotomayor, J., dissenting).

110. *See id.* at 1151 (majority opinion).

111. *Id.* at 1153.

to others.'"[112] Under these precedents, Justice Sotomayor said, "Kisela's conduct was clearly unreasonable."[113] Justice Sotomayor concluded that the majority opinion "tells officers that that they can first shoot and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent."[114]

Once again, Justice Kagan thought police should be shielded from liability when the illegality of their particular conduct was debatable. Justice Sotomayor thought police should be liable if their conduct violated an established legal principle. Justice Kagan joined the Court in analyzing the case in terms of reasonableness from the perspective of a police officer faced with a difficult situation. Looking at the facts more through the eyes of Amy Hughes, Justice Sotomayor's focus was on what was right and just.

F. Nieves v. Bartlett *(2019)*[115]

During the Arctic Man festival in Alaska in 2014, Russell Bartlett was arrested for disorderly conduct (and then released a few hours later) after he physically blocked a police officer from questioning a teenager and yelled at the officer.[116] Bartlett sued the arresting officers, charging they had arrested him in retaliation for his exercise of his First Amendment rights.[117] The U.S. Court of Appeals for the Ninth Circuit held the suit could proceed even if the officers had probable cause to support an arrest.[118] The Supreme Court reversed.

Justice Kagan joined the majority opinion by Chief Justice Roberts, which held that probable cause to arrest defeats a claim that the arrest was in retaliation for the arrestee's exercise of First Amendment rights except when the plaintiff presents objective evidence that "otherwise similarly situated individuals not engaged in the same sort of protected speech had not been" arrested for similar behavior.[119] Applying that test, the Court held the officers were immune from suit.[120] Justice Sotomayor dissented, arguing that police should be liable if the plaintiff could show that the arrest was improperly motivated (for example, through evidence of statements by police officers) unless the police could prove that the arrest would have occurred despite the improper motivation.[121]

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112. *Id.* at 1158 (Sotomayor, J., dissenting) (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)).

113. *Id.*

114. *Id.* at 1162.

115. Nieves v. Bartlett, 139 S. Ct. 1715 (2019).

116. *See id.* at 1720–21.

117. *See id.* at 1721.

118. *See id.*

119. *Id.* at 1727.

120. *See id.* at 1728.

121. *See id.* at 1736 (Sotomayor, J., dissenting).

The major difference between the majority opinion and the dissent lies in what each saw as the greater interest and the greater risk. The majority opinion thought it important to require objective evidence that the plaintiff's conduct would not normally have resulted in arrest in order to protect the community's interest in effective law enforcement. The opinion said: "Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'"[122] "To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness."[123]

By contrast, Justice Sotomayor worried that the majority's approach would leave First Amendment rights unprotected and "shield willful misconduct from accountability."[124] Justice Sotomayor concluded:

> The power to constrain a person's liberty is delegated to law enforcement officers by the public as a sacred trust. The First Amendment stands as a bulwark of that trust, erected by people who knew from personal experience the dangers of abuse that follow from investing anyone with such awesome power. Because the majority shortchanges that hard-earned wisdom in the name of marginal convenience, I respectfully dissent.[125]

Once again, Justice Kagan looked at the problem of regulating law enforcement in terms of the practical needs of contemporary society and a reasonable balancing of competing interests. Justice Sotomayor dismissed pragmatic balancing as mere "marginal convenience" and chose to emphasize instead the "hard-earned wisdom" of those "who knew from personal experience the dangers" posed by abusive government.[126] Thus, for Justice Sotomayor, the original intent of the nation's founders, people who knew what it meant to be rebels, was preferable to modern calculations of social utility.

CONCLUSION

In local criminal justice cases, Justice Kagan and Justice Sotomayor see things differently.[127] Justice Kagan tends to the perspective of those entrusted with responsibility. Justice Sotomayor sees through the eyes of those who are subject to government. Justice Kagan sees an indeterminate past. Justice Sotomayor sees clear lessons in history. Justice Kagan finds loose standards that leave substantial room for official discretion. Justice Sotomayor is more apt to see clear rules protecting individual liberty. Justice Kagan sees competing interests that must be balanced. Justice Sotomayor sees rights.

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122. *Id.* at 1725 (majority opinion) (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)).

123. *Id.*

124. *Id.* at 1740 (Sotomayor, J., dissenting).

125. *Id.* at 1742 (citations omitted).

126. *Id.*

127. *See* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007).

The jurisprudential differences between the two Justices support their different approaches to the regulation of local prosecutors and police. Justice Kagan's legal realism and pragmatism justifies more deference to government officials and is better designed to help government protect the public in a reasonable way. Justice Sotomayor's legal formalism and originalism gives her a firmer basis for challenging government action and is better designed to protect individuals from the overreach of government.[128]

128. *See* Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631, 678 (2003) (arguing that formalism can be a tool of the Left).