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Sonia Sotomayor's Legal Phenomenology, Racial Policing, and the Limits of Law

Abstract
Sonia Sotomayor's dissent in the Fourth Amendment case *Utah* v. *Strieff* (2016) received a great deal of media attention, particularly for its citations to prominent Black political thinkers and its evocations of Black Lives Matter. This article interprets Justice Sotomayor's dissent as constructing an emergent legal theory that incorporates Black Lives Matter and the experiences of people of color subject to being stopped and searched into the core of Fourth Amendment jurisprudence. In contrast to Clarence Thomas's abstracted majority opinion, I argue Sotomayor contests the meaning of law's relations to subjects, bringing the feeling, moving, restrained, invaded, prodded, shaped, habitual, racialized subject of the police stop into Supreme Court legal reasoning. In tension with Sotomayor's phenomenological alternative are structural and institutional constraints on the liberatory possibilities for any Supreme Court dissent, particularly one focused on racial injustice. The article argues for recognizing both the generativity of the emergent legal phenomenology and the constraints on its politics in order to grapple with the potential for legal critique to surface from what Sotomayor calls law's "cold abstractions."

Keywords: Sonia Sotomayor; legal theory; Fourth Amendment; phenomenology; racism; policing

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Sonia Sotomayor's Legal Phenomenology, Racial Policing, and the Limits of Law

"Mastery of the of the law's cold abstractions … was actually incomplete without an understanding of how they affected individual lives."[1]

INTRODUCTION

Justice Sonia Sotomayor received a great deal of media coverage for her dissent in the Fourth Amendment case *Utah* v. *Strieff*, decided in June 2016. Her dissent was "fierce," "blistering," "fiery," and an "atomic bomb" of a dissent, or maybe the dissent and coverage were just plain "wrong."[2] Such flourishes describe twelve pages of legal writing, in a case taking up the extent of the exclusionary rule in Fourth Amendment jurisprudence. What makes Sotomayor's dissent so remarkable? Commentators point to Sotomayor's citations of Michelle Alexander and Ta-Nehisi Coates, her critiques of policing, and her evocations of #BlackLivesMatter (BLM), but in this article, I read Sotomayor's dissent as constructing an *emergent legal phenomenology* that works to incorporate BLM rhetorics and, most of all, the bodily experiences of people of color subject to being stopped and searched into the core of Fourth Amendment jurisprudence.

This mode of legal writing Sotomayor cultivates in *Strieff* challenges the disembodied, abstract nature of conventional Fourth Amendment jurisprudence, including Justice Clarence

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[1] Sonia Sotomayor, *My Beloved World* (New York: Vintage, 2014), 271.

[2] Robert Barnes, "Sotomayor's Fierce Dissent Slams High Court's Ruling on Evidence from Illegal Stops," *Washington Post*, June 20, 2016, https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-5-3-that-mistakes-by-officer-dont-undermine-conviction/2016/06/20/f1f7d0d2-36f9-11e6-8f7c-d4c723a2becb_story.html; Sameer Rao, "Justice Sonia Sotomayor Evokes Baldwin, Coates in Blistering Dissent on Illegal Stops," *Colorlines*, June 20, 2016, http://www.colorlines.com/articles/justice-sonia-sotomayor-evokes-baldwin-coates-blistering-dissent-illegal-stops; Tal Kopan, "Sotomayor in Fiery Dissent: Illegal Stops 'corrode All Our Civil Liberties'," *CNN*, June 21, 2016, http://edition.cnn.com/2016/06/20/politics/sotomayor-supreme-court-dissent-utah-strieff/; Mark Joseph Stern, "Read Sonia Sotomayor's Atomic Bomb of a Dissent Slamming Racial Profiling and Mass Imprisonment," *Slate*, June 20, 2016, http://www.slate.com/blogs/the_slatest/2016/06/20/sonia_sotomayor_dissent_in_utah_v_strieff_takes_on_police_misconduct.html. Howard Slugh, "Vox Gets Utah v. Strieff Holding Wrong," *National Review,* June 22, 2016, http://www.nationalreview.com/bench-memos/436946/vox-sonia-sotomayor-utah-v-strieff-holding-wrong.

Thomas's majority opinion. Sotomayor's framework generates several political and jurisprudential effects: turning this case about a white defendant into an account of racialized policing; drawing on BLM; and, most of all, incorporating embodied experiences of racial subjugation into legal discourse. This framework contests the meaning of law's relationship to subjects, centering in Supreme Court jurisprudence the feeling, moving, restrained, invaded, prodded, racialized subject of the police stop instead of an abstract raceless subject. The article theorizes this as an emergent legal phenomenology—where phenomenology entails an emphasis on "the importance of lived experience, the intentionality of consciousness … and the role of repeated and habitual actions in shaping bodies and world"[3]— that enables Sotomayor's attempted shift from a realm of abstract and disembodied jurisprudential knowledge to that of legally-theorized experience.

At the same time, this radical potential in the dissent enters a relationship of irreducible tension with limits on potentially radical jurisprudence. Especially salient for Sotomayor's project, the Supreme Court has regularly dehumanized, depersonalized, and dispossessed Black people and people convicted of crimes,[4] and Sotomayor's dissent arguably fails to interrogate the extent to which criminal law and police order could ever be a site of Black lives mattering.[5] This irresolution between Sotomayor's writing as critical legal theory and as profoundly constrained by antiblack racism saturates her dissent. The article tracks this conflict, especially as it operates at the nexus of the relationship between law and violence.

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[3] Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham, N.C.: Duke University Press, 2006), 2.
[4] Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton and Oxford: Princeton University Press, 2011).
[5] Monica C. Bell, "Police Reform and the Dismantling of Legal Estrangement," *Yale Law Journal* 126, no. 7 (2017): 2054–2150; Patrice D. Douglass, "On (Being) Fear: Utah v. Strieff and the Ontology of Affect," *Journal of Visual Culture* 17, no. 3 (2018): 332–42.

The first section of the article provides an overview of *Utah* v. *Strieff* and interrogates the abstractions of Thomas's majority opinion in order to set up Sotomayor's alternative by contrast. From there, I examine the structure of Sotomayor's dissent, how and why she converts this case about a white individual into a critique of racial policing, and the way she evokes BLM. This opens onto an interpretation of Sotomayor's dissent, through the work of Sara Ahmed, as a developing phenomenology of being stopped and searched by police. I claim that Sotomayor brings racialized embodiment into Supreme Court discourse while focusing attention on the systemic racialization of policing. From here, I examine the limits on the transformative potential of Sotomayor's legal phenomenology, particularly from the standpoint of theorizations of antiblack racism. The conclusion works through Robert Cover's accounts of law's violence and Colin Dayan's concept of a "phantom" legal decision to grapple with the tension between the dissent's potential and its radical limits.

UTAH V. *STRIEFF* AND LAW'S COLD ABSTRACTIONS

Utah v. *Strieff* originates in 2006. After receiving a tip that a Salt Lake City, Utah home was being used for narcotics activity, detective Douglas Fackrell began surveilling the house. Many people made brief visits over several days, leading Fackrell to suspect that the house was used for drug-dealing. After Edward Strieff left the house one day, Fackrell stopped him in a nearby parking lot. The attorney representing the State of Utah would later stipulate that Fackrell lacked reasonable suspicion justifying the stop. Fackrell requested Strieff's identification, which Strieff produced. Strieff had an outstanding warrant for arrest for a traffic violation. Fackrell then arrested Strieff, and upon searching Strieff and his car, found methamphetamine and drug paraphernalia.[6] The State of Utah charged Strieff with unlawful possession based on this

[6] *Utah* v. *Strieff*, 136 S.Ct. 2056, at 2059-60 (2016).

evidence. At trial, Strieff challenged the evidence as originating from an illegal stop and thus inadmissible under the Fourth Amendment. The prosecution argued that while the stop was unlawful, the valid arrest warrant constituted an intervening circumstance making the evidence admissible.

The trial court accepted the State's argument and admitted the evidence. The Utah Supreme Court reversed the trial court's decision, holding that only voluntary consent or confession could sever the link between the illegal stop and the discovery of evidence. The arrest warrant did not constitute such an act, and thus the Court ruled that the evidence be suppressed. The Supreme Court granted certiorari in order to resolve competing rulings in lower courts, specifically regarding evidence where an unconstitutional detention leads to the discovery of a valid arrest warrant."[7] In a 5-3 decision, the Supreme Court reversed the Utah Supreme Court's decision and held that the evidence was admissible. Clarence Thomas wrote the majority opinion, joined by John Roberts, Anthony Kennedy, Stephen Breyer, and Samuel Alito; Sotomayor filed a dissent joined in part by Ruth Bader Ginsburg, while Elena Kagan also wrote a dissent, joined by Ginsburg.

Thomas's opinion ruled that the preexisting, valid, and untainted arrest warrant "attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest."[8] While the Court "at times" requires evidence "obtained by unconstitutional police conduct" to be excluded, the rule is subject to an analysis of whether "the costs of exclusion outweigh its deterrent benefits," citing *Hudson* v. *Michigan*, 547 U. S. 586 (2006).[9] Thomas then claims that the relevant criteria to apply in this case is the attenuation doctrine, by which evidence is "admissible when the connection between unconstitutional police conduct and

[7] Ibid., 2060.
[8] Ibid., 2065.
[9] Ibid., 2059.

the evidence is remote or has been interrupted by some intervening circumstance." To evaluate this, Thomas applies a three-factor analysis articulated in *Brown* v. *Illinois*, 422 U.S. 590 (1975), which he uses to determine whether the discovery of the warrant for Strieff constituted "a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence."[10]

The first factor, "temporal proximity between the initially unlawful stop and the search," weighs in favor of suppressing the evidence because its discovery occurred "only minutes after the illegal stop."[11] The second factor, the presence of intervening circumstances, favors its admissibility. The warrant "was valid," "predated Officer Fackrell's investigation," "was entirely unconnected with the stop," and obligated arrest and search.[12] According to Thomas, this "discovery of the warrant broke the causal chain between the unconstitutional stop and the discovery of evidence."[13] The third factor, the flagrancy of the violation, also favors the State. Thomas interprets this part of the analysis to indicate exclusion "only when the police misconduct is most in need of deterrence…when it is purposeful or flagrant." Instead, Thomas holds "Officer Fackrell was at most negligent," making "two good-faith mistakes" by not knowing how long Strieff was in the house, and by "demanding" that Strieff stop when he "should have asked Strieff whether he would speak with him."[14] For Thomas, Fackrell did *not* purposefully or flagrantly violate the Fourth Amendment, acted entirely lawfully after the initial stop, and searched Strieff incident to a lawful arrest. As a result of this analysis, the Court reversed the Utah Supreme Court and ruled the evidence be admitted.

[10] Ibid., 2061.
[11] Ibid., 2062.
[12] Ibid., 2062.
[13] Ibid., 2063.
[14] Ibid.

In this opinion, Thomas engages in legal reasoning that isolates and abstracts the questions raised by the case and the ruling. The opinion applies the *Brown* test to a constrained set of facts severed from broader political and legal contexts. There is only one searched body and there are no questions raised about race or racialized policing. Thomas's opinion works exclusively in the realm of what Sotomayor herself calls "the opinion's technical language."[15] Hegemonic enactments of criminal law jurisprudence regularly present themselves as disembodied and perspective-less. In the specific realm of police searches, the body constructed by much Fourth Amendment law *disembodies the searched person*.[16] This produces an abstract subject that is "isolated," "veiled from the reader of the opinion," and "reified into a thing," all while the judicial body writing such opinions "denies its own agency" in the kind of body-subject it constructs.[17] Conventional legal reasoning can thus efface both the reality of law as lived and the power relations enacted by decisions. Thomas's opinion perpetuates the trajectory Hyde identifies in the way he limits himself to an abstracted application of *Brown* v. *Illinois*'s analysis and sequesters the precise details of one warrant at the expense of broader practices of being stopped and searched.

Thomas goes out of his way to wall off the case from broader contexts of racial policing. Twice, Thomas emphasizes the incidental, singular nature of Fackrell's behavior. First, in the attenuation analysis, he deems Fackrell's actions an "isolated instance of negligence" and *not* "part of any systemic or recurrent police misconduct."[18] Second, Thomas denies Strieff's claim that the prevalence of outstanding warrants means police "will engage in dragnet searches," because he reasons there was no evidence of a dragnet catching Strieff and because exposure to

[15] Ibid, 2064.
[16] *Bodies of Law* (Princeton, NJ: Princeton University Press, 1997), chapter. 8. Also see Devon Carbado, "(E)Racing the Fourth Amendment," *Michigan Law Review* 100, no. 5 (2002): 946–1044
[17] Hyde, *Bodies Of Law*., 155, 157.
[18] *Utah* v. *Strieff*, 2063

"civil liability" would deter "wanton conduct."[19] By explicitly not situating *Strieff* in a broader context and insisting that Fackrell's acts are individualized "good-faith" mistakes, Thomas isolates the case and its implications. This rejection protects the kind of behavior that Fackrell engages in from scrutiny as part of a regularized police apparatus of stopping and searching, such that Thomas's approach evacuates the case of the broader meaning or significance that Sotomayor's approach will draw out.

This is potentially surprising. Corey Robin's recent monograph on Thomas contends that Thomas commits to a "need to reveal oneself through words" irrespective of legal conventions, constructs a "race-conscious, even race-centric" jurisprudence often focused on the "yawning gulf between whites and blacks," and markedly narrates racial violence in his opinions.[20] These qualities could lend themselves to the kind of race-centric, phenomenological approach that Sotomayor engages. Instead, Thomas writes an abstract opinion that, as Robin notes, largely "hinged on technical legal questions."[21] How to make sense of this? Robin argues that "Thomas understands racism as primarily a form of individual prejudice—not as the product of impersonal institutions whose policies and practices reproduce the inequality of black people."[22] If this is the case, then Strieff experiencing an unlawful stop as a white man would not dispose Thomas to turn to a critique of racialized policing. Second, Thomas generally opposes the "Rights Revolution" of the mid-twentieth century, Fourth Amendment included: he considers it to have eliminated a moralizing, paternal punishment regime and replaced it with an obstacle-less

[19] Ibid., 2064.
[20] Corey Robin, *The Enigma of Clarence Thomas* (New York: Metropolitan Books, 2019), 13; 44; chapter 8.
[21] Ibid., 202.
[22] Ibid., 44.

permissiveness facilitating moral weakness;[23] this frequently does outweigh Thomas's "account of a racist society."[24] Conversely, grappling with the experience of the stop, as Sotomayor does, would lead to a systemic framework and Fourth Amendment position that Thomas's project opposes.

SOTOMAYOR'S EMERGENT LEGAL PHENOMENOLOGY

The Structure of the Dissent

The first three-quarters of Sotomayor's opinion form a more-or-less conventional dissent, with little that sets it apart from a typical strong dissent.[25] In these sections, she argues that the "Fourth Amendment should prohibit, not protect" Fackrell's "misconduct," such that the Court's decisions means that "if the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant."[26] Reasoning that "two wrongs don't make a right" when in Fourth Amendment law, she deploys the principle that the "fruit of the poisoned tree" cannot be made unspoiled, with the "fruit that must be cast aside" including evidence both "directly found by an illegal search" and "'come at by exploitation of that illegality.'"[27] She then goes on to discuss the function of the exclusionary rule, which provides incentives for police to act lawfully and for agencies to develop protocols incorporating Fourth Amendment protections, while also preventing prosecutorial reward from neglect of constitutional principles.

[23] Jeffrey R. Dudas, *Raised Right: Fatherhood in Modern American Conservatism* (Stanford: Stanford Unviersity Press, 2017), chapter 5; Robin, *The Enigma of Clarence Thomas*, chapter 9.
[24] Robin, *The Enigma of Clarence Thomas*, 202.
[25] Indeed, Kagan's dissent overlaps some with the first three Parts of Sotomayor's dissent.
[26] *Utah* v. *Strieff*, 2064.
[27] Ibid., 2065. Internal quotations are to *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963).

In this case she claims the exclusionary rule should make the evidence inadmissible: "The officer found the drugs only after learning of Strieff's traffic violation; and he learned of Strieff's traffic violation only because he unlawfully stopped Strieff to check his driver's license."[28] In Part II, she reasons that "the officer's violation was also calculated to procure evidence," making the warrant check *not* an intervening circumstance but "part and parcel of the officer's illegal" search.[29] In III.A, Sotomayor implicitly refutes the three-factor *Brown* v. *Illinois* analysis in Thomas's opinion, arguing that: the "mere existence" of a warrant should not authorize an unlawful stop; the "officer's illegal conduct in stopping Strieff" was "essential" to discovering the warrant; Fackrell did not have reason to fear for his safety, disproving the "safety rationale" for the warrant check; and even if Fackrell was negligent rather than intentionally violating the Fourth Amendment, this does not make the evidence admissible.[30]

Part III.B criticizes what she deems the "most striking" part of the majority's decision, which is also the part most engaging in cold abstraction: Thomas's "insistence that that the event here was 'isolated,' with 'no indication that this unlawful stop was part of any systemic or recurrent police misconduct.'" Sotomayor responds that "respectfully, nothing about this case is isolated."[31] Citing several Justice Department Civil Rights division reports—including the report into Ferguson, MO undertaken in response to the police killing of Michael Brown—as well as reports from non-governmental organizations, she details the expansive network of outstanding criminal warrants in the United States at federal and local levels, most of which relate to minor offenses, ordinance violations, and/or traffic violations. She does this to demonstrate how "these astounding numbers of warrants can be used by police to stop people without cause" and how

[28] Ibid., 2066.
[29] Ibid.
[30] Ibid., 2067-68.
[31] Ibid., 2068, quoting Thomas at 2063.

police departments and manuals, including in Salt Lake City where Strieff was arrested, "institutionaliz[e] training procedures" for stopping people and running warrant checks with no reasonable suspicion at the time of the stop, in the hopes of discovering an outstanding warrant.[32] As a result, she contends there is no justification for the majority opinion's claim that *Strieff* is '"isolated" from all of these other examples; thus Fackrell's behavior *would* be flagrant.[33]

Even as I turn to focus on Sotomayor's composition of emergent legal phenomenology in Part IV of her dissent, it is important to hold onto the way that the unconventional elements build upon and go beyond this mostly technical foundation. Sotomayor applies precedent differently than Thomas and insists that Fackrell's behavior ought to be understood as systemic and flagrant. While she goes on to construct jurisprudential reasoning that recasts the systematic nature of police misconduct into a different register of legal theory, Sotomayor demonstrates with her dissent that a Supreme Court opinion can engage in a close analysis of precedent and also expand the terrain of legal reasoning.

Race and #BlackLivesMatter in Strieff

Edward Strieff is white. Any opinion in the case is not guaranteed to examine the intersection of racism, the Fourth Amendment, and policing. Sotomayor explicitly acknowledges her move to do so, asserting that while "the white defendant in this case shows that anyone's dignity can be violated in this manner," "it is no secret that people of color are disproportionate victims of this type of scrutiny."[34] She follows this by specifically discussing the lessons taught to children of color by their parents in an attempt to protect them from police violence.[35] Although Strieff is

[32] Ibid., 2068-69.
[33] Ibid., 2069.
[34] Ibid., 2070.
[35] Ibid.

white, Sotomayor's dissent insists on attending to the policing of people of color, and especially Black people, in America, even though *none* of the other case materials do so.[36]

Thomas does not bring up race in his opinion. This is consistent with his abstract analysis discussed above, but inconsistent with a regular theme of his jurisprudence. In multiple major cases, Thomas has "raise[d] the banner of race in precincts that neither liberals nor conservatives believe involve race at all" such that in his jurisprudence race "is everywhere, even in cases that don't appear to involve race."[37] For instance, in the Fifth Amendment eminent domain case *Kelo* v. *City of New London* 545 US 469 (2005), Thomas takes what Robin interprets as Sandra Day O'Connor's "non-racialized abstractions — beneficiaries, disproportion, resources" and "transform[s]" them "into a brutal and bitter racial narrative" even as he joins her in dissent.[38] Yet in *Strieff*, it is Thomas who limits himself to race-less abstractions and Sotomayor who transforms the case into one about racialized experience. Sotomayor neither ignores Strieff's race nor uses it as an excuse to elide a discussion of racism and thus engage in the typical "colorblindness" that pervades judicial reasoning and "naturaliz[es] whiteness" within it.[39] Instead, she explicitly discusses racial policing, even as Thomas and the materials internal to the case never raise such questions.

Before going on to discuss the BLM rhetorics of the dissent, it is necessary to highlight one dimension of Part IV more ambivalent in its political effects. Sotomayor's claim that people of color are "disproportionate victims" of over-policing is followed by a citation to Michelle

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[36] The only mention of race in any of the *amici curiae* briefs is in the one filed on behalf of *Utah* by the US Solicitor General's office, which explicitly says that race is *not* a factor in this case. Brief for the United States as *Amicus Curiae*, p. 32, *Utah* v. *Strieff* 136 S.Ct. 2056 (2016). No other *amicus* material discusses race.

[37] Robin, *The Enigma of Clarence Thomas*, 41.

[38] Ibid., 116. Also see 42-47.

[39] Cheryl I. Harris, "Ricci V. Destefano: Lost at the Intersection," *Denver University Law Review* 92, no. 5 (2015): 1121-50, at 1122. Also see Sotomayor's dissent in *Schuette* v. *Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

Alexander's paradigmatic work on mass incarceration, and she appends to her brief discussion of 'the talk' a citation to the work of W.E.B. Du Bois, James Baldwin, and Ta-Nehisi Coates.[40] Such citations step outside the confines of precedent and law review articles alone[41] to gesture to a mini-canon of Black political thought, as if the only way to fully analyze issues in the case is to attend to theory interrogating the experiences and power relations of antiblack racism in the United States. At the same time, it is not as though Sotomayor is turning over the dissent to these Black thinkers themselves. They are only cited, rather than their authorial voices becoming part of the dissent itself, with the commendation of liberal media sources for such citational gestures marking low expectations for representation.

Sotomayor centers the color line in ways that go beyond this explicit discussion of disproportionate scrutiny and 'the talk,' as well as her brief citations to Black thinkers. The conclusion of her dissent opens up to draw on the political rhetoric of BLM. In the final paragraph, Sotomayor writes that "the countless people who are routinely targeted by police" are *not* isolated but rather "are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere."[42] We ought to read this passage as an allusion to the final words of Eric Garner as he was dying after being placed in an illegal chokehold by a New York City police officer. On the ground, Garner says "I can't breathe" at least eight times.[43] Protestors have since then chanted "We can't breathe" at marches and demonstrations, while the

[40] *Utah* v. *Strieff*, 2070. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010). W.E.B. Du Bois, *The Souls of Black Folk* (Chicago: A.C. McClurg & Company, 1903); James Baldwin, *The Fire Next Time* (New York: Dial Press, 1963); Ta-Nehisi Coates, *Between the World and Me* (New York: Spiegel & Grau, 2015).
[41] Even when justices do so to cite literary texts, a recent study demonstrates that the near-total majority of references is to work by white writers. Scott Dodson and Ami Dodson, "Literary Justice," *Green Bag: An Entertaining Journal of Law* 18, no. 4 (2015): 429-434.
[42] *Utah* v. *Strieff*, 2071.
[43] Susanna Capelouto, "Eric Garner's Haunting Last Words," CNN, December 8, 2014, http://www.cnn.com/2014/12/04/us/garner-last-words/index.html.

hashtag #ICantBreathe frequently trends on social media in the wake of police violence against Black people. This sentence from Sotomayor thus knits together the expanding purview of the dissent with police violence against Black people.

I claim that similar discourse operates in the final two sentences of this paragraph: "They [people routinely targeted by police] are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but."[44] We might read the language of *lives* under threat and voices that do and do not *matter* as an addition allusion to BLM. If we read BLM to be making the claim that attention to Black life, experiences, and perspectives is necessary for understanding racism, violence, and policing, then we can grasp Sotomayor's words as making the claim that attention to the voices and lives of those subject to routine targeting by police is necessary for understanding Fourth Amendment jurisprudence, the *Strieff* opinion, and civil liberties more broadly. Sotomayor also suggests that a direct focus on Black people—those most targeted by police—contains a more universalistic potential to safeguard civil liberties, and that the protection of Strieff's civil liberties is contingent on an account of racial injustice. For Sotomayor, foregrounding the situation of those most affected by mass incarceration, police violence, and the effects of the majority decision in *Strieff* is crucial to understanding the implications of the decision the institution of policing.

A Phenomenology of Stopping

I argue that Sotomayor constructs an emergent phenomenological framework of being targeted by police, which I explore through Sara Ahmed's theorization of the "phenomenology

[44] *Utah* v. *Strieff*, 2071.

of 'being stopped.'"[45] Sotomayor enables, at least for a few pages, the loftiness of a Court opinion to connect to lived experience, continuing what others have argued is a central role she plays on the Court of "provid[ing] illuminating insights … about how criminal justice processes operate and affect people's lives in the system's actual, day-to-day operations."[46] In doing so, she re-signifies conventional legal meanings and frameworks. Focusing on "law's power to define" in "terms that may or may not be accountable to experience," Dayan critiques the way that that law and its rituals create forms of legal personhood that often have little connection to law as it is lived, especially by those whose personhood is put into question.[47] Legal narratives in general, and Fourth Amendment narratives in particular, frequently distort and decontextualize legal texts and individual experiences, especially those connected to race.[48] In order to contest this, Dayan argues, "unearthing" the "'dry bones' of law and giving them life" is possible only "outside the guild of lawyers."[49] And yet, in her dissent, Sotomayor performs a kind of unearthing not only from within the guild of lawyers, but from its highest court.

Sotomayor's dissent works against the tendency to obscure experience by providing a detailed and, I claim, phenomenological analysis of being stopped and searched. Her dissent begins:

> The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: this case allows the police to stop you on the street,

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[45] Ahmed, *Queer Phenomenology*, 139.
[46] Smith and Petlakh, "The Roles of Sonia Sotomayor," 466.
[47] Dayan, *The Law is a White Dog*, 216.
[48] Kimberlé Crenshaw and Gary Peller, "Reel Time/Real Justice," *Denver University Law Review* 70 (1992): 283–96; Sara Ahmed, "Deconstruction and Law's Other: Towards a Feminist Theory of Embodied Legal Rights," *Social & Legal Studies* 4 (1995): 55–73. On the neutrality, supposed colorblindness, and abstraction of Fourth Amendment jurisprudence specifically, see Carbado, "(E)Racing the Fourth Amendment." Additionally, Danielle Hayes analyzes the problems generated by the purported racial neutrality and colorblindness of the *Strieff* majority, "He Say, She Say: Utah v. Strieff and the Role of Narrative in Judicial Decisions," *Howard Law Journal* 61, no. 3 (2018): 611–40.
[49] Dayan, *The Law is a White Dog*, xi.

> demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant.[50]

Already in this opening statement, Sotomayor articulates several themes of her emergent phenomenological analysis: a shift from the realm of "technical language" to theorized experience; a discussion of the concrete practices and procedures authorized by the decision; and the use of the second person to shift the addressee of her dissent beyond her fellow Justices. She opens Section IV with the disclaimer "Writing only for myself, and drawing on my own professional experiences… ."[51] No longer joined by Ginsburg in the final Part, Sotomayor makes explicit the turn to law as lived. She marks this dissent as something different, and marks herself as an experiencing person. What follows involves bringing to the Court a detailed account of being stopped that integrates phenomenological analysis of the stop and search with a command over Fourth Amendment precedent.

Part IV of the dissent continues with her assertion that "unlawful 'stops' have severe consequences much greater than the inconvenience suggested by that name."[52] For her, the mere naming of the stop in an opinion does not capture its reality: conventional legal rhetorics are not enough to grapple with how law is lived. Furthermore, while "many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more."[53] The experience of being stopped and searched is differentially distributed. Sotomayor writes that while Strieff is white, "it is no secret that people of color are disproportionate victims of this type of scrutiny."[54] Thus, we should not focus on the lived

[50] *Utah* v. *Strieff*, 2065.
[51] Ibid.
[52] Ibid., 2069.
[53] Ibid.
[54] Ibid., 2070.

experience of any random person living in the United States, or of a generic, supposedly race-less citizen. Rather, conceptualizing the encounter with police requires grounding in the lives of the people disproportionately targeted by police.

In this sense, Sotomayor recognizes and makes legible in her dissent what Ahmed calls in her phenomenology a racialized "political economy" of stopping, which analyzes how "stopping…is distributed unevenly" and how the stop and search "is a technology" in which "some bodies more than others are 'stopped' by being the subject of the policeman's address".[55] She further examines the racialization of space, contrasting "the ease with which the white body extends itself in the world through how it is orientated" with a Frantz Fanon-inspired "phenomenology of the black body" that "could be described in terms of the bodily and social experience of restriction, uncertainty, and blockage."[56] I argue that Sotomayor builds a partial phenomenology of restriction to interrogate the legal mechanisms that authorize the stopping from the perspective of one who is stopped.

Only those bodies subject to constant stopping "realize how degrading a stop can be," and their experience is most important for examining how "this Court has given officers an array of instruments to probe and examine" as a result of *Strieff*—which she posits is only the most recent in a long trajectory of cases weakening Fourth Amendment protections.[57] In the span of Part IV alone, she describes the rampant stop and search practices as: "degrading"; an "indignity"; causing one to feel "'helpless' (citing *Terry v. Ohio*, 392 U.S. 1); placing one under an "officer's control"; effecting "civil death"; subjecting one to "humiliation" and to a "violation" of one's "dignity"; producing a "double consciousness"; and making one's "body…subject to

[55] Ahmed, *Queer Phenomenology*, 139-140.
[56] Ibid., 138-139.
[57] *Utah* v. *Strieff*, 2069.

invasion."[58] This language suggests that those subject to being stopped at any time, for no particular reason, experience a loss of personhood and bodily integrity. Sotomayor's dissent uses its position within the official legal discourse to racialize the Fourth Amendment. The effect of the Court's Fourth Amendment decision is to ensure that the bodies of people of color constantly experience a political economy of stopping and cannot extend into space, robbing them of personhood.

Ahmed conceptualizes racialized stopping as not only a political economy of differential liability to being stopped, but also as "an affective economy that leaves its impressions, impressing on the bodies that are subject to its address."[59] This manifests, in Sotomayor's phenomenology, as a series of specific bodily actions, which she examines from the standpoint of the person being searched, and not only in her *Strieff* dissent. This perspectival shift is also found in Sotomayor's dissents in the qualified immunity cases *Salazar-Limon* v. *City of Houston, Texas, et al.*—dissenting from a denial of certiorari in Salazar-Limon's appeal of summary judgment in favor of Houston police—and *Kisela* v. *Hughes*—dissenting from a *per curiam* summary reversal of a Ninth Circuit denial of qualified immunity for a police officer.[60] While the Court often projects and reconstructs the *officer's* perspective and experiences,[61] in these dissents Sotomayor emphasizes the experience and perspective of the individuals subject to police force as well as the broader socio-legal contexts[62] in a way that I suggest is consistent with her emergent phenomenology in *Strieff*.

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[58] Ibid., 2069-71.
[59] Ahmed, *Queer Phenomenology*, 140.
[60] 137 S.Ct. 1277 (2017); 138 S.Ct. 1148 (2018).
[61] Leonard C. Feldman, "Police Violence and the Legal Temporalities of Immunity," *Theory & Event* 20, no. 2 (2017): 336-38.
[62] For instance, her dissent in *Salazar-Limon* argues that the Court evinces a "disturbing trend" of being too deferential in "afford[ing] [police] officers the benefit of qualified immunity" in "cases involving the use of force (581 U.S. ___ (2017), Sotomayor dissenting at 8-9).

In *Strieff*, Sotomayor contends that the Court has granted police officers have been granted "an array of instruments to probe and examine" the person being stopped,[63] and Sotomayor goes on to construct a quasi-phenomenological archive of precedents, drawing out the embodied experiences from earlier decisions by the Court. The officer may "order you to stand 'helpless, perhaps facing a wall with [your] hands raised.'"[64] He "may then 'frisk' you for weapons," which can "involve more than just a pat down": "As onlookers pass by, the officer may 'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.'"[65] Sotomayor continues by pointing out that an "officer's control over you does not end with the stop" but that the officer "may handcuff you and take you to jail for doing nothing more than speeding, jaywalking," or driving without a seatbelt while children are in the car.[66] Once at a jail, an officer "can fingerprint you, swab DNA from the inside of your mouth, and force you to 'shower with a delousing agent' while you 'lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals'"[67] Consequently, the *Strieff* majority means that "your body is subject to invasion while courts excuse the violation of your rights."[68] The effects of the Court's decision do not remain in the realm of the abstract, hypothetical, or disembodied for Sotomayor. Instead, they are the material of bodily experiences of stopping that leave their trace on the body of the person being stopped. All of these regularized bodily experiences constitute a situation in which "many innocent people are

[63] *Utah* v. *Strieff*, 2069.
[64] Ibid., 2070, citing *Terry v. Ohio*, 392 U.S. 1, 17.
[65] Ibid., citing *Terry v. Ohio*, 392 U.S. 1, 17.
[66] Ibid.
[67] Ibid., citing *Florence* v. *Board of Chosen Freeholds of County of Burlington*, 566 U.S. ___, slip opinion at 2-3 and *Maryland* v. *King*, 569 U.S. ___, slip opinion at 28.
[68] Ibid.

subjected to the humiliation of these unconstitutional searches."[69] An account of embodied experience of the stop and search the loss of personhood resulting from the kinds of searches authorized by the Court's decision. This is an emergent phenomenology of stopping that braids together an analysis of the following, put in the terms of Ahmed's phenomenological concepts: the differential distribution of stopping; the embodied social experience of stopping; the situation of the restricted body that cannot extend into space; and the bodily impressions that stopping creates.

The stop that Sotomayor theorizes does not comprise one single occasion; it becomes part of the regularized experience for people of color, and in particular for young Black men.[70] Ahmed emphasizes the phenomenological importance of habit and repetition, which shape spaces and institutions to fit some bodies and make other bodies uncomfortable.[71] Not only is the stop as such a degrading experience that robs one of personhood. It also saturates habits and everyday experience, particularly for the people whose bodies render them always-stoppable subjects of a police state. The habituation to racialized over-policing extends into the experience of childhood itself, as Sotomayor points out in her discussion of 'the talk' that parents give children of color. Public space and public institutions become increasingly unable to fit them into its contours as they develop a style of embodiment that is always tensed for the next stop and bodily invasion.[72]

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[69] Ibid.
[70] Jennifer Fratellow, Andres F. Rengifo, and Jennifer Trone, "Coming of Age with Stop and Frisk" (New York, NY: Vera Institute of Justice, 2013), https://www.vera.org/publications/coming-of-age-with-stop-and-frisk-experiences-self-perceptions-and-public-safety-implications.
[71] Ahmed, *Queer Phenomenology*, 129-33.
[72] For an account of the racial embodiment of being habitually subjected to being stopped and searched, see Claudia Rankine, *Citizen: An American Lyric* (Minneapolis, Minnesota: Graywolf Press, 2014). On the racialized impacts of police stops for citizenship, see Amy E. Lerman and Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* (Chicago: University of Chicago

Sotomayor's emphasis on experience activates her legal analysis and the possibility for her conclusions to resonate more acutely. Indeed, Sotomayor writes most of Part IV of her dissent in the second person, shifting the addressee of her writing to include not just the guild of lawyers, but all of those who have been and will be subject to the continual political economy of stopping. Marking her own professional experience and moving through the theorized experiences of being stopped and searched, Part IV of Sotomayor's dissent is a kind of legal phenomenology that is embodied and felt.

Embodying an Alternative to Law's Cold Abstractions

Sotomayor's turn to phenomenology generates broader ramifications for the politics of jurisprudential constructions of criminal law. Her dissent in *Strieff* starts to develop an alternative mode of judicial theorizing that contrasts with the non-phenomenological majority opinion by centering the everyday experiences of bodies. Ahmed argues that, in response to hegemonic jurisprudence, the "embodiment of subjects" is a site where the power relations are "contested through specific practices of law, and through specific conceptualizations and definitions of what constitutes the law."[73] Sotomayor's warning early in her *Strieff* dissent to not be soothed by the technical language of Thomas's opinion echoes the revelation from her memoir providing the epigraph to this article, namely that having "mastery of the law's cold abstractions" is "incomplete" for fulfilling the purposes of law, but instead must be incorporated into an understanding where the abstractions are contextualized in relation to individual experiences.[74]

Press, 2014); Charles R. Epp, Steven Maynard-Moody, and Donald P. Haider-Markel, eds., *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago: University of Chicago Press, 2014).

[73] Ahmed, "Deconstruction and Law's Other," 56, 59-60.

[74] Sotomayor, *My Beloved World*, 271. I make reference to Sotomayor's memoir with hesitation, as she cautions against using the work for clues to her jurisprudence (Ibid., 219). However, given my attention to

She responds to Thomas's (indeed abstract) opinion and its technical language by filling her dissent with the embodied subject constituted by law and by racialized patterns of policing. Her dissent not only contests the conventional legal reasoning of the opinion but—in a kind of demonstration of Ahmed's phenomenological suggestion about the potential of embodiment and law—contests the meaning of Fourth Amendment law and its relationship to subjects. That is, Sotomayor theorizes the feeling, moving, restrained, invaded, prodded, shaped, habituated, racialized subject of the police stop, and thus partially reconstitutes one mode of Fourth Amendment reasoning.

Alan Hyde offers a utopian legal discourse of bodies in response to what he interrogates as estranging "language that makes the body disappear" and the "constructions of the body that emphasize its thingness, its distance from us," contending that law must develop "greater self-consciousness about its discursive constructions of the body" in an attempt to develop an ethical discourse of "presence not absence."[75] One form this might take is a "hypothetical dialogue in which the judge must imagine himself or herself trying to convince a real person, in the flesh, of the location of justice."[76] Sotomayor's dissent pursues these objectives: she is self-conscious about the turn her dissent takes in Part IV; she seeks to make the presence of bodies visceral; she theorizes bodies in their relations to bodies of law, officers, racializing processes, and potentially the reader of the dissent; and, above all, she offers a discourse to convince the reader in the flesh through her phenomenological discourse. Hyde suggests such an alternative is especially needed for Fourth Amendment cases, in which decisions tend to involve "only law's own artifact," an

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questions of experience in this article, I find Sotomayor's memoir illustrative. I thank Sari Krieger Rivera for suggesting I read Sotomayor's memoir in relation to this article.

[75] Hyde, *Bodies of Law*, 260, 263.

[76] Ibid., 264.

"abstract, universal body" that "effaces any individuated element of the body."[77] Sotomayor's turn away from an abstract legal subject and toward a phenomenological body in order to examine the experiences of being searched and of habitual exposure to racialized stops *rejects* estranging abstract universals for a contextual body. While Hyde's ultimate goal may indeed be "impossibly utopian," he closes his book by considering what would become of law if its discourse underwent "modest changes" with "more sensitivity to our language of the body" in "invigorated, embodied legal texts."[78] Sotomayor offers us a model of what this more modest step might be in her *Strieff* dissent. In doing so, she approaches what we might consider to be the closest possible "utopian" legal discourse of the body possible from a Supreme Court Justice, caught as they are in centuries of precedential decisions and discourses of the body.

Sotomayor's legal phenomenology also holds potential from the standpoint of legal mobilization scholarship. Two central insights of the legal mobilization literature are, first, that legal rights are often important for movements as strategic resources in their advocacy and struggle,[79] and, second, that "legal mobilization politics" regularly involve "reconstructing legal dimensions of inherited social relations."[80] Sotomayor's critique of Fourth Amendment jurisprudence and legal reasoning, particularly the way it reconceptualizes legal and social relations, might serve as a strategic resource for movements and future cases challenging policing procedures, even though she writes in dissent. Indeed, in her analysis of the NAACP's role in litigating *Moore v. Dempsey* (261 U.S. 86 (1923)) and of the role of *Moore* in shaping the development of federal institutions in the areas of criminal procedure and civil rights, Megan

[77] Ibid., 160.
[78] Ibid., 264.
[79] Jeffrey R. Dudas, Jonathan Goldberg-Hiller, and Michael W. McCann, "The Past, Present, and Future of Rights Scholarship," in *The Handbook of Law and Society*, ed. Austin Sarat and Patricia Ewick (West Sussex, UK: John Wiley and Sons, 2015): 367-81, at 372–74.
[80] Michael W. McCann, "Law and Social Movements: Contemporary Perspectives," *Annual Review of Law and Social Science* 2, no. 1 (2006): 25.

Ming Francis points to intertwining social movements and legal struggles against stop-and-frisk and other police practices as instructive of the process by which movements might use courts to challenge the state and expand democratic participation.[81]

However, an interpretive approach to law usually centers the everyday meaning-making of individuals navigating and struggling against the world rather than institutional rules and decisions.[82] The pertinent sites of legal meaning-making in such literatures are those of "cultural conventions, logics, rituals, symbols, skills, practices, and processes" rather than discourses of "official legal texts or institutions."[83] This scholarship would suggest we decenter the words of a Supreme Court Justice. Future work ought to study whether Sotomayor's dissents are deployed by and reworked in social movement mobilizations in any way. Here I note that Sotomayor's phenomenology creates an opportunity to fuse together the individual-practical and official-juridical realms in the way it brings in the standpoint and experience of the searched body into formal legal discourse. By attending to the everyday as sites of experience of law, Sotomayor points to novel legal conceptualizations that may be a more vital resource for legal mobilization by movements: they may be words from a judge on high, but they are also more than that.

Ultimately, at the end of her dissent, Sotomayor claims that the decision in *Strieff* "implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[84] That is, the conclusion of Sotomayor's emergent phenomenology—the claim

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[81] Megan Ming Francis, *Civil Rights and the Making of the Modern American State* (New York: Cambridge University Press, 2014).
[82] Michael W. McCann and Tracey March, "Law and Everyday Forms of Resistance: A Socio-Political Assessment," ed. Austin Sarat and Susan S. Silbey, Studies in Law, Politics, and Society 15 (1995): 207-36, at 209-10.
[83] Michael W. McCann, "How Does Law Matter for Social Movements?," in *How Does Law Matter?: Fundamental Issues in Law and Society*, ed. Bryant Garth and Austin Sarat (Evanston, IL: Northwestern University Press, 1998): 76-108, at 81.
[84] *Utah* v. *Strieff*, 2070-71.

that her emergent phenomenology justifies her to make in her legal analysis—is that what is supposed to be a democratic polity functions primarily as a jailer cataloging Black people.

SOTOMAYOR AND THE LIMITS OF LAW

Even if new potentials for legal bodies, claims, and modes of argumentation arise from Sotomayor's developing phenomenology, a series of structural limits confine these potentialities. This section examines two of these limits in order to critically evaluate Sotomayor's project and to gesture to the fundamental restraints of even the most radical of legal-institutional methods of working for transformation. I begin with the challenge posed by Gerald Rosenberg in *The Hollow Hope*, that "social reformers" regularly "succumb to the 'lure of litigation'" to effect social change, when in fact "courts can seldom produce significant social reform" due to the severe structural and political constraints on their efficacy.[85] According to Rosenberg, the partial nature of constitutional rights, insufficient judicial independence, and the lack of enforcement mechanisms narrow the conditions under which substantial change through law may take place.[86] Most relevant for *Strieff*, Rosenberg suggests that exclusionary rule jurisprudence is one area in which, contrary to common beliefs, courts have in fact had limited empirical impacts in rulings affirming or expanding the rule.[87]

While the subject of much debate,[88] Rosenberg presents an important set of questions. Even if Sotomayor may not be said to overcome the limits Rosenberg identifies, she at least reworks their boundaries. This is particularly the case with his first constraint, about the nature of

[85] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), 341.
[86] Ibid., 33-35.
[87] Ibid., chapter. 11.
[88] David A. Schultz, ed., *Leveraging the Law: Using the Courts to Achieve Social Change* (New York: Peter Lang, 1998).

constitutional rights. He argues that legal precedent, language, and culture circumscribe the kinds of claims that can be made, such that they must be translated and thus diluted into a Court-appropriate framework.[89] Sotomayor struggles against this very dynamic in the *Strieff* dissent, and in doing so *expands* the kinds of claims that may be present. Similarly, while Rosenberg argues that legal framing regularly "denudes" the "political and purposive" and "emotional" appeal of a matter,[90] Sotomayor's phenomenology offers an alternative framing that returns the political and emotional nature of the stop-and-search. Rosenberg asserts that "focusing on the language of judicial decisions excludes the political, social, and economic context in which the decisions have to be implemented."[91] Sotomayor's phenomenological language, however, is in fact more deeply attuned to the social and political context of racism than standard modes of legal discourse.

There, is however, one limit that Sotomayor's phenomenology definitively cannot surmount, that of paradigmatic antiblackness.[92] If antiblackness is structurally or ontologically encoded into American policing and law,[93] then even the most robust civil libertarian interpretation of the Fourth Amendment might barely ameliorate any of the conditions that Sotomayor interrogates in her emergent phenomenology. Patrice D. Douglass makes such a critique in an analysis of Sotomayor's dissent:

> By using Black Lives Matter slogans and referencing Black literature that historicizes the racial origins of policing, Sotomayor is tapping into the political and social charge of that movement that demands immediate justice and recourse to Black people dying. …

[89] Rosenberg, *Hollow Hope*, 11-12.
[90] Ibid., 12.
[91] Gerland N. Rosenberg, "Ideological Preferences and Hollow Hopes: Responding to Criticism," University of Chicago Press, 2008, https://www.press.uchicago.edu/books/rosenberg/index.html.
[92] Frank B. Wilderson III, *Red, White & Black: Cinema and the Structure of U.S. Antagonisms* (Durham and London: Duke University Press Books, 2010).
[93] See, e.g., Barnor Hesse, "White Sovereignty (…), Black Life Politics: 'The N****r They Couldn't Kill,'" *South Atlantic Quarterly* 116, no. 3 (2017): 581-604; Calvin Warren, *Ontological Terror: Blackness, Nihilism, and Emancipation* (Durham, NC: Duke University Press, 2018): chapter 2.

> [Sotomayor] would have us believe that had the court ruled in favor of Strieff, Black lives would matter, if not fully at least a little more. However, the dissent is performing a political affinity with Black suffering that the law cannot and does not provide in this context.[94]

That is, a remedy focused on stronger Fourth Amendment protections does not confront roots of antiblack violence or ask whether a non-antiblack police order is in fact possible when "nothing about the police suggests that they have ever or will ever be on the side of Blackness."[95]

For all its challenge to constitutional jurisprudence's assumptive logics, to cold and technical rationalities, and to an inability to grasp lived experience, Sotomayor's phenomenology does not—we might say cannot—construct a remedy outside of that legal system it contests. Even if my argument that Part IV of the dissent seeks to destabilize the law and put it into question is reasonable, the alternative that Sotomayor offers—the alternative her position compels her to offer—can only ever be stronger Fourth Amendment protections within law itself. No matter how much her phenomenology may offer a vantage point outside conventional ideas of jurisprudence, Sotomayor remains at the pinnacle of America's legal institutions. As Douglass writes, the "belief that the law can be a site for moral or even ethical redress" too easily implies

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[94] Douglass, "On (Being) Fear," 337. On BLM and the limits of criminal justice "reform," see Paul Butler, "The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform," *Georgetown Law Journal* 104, no. 6 (2016): 1419–78.

[95] Ibid., 338, 340. There is an additional layer of Douglass's critique contending that "Although fear is only briefly mentioned in the dissent, and never returned to, I argue that the use of the term juxtaposed with the justifiability of Officer Fackrell's actions arguably upends the political maneuver Sotomayor offers next. … This invocation of fear is not concerned with how this very logic has been deputized against Black bodies and employed as justification for their violation. Furthermore, it occludes a sustained engagement with how fear has shrouded police culpability in very recent killings of unarmed Black people." Ibid., 335. Sotomayor invokes fear in response to Thomas's opinion, in which Fackrell's warrant check is justified as a precautionary step taken for the officer's safety. Sotomayor responds that that Fackrell "by his own account … did not fear Strieff," and that the Court's "safety rationale" for warrant checks is not at issue in the case (*Utah* v. *Strieff*, 2067). However, I argue that the jurisprudential argument in Parts I-III of the dissent are not dependent on this claim, especially because Sotomayor ultimately rejects that the safety rationale governs in this case. The claim about Fackrell's potential fear plays also no causal or assumptive role in the final Part of the dissent, and the substantial break in style, logic, rhetoric, and philosophical framework between Parts I-III and Part IV makes it, I think, stand outside of any claim about Fackrell's fear. Even if I am correct here, I do not think this detracts from the force of Douglass's broader claim.

that better laws and better jurisprudence could simply provide "a site to redress the violence endured by Black people at the hands of the police."[96] This is a profoundly fundamental challenge to the potentiality of Sotomayor's critique, where the limits of the mechanisms of redress might always belie the power of even her most incisive critiques—even if those critiques partially deconstruct and push against law and its violences.

CONCLUSION: LAW'S VIOLENCE IN A PHANTOM DISSENT

Legal interpretation, Robert Cover contends, always "takes place in a field of pain and death" and of the "social practices of violence": the pain and death of victims, yes, but also that of defendants, incarcerated people, convicts, the condemned—all "bodies on the line."[97] The perplexities of Sotomayor's dissent pose a challenge to those working to analyze her developing legal phenomenology of racial policing in the terms of law's relationship to violence. Indeed, Sotomayor is writing in dissent in a case with the consequence of further entrenching racialized police practices, writing about a white person, writing with no other Justices joining the crucial Part IV of the dissent, writing in a document a small number of people will ever read, writing as part of a Supreme Court unlikely to strengthen Fourth Amendment protections in the near future, and writing to offer legal remedies that, even if adopted, might do very little to address antiblack policing. These limits persist in necessary tension with the cracks that she opens in the edifice of Supreme Court jurisprudence and legal reasoning, legalistic openings through which concerns about lived experiences of racism might be glimpsed.

If a judge is understood to be a disembodied, abstract, rational voice from on high, this conceals the way that law's violence itself shatters the ability of "any interpretation rendered as

[96] Ibid., 335, 334.
[97] Robert M. Cover, "Violence and the Word," *Yale Law Journal* 95, no. 8 (1986): 1601-29, at 1610, 1615.

part of the act of state violence" to be able to "constitute a common and coherent meaning."[98] In this sense at least, Sotomayor offers a substantial response to the problematic Cover identifies. Rather than evacuating pain and violence from her opinion, she attempts through her emergent phenomenology to confront the Court and the reader with the violence of the racialized stop and search. The "pain and fear" of prisoners and defendants are "remote, unreal," and "almost never made a part of the interpretive [judicial] artifact."[99] Sotomayor to some extent struggles against this by drawing on BLM's rhetorics and on the phenomenological experience of racialized police violence, grounding her interpretation with those bearing the brunt of the ruling and its consequences. In an earlier work, Cover argues that a "commitment to a jurisgenerative process that does not defer to the violence of administration is the judge's only hope of partially extricating [her]self from the violence of the state."[100] While not fully giving over her "hermeneutic of jurisdiction" in a way that evacuates the institutional power of the judge, Sotomayor does construct what Cover might evaluate as a "redemptive constitutionalism … [within] the statist convention", positing an alternative normative, interpretive, and jurisprudential world that nonetheless stays within the horizon of "officials of the state."[101]

In the end, though, Sotomayor's statist redemption cannot fully disentangle itself from law's violence in general, or the antiblackness of criminal law in particular. Her dissent is thus non-unified in its political effects and heterogeneous with itself. This doubling–her dissent as both phenomenologically "jurisgenerative" and coercively "jurispathic," to use Cover's terms[102]–haunts the radical potential of the dissent. Dayan, interested as she is in the ghosts that haunt America jurisprudence, writes of "phantom decision[s]" from the Court which, while "forgotten"

[98] Ibid., 1628.
[99] Ibid., 1629.
[100] Robert M. Cover, "*Nomos* and Narrative," *Harvard Law Review* 97, no. 1 (1983): 4-68, at 59.
[101] Ibid., 60; 43.
[102] Cover, "*Nomos* and Narrative," 11-19, 40-44

and "never given life" by the Court, nonetheless exhibit "ghostly promise" and "lost potential" in relation to "what has not yet been actualized."[103] Sotomayor, I suggest, enacts this kind of phantom legal writing in *Utah* v. *Strieff*. One finds its ghostly promise to respond the law's violence in the way that the dissent abstains from the usual function of criminal law to avoid discussion of specific harms through the use of legal reasoning and legal fictions that abstract away from the harm and deny the experiential dimensions of law.[104] Sotomayor's dissent resists (some of) these obfuscations. Sotomayor's legal discourse provides specificity and an explicit discussion of racism instead of remaining on the plane of generic, abstract, and contrived-to-be-raceless citizens, which in turn underwrites the phenomenology of stopping insisting that a consideration of the legal issues at stake in the case must engage the racialized, embodied, lived experience of police stops instead of reducing them to pure abstraction. Recall that Sotomayor opens her dissent by overtly seeking to disavow the obscuring language of the Court, warning the reader to "not be soothed by the opinion's technical language" and to instead consider the specific experiences and acts authorized by the decision.[105] Sotomayor does use such technical language, especially in Parts I-III of her dissent, but her developing phenomenology exceeds the register of conventional Supreme Court jurisprudence and legal writing to construct a different kind of legal theory that could be said, in Cover's terms, to envision legal narrative as "a bridge linking a concept of a reality to an imagined alternative."[106]

I argue that it is necessary to hold on to and stay with the tension of Sotomayor's multivalent dissent, a tension emblematic of a non-unified legal and political culture in which any "unification of meaning … exists only for an instant" as a "template for a thousand real

[103] Dayan, *The Law is A White Dog*, 91.
[104] See Cover, "Violence and the Word," 1628.
[105] *Utah* v. *Strieff*, 2064.
[106] Cover, "*Nomos* and Narrative," 9.

integrations of corpus, discourse, and commitment."[107] I do not argue that the ghostly potential of Sotomayor's dissent outweighs its structural and institutional position, or that it offers innocent or naive hope for eventual liberation and redemption. Rather, I contend that those severe positional—and political-ontological, in the case of Douglass's challenge to legal humanism—limitations are in tension with that phantom promise of the dissent, instead of precluding the emergence of those possibilities. This tension, this double-ness, is the point in a non-unified legal and political culture in which a phantom dissent haunts legal concepts with alternative jurisprudential modes. Sotomayor's dissent contests the relationship between law and racialized violence, and challenges conventional modes of legal reasoning. Sotomayor's dissent also faces severe limits to its radical potential, in terms of both legal rhetoric's possible effects on movements and especially the paradigmatic structure of antiblack racism. These dimensions of the dissent, I suggest, present a relation of neither synthesis nor mutual exclusivity, but rather one of irreducible tension, offering a ghostly, unclear, and fraught glimpse of an emergent legal phenomenology amid the law's cold and violent abstractions.

[107] Ibid., 15.