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## The Racial Architecture of Criminal Justice

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# THE RACIAL ARCHITECTURE OF CRIMINAL JUSTICE

*Bennett Capers\**

## ABSTRACT

*One of the pleasures of contributing to symposia—especially symposia where each contribution is brief—is the ability to engage in new explorations, test new ideas, and offer new provocations. I do that now in this essay about race, architecture, and criminal justice. I begin by discussing how race is imbricated in the architecture of courthouses, the quintessential place of supposed justice. I then take race and architecture a step further. If we think of architecture expansively—Lawrence Lessig’s definition of architecture as “the physical world as we find it” comes to mind—then it becomes clear that race is also imbricated in the very architecture of the Fourth Amendment. All of this raises an interesting question: If the very architecture of the Fourth Amendment is the problem—not just its interpretation but its very design—what are we to do?*

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## I. INTRODUCTION

I have been thinking quite a bit about race and architecture recently. Part of this is attributable to a brilliant show at the Museum of Modern Art in New York (MoMA), which I was lucky enough to see. The show, *Reconstructions: Architecture and Blackness in America*, features works of Black architects and designers who are normally excluded from the canon.<sup>1</sup> (It is telling that the architecture rooms at MoMA are named

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1. A description of the exhibition can be found on the museum’s website. See *Reconstructions: Architecture and Blackness in America*, THE MUSEUM OF MODERN ART, <https://www.moma.org/calendar/exhibitions/5219> [<https://perma.cc/CRY7-FJV6>]. There is also a catalogue that accompanies the exhibit. See SEAN ANDERSON, MABEL O. WILSON, ARIELE DIONNE-KROSNICK & AARON SMITHSON, *RECONSTRUCTIONS: ARCHITECTURE AND BLACKNESS IN AMERICA* (Sarah Kramer & Don McMahon eds., 2021).

for Phillip Johnson, a world-renowned architect and the founding director of MoMA’s architecture department—Johnson was also an avowed racist.)<sup>2</sup> But featuring Black architects is only the start. The show also reimagines “architecture from the perspective of Black people.”<sup>3</sup> Or as Michael Kimmelman, the art critic for *The New York Times* put it, “How can Blackness construct America?”<sup>4</sup>

But even before the show opened, architecture was increasingly on my mind. There was President Trump’s executive order—called “Promoting Beautiful Federal Civic Architecture”—issued during the last month of his waning presidency.<sup>5</sup> The order mandated that all new federal buildings adhere to “classical” and other “traditional” styles, and specifically praised Greek and Roman styles of architecture.<sup>6</sup> Members of the non-profit Architecture Lobby, anticipating this order—it was a year in the works—had already issued a statement making clear their disapproval and noting, among other things, that “Neoclassicism in the US is directly related to the construction of whiteness.”<sup>7</sup> Against this backdrop, I was also vaguely aware of the Academy of Architecture for Justice, the “networking group for [American Institute of Architects] member architects whose clients include police departments, county sheriffs, courts, and corrections departments.”<sup>8</sup>

Indeed, since “subject position is everything in my analysis of the law,” to borrow a line from Patricia Williams,<sup>9</sup> it would probably be more accurate to say that I have been thinking about race and architecture for years. For the most part, though, I’ve kept my thoughts to myself. Only recently have I begun putting my thoughts onto the page.<sup>10</sup>

One of the pleasures of contributing to symposia—especially symposia where each contribution is brief—is the ability to engage in new explorations, test new ideas, and offer new provocations. I do that now in this essay about race, architecture, and criminal justice. I begin, in Part Two,

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2. Matt Hickman, *Philip Johnson’s Name Covered at MoMA for Reconstructions: Architecture and Blackness in America*, THE ARCHITECT’S NEWSPAPER (Mar. 2, 2021), <https://www.archpaper.com/2021/03/philip-johnson-name-covered-at-moma-for-reconstructions-architecture-and-blackness-in-america> [https://perma.cc/8J9N-4KTW].

3. Michael Kimmelman, *How Can Blackness Construct America?*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/arts/design/black-architecture-moma.html> [https://perma.cc/4YGC-M2UB].

4. *Id.*

5. Exec. Order No. 13967, 85 Fed. Reg. 83,739 (Dec. 18, 2020).

6. Neda Ulaby & Elizabeth Blair, *Keep It Classical, Says Trump Order on Federal Architecture*, NPR (Dec. 21, 2020, 6:00 PM), <https://www.npr.org/2020/12/21/948926995/keep-it-classical-says-trump-order-on-federal-architecture> [https://perma.cc/RQT7-7CKP].

7. Claire Selvin, *Trump Issues Executive Order Mandating ‘Beautiful’ Architecture for Federal Buildings*, ARTNEWS (Dec. 21, 2020, 2:45 PM), <https://www.artnews.com/art-news/news/trump-signs-executive-order-classical-architecture-1234579994> [https://perma.cc/72K6-29JZ].

8. Raphael Sperry, *Is “Justice Architecture” Just?*, AGGREGATE (Mar. 2015), <http://www.we-aggregate.org/piece/is-justice-architecture-just> [https://perma.cc/T5RM-N75V].

9. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 1 (1991).

10. See Bennett Capers, *The Law School as a White Space?*, 106 MINN. L. REV. (forthcoming fall 2021).

by discussing how race is imbricated in the architecture of so many of our places of supposed justice: courthouses. Part Three takes race and architecture a step further: it argues that if we think of architecture expansively—Lawrence Lessig’s definition of architecture as “the physical world as we find it” comes to mind<sup>11</sup>—then it becomes clear that race is also imbricated in the very architecture of the Fourth Amendment.

## II. THE ARCHITECTURE OF THE COURTHOUSE

It may seem strange to discuss architecture in legal scholarship. Indeed, for many of us, architecture is just something in the background. It may affect our mood, and we may have a general sense of the built environment around us, but rarely is it the focus of legal scholarship.<sup>12</sup>

But of course, architecture is more than this. For starters, architecture is “a way of engineering relationships among people that, after a time, becomes just another part of the landscape.”<sup>13</sup> Beyond this, we live in

a built environment that is not only compromised but also, as the critic Ta-Nehisi Coates contends, “argues against the truth of who [we] are.” These injustices are embedded in nearly every aspect of America’s design—an inheritance of segregated neighborhoods, compromised infrastructures, environmental toxins, and unequal access to financial and educational institutions.<sup>14</sup>

Think of architecture connected to city planning, which has a long history of facilitating segregation along lines of race and class, as Deborah Archer has written.<sup>15</sup> For her part, Elise Boddie has written about “the racial identifiability of spaces,” which is often a result of a history of exclusion.<sup>16</sup> All of this suggests architecture can have an expressive function. This is certainly true of classical architecture in this country. Simply put, Trump’s efforts to mandate that federal buildings be built in the classical style is anything but valueless. There is a reason that the members of the far-right view “ancient Greeks and Romans as the originators

11. Lawrence Lessig famously defined architecture as “the physical world as we find it, even if ‘as we find it’ is simply how it has already been made.” Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999). I cannot think of a better definition.

12. For a few notable exceptions, see generally Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002); Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMS. 311 (2012).

13. Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121, 124 (1980).

14. See *Reconstructions: Architecture and Blackness in America*, *supra* note 1 (quoting TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 99 (Chris Jackson ed., 2015)).

15. Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1264 (2020) (detailing the role highway construction has played in segregating cities along lines of race and proposing that jurisdictions consider racial equity impact going forward); see also Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1939 (2015) (examining “the sometimes subtle ways that the built environment has been used to keep certain segments of the population—typically poor people and people of color—separate from others”).

16. Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 414 n.63 (2010).

of so-called white culture” and that “[m]archers in Charlottesville, Va., carried flags bearing a symbol of the Roman state.”<sup>17</sup> Classical architecture in this country has always been a way of claiming a particular lineage.<sup>18</sup> Given that so many courthouses adopted a neoclassical style starting in the nineteenth century, it is surprising that the connection between the architecture of courthouses and whiteness has not been discussed more.

That is beginning to change, at least if we think of architecture as including not only buildings but also interior design and other aesthetic elements. Consider a recent decision from Judge David Bernhard of the Nineteenth Judicial Circuit of Virginia that garnered coverage in *The Washington Post*, *The New York Times*, and other media.<sup>19</sup> The decision was in response to a “Motion to Remove Portraiture Overwhelmingly Depicting White Jurists Hanging in Trial Courtroom.”<sup>20</sup> For the judge, the issue was whether he “should permit a jury trial to take place in a courtroom gilded with portraits of jurists, particularly when they are overwhelmingly of white individuals peering down on an African American defendant.”<sup>21</sup> In ruling for the defendant—and indeed issuing a ruling that would apply to all criminal trials in his courtroom going forward—the judge made clear that it was irrelevant whether any particular judge depicted in a portrait had expressed racist views.<sup>22</sup> What mattered was the expressive message communicated by “symbols that ornament the hallowed courtrooms of justice to favor a particular race or color.”<sup>23</sup> Concluding the “portraits may serve as unintended but implicit symbols that suggest the courtroom may be a place historically administered by whites for whites, and that others are thus of lesser standing in the dispensing of justice”<sup>24</sup> and would thus deprive the defendant of a fair trial, the judge ruled, going forward, all cases before him would proceed “in a courtroom devoid of portraits in the furtherance of justice.”<sup>25</sup>

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17. Rachel Poser, *He Wants to Save Classics from Whiteness. Can the Field Survive?*, N.Y. TIMES MAG. (Feb. 12, 2021), <https://www.nytimes.com/2021/02/02/magazine/classics-greece-rome-whiteness.html> [<https://perma.cc/3FXH-TK5B>].

18. See Kate Wagner, *Duncing About Architecture*, THE NEW REPUBLIC (Feb. 8, 2020), <https://newrepublic.com/article/156509/donald-trump-war-on-architecture> [<https://perma.cc/79UM-8DTK>].

19. See, e.g., Derrick Bryson Taylor, *Virginia Judge Won't Try Black Man in Courtroom Lined with White Portraits*, N.Y. TIMES (Jan. 2, 2021), <https://www.nytimes.com/2021/01/01/us/virginia-judge-white-portraits.html> [<https://perma.cc/DQ6X-UWFP>]; Justin Jouvenal, *Va. Judge Rules Black Defendant Can't Get a Fair Trial in Courtroom Largely Featuring Portraits of White Judges*, WASH. POST (Dec. 22, 2020, 2:26 PM), [https://www.washingtonpost.com/local/legal-issues/courtroom-portraits-judges-ruling/2020/12/22/366c57a8-445e-11eb-975c-d17b8815a66d\\_story.html](https://www.washingtonpost.com/local/legal-issues/courtroom-portraits-judges-ruling/2020/12/22/366c57a8-445e-11eb-975c-d17b8815a66d_story.html) [<https://perma.cc/L57B-XBX5>].

20. *Commonwealth v. Shipp*, No. FE-2020-8, 2020 WL 7638843, at \*2 (Va. Cir. Ct. Dec. 20, 2020).

21. *Id.* at \*1.

22. *Id.* at \*1–2.

23. *Id.* at \*5.

24. *Id.*

25. *Id.* at \*6.

To be sure, Judge Bernhard's decision is noteworthy for its willingness to reckon with the law's implicit role in this country's racial history. It is no coincidence that he issued his decision against the backdrop of efforts to address racism in this country following the shooting of George Floyd and what *The New York Times* described as possibly the largest movement in American history.<sup>26</sup> As Judge Bernhard noted:

We stand at a point in judicial history where the moment calls for heightened attention to the past inequities visited upon persons of color and minorities. On August 14, 2020, the fifteen current judges of the Fairfax Circuit Court, seizing on that moment, unanimously affixed their signature to a collective landmark "Initial Plan of Action to Address Systemic Racism and Enhance Civic Engagement With Our Community."<sup>27</sup>

But the decision's greater significance is its recognition of the expressive messages communicated by architecture—or at least portraits—about who belongs and who does not, who is a full citizen entitled to full and equal protection of the law and who is not.

And of course, it is not just portraits of jurists adorning courtroom walls that "serve as unintended but implicit symbols that suggest the courtroom may be a place historically administered by whites for whites."<sup>28</sup> I have written previously about images of Lady Justice—blindfolded, the scales of justice in one hand, a sword in the other.<sup>29</sup> While her blindfold is understood to represent her impartiality, her blindness and impartiality also suggest a reliance on whiteness as a default.<sup>30</sup> In criminal law, where the belief of a defendant is measured against that of a reasonable person—think self-defense cases or even police use-of-force cases—is the reasonable person that Justice imagines when she turns a blind eye to the particularities of a white person? Is the person middle-class? College educated? But more importantly, although rarely commented on, Justice herself, almost invariably figured as white, sends the expressive message about the very whiteness of the law.<sup>31</sup>

And then there is the architecture of courtrooms themselves, those "temples of justice," so many of which remain in the neoclassical style, including the U.S. Supreme Court, and so many of which reference "the influence of Thomas Jefferson's designs."<sup>32</sup> As the art critic Michael Kim-

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26. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/3V5C-JCWU].

27. *Shipp*, 2020 WL 7638843, at \*2.

28. *Id.* at \*5.

29. See Bennett Capers, *Blind Justice*, 24 YALE J.L. & HUMS. 179, 180 (2012) (discussing the messages conveyed by the whiteness of Lady Justice); see also Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203, 203–04 (2006).

30. See Capers, *On Justitia, Race, Gender, and Blindness*, *supra* note 29, at 224–25.

31. See *id.*; Capers, *Blind Justice*, *supra* note 29, at 180.

32. JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 137 (2011).

melman points out, classical architecture in this country can “dredge[ ] up images of antebellum America, when classicizing Federal architecture was all the rage.”<sup>33</sup> But it is more than this. Classical architecture in this country conjures a segregated past where non-whites tended to be prohibited from testifying against whites in some places, or against anyone in other places.<sup>34</sup> A history of California courthouses has acknowledged that “African Americans were barred by law from giving testimony in California courts until 1863; Asians and Native Americans were excluded until 1872.”<sup>35</sup> Indeed, even after race-based restrictions on testimony were officially lifted, race still mattered. In North Carolina, courts required that “whenever a person of color shall be examined as a witness, the court shall warn the witness to declare the truth.”<sup>36</sup> And in Oregon, the state supreme court twice ruled that Chinese witnesses must be viewed with special scrutiny, stating in one case that “[e]xperience convinces every[one] that the testimony of Chinese witnesses is very unreliable.”<sup>37</sup>

These courtrooms conjure too a history of segregated courtrooms, where African Americans were consigned to sitting or standing in the back of the courtroom, or upstairs—think of the courtroom scenes in *To Kill a Mockingbird*.<sup>38</sup> Even after de jure restrictions were lifted, de facto restrictions held sway in many places, with the law lurking not far behind. Consider the case against Ford T. Johnson, a Black man who was convicted of contempt of court in 1960s Virginia when he sat in a section “reserved for whites” and refused to move to the “section reserved for Negroes.”<sup>39</sup> It took a Supreme Court case, *Johnson v. Virginia*, to reverse his conviction on equal protection grounds.<sup>40</sup>

Finally, add to this the long history of extrajudicial justice being meted out in front of courthouses during the period following Reconstruction. As Sherrilyn Ifill observes in her book *On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century*, “Between 1900 and 1935 courthouse lawns on the Eastern Shore were routinely sites of lynchings or near lynchings, involving the participation of hun-

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33. Michael Kimmelman, *MAGA War on Architectural Diversity Weaponizes Greek Columns*, N.Y. TIMES (Feb. 8, 2020), <https://www.nytimes.com/2020/02/07/arts/design/federal-building-architecture.html> [https://perma.cc/8J7K-4Q8D].

34. See George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 684–85 (1997); see also Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 889 (2018).

35. RESNIK & CURTIS, *supra* note 32, at 138.

36. Fisher, *supra* note 34, at 685 (quoting ch. 40, § 10, 1866 N.C. Sess. Laws 99, 102).

37. *State v. Mah*, 10 P. 306, 306–07 (1886). In the second case, *State v. Ching Ling*, the court stated that the “Chinamen . . . will not hesitate to conspire” and implored juries “to be prudent, vigilant, and discriminating.” 18 P. 844, 847 (1888). For more on Asian Americans and the presumption against credibility, see Gabriel J. Chin, “A Chinaman’s Chance” in *Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965, 970–72 (2013).

38. A clip from the film can be found on YouTube. See Movieclips, *To Kill a Mockingbird (8/10) Movie CLIP – Your Father’s Passing (1962) HD*, YOUTUBE (May 27, 2011), [https://www.youtube.com/watch?v=Q7CX\\_5D6y6E](https://www.youtube.com/watch?v=Q7CX_5D6y6E) [https://perma.cc/CDN8-25SD].

39. *Johnson v. Virginia*, 373 U.S. 61, 61–62 (1963).

40. *Id.*

dreds and sometimes thousands of white onlookers.”<sup>41</sup> The fact that these lynchings, which extended back into the 1800s, occurred in front of courthouses was no accident: “The courthouse lawn . . . was a very deliberate choice of venue for lynching”<sup>42</sup> and part of a broader practice of using public spaces “to enforce the message of white supremacy.”<sup>43</sup> All of this contributes to how courthouses in this country, at least those in the classical style, remained raced,<sup>44</sup> simultaneously conveying messages of justice and injustice.

Of course, the criminal “justice” system has other problems besides the expressive messages communicated by courthouses in the classical style or by images of a white Lady Justice, or by portraits of white jurists. Our jails cycle through approximately ten million people each year,<sup>45</sup> with the vast majority of people awaiting trial for nonviolent offenses while we, as a society, keep telling ourselves that everyone is innocent until proven guilty. We have one of the highest incarceration rates in the world,<sup>46</sup> even though there is nothing particularly exceptional about our rate of crime compared to those of other countries.<sup>47</sup> Indeed, we are at a point where one in every three adults in America has a criminal record,<sup>48</sup> and for every fifteen persons born in 2001, one will likely spend time in jail or prison,<sup>49</sup> and yet for the most part, “we” take this all in stride as just how things are. To be sure, there are growing calls to defund the police and for abolition, and even more calls for reforms at the margins—what aboli-

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41. SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 7–8 (2007).

42. *Id.* at 8.

43. *Id.* at 16.

44. Critical Race Theory scholars have long argued that we should think of “race” as a verb. *See, e.g.*, Kendall Thomas, Commentary, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806–07 (1993) (“[W]e are ‘raced’ through a constellation of practices that construct and control racial subjectivities.”); john a. powell, *The “Racing” of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 103–05 (1997).

45. ZHEN ZENG, U.S. DEP’T OF JUST., NCJ 251210, JAIL INMATES IN 2016, at 1 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/S9QW-9P9J>] (noting that jails “reported 10.6 million admissions during 2016”).

46. ROY WALMSLEY, INST. FOR CRIM. POL’Y RSCH., WORLD PRISON POPULATION LIST 2 (12th ed. 2018), [https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wpp1_12.pdf) [<https://perma.cc/N8S3-D5GA>].

47. *See, e.g.*, U.N. OFF. ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 12, 126 (Jonathan Gibbons ed., 2013), [https://www.unodc.org/documents/gsh/pdfs/2014\\_GLOBAL\\_HOMICIDE\\_BOOK\\_web.pdf](https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf) [<https://perma.cc/6LK8-XJPJ>] (showing that the U.S. homicide rate is actually below average).

48. NAT’L CONF. OF STATE LEGISLATURES, BARRIERS TO WORK: PEOPLE WITH CRIMINAL RECORDS 1 (2018), <http://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx> [<https://perma.cc/Y3XH-DPHZ>]; THE SENTENCING PROJECT, AMERICANS WITH CRIMINAL RECORDS 1 (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [<https://perma.cc/2P2T-V992>].

49. *See* THOMAS P. BONCZAR, U.S. DEP’T OF JUST., NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 7 (2003), <https://www.bjs.gov/content/pub/pdf/piusp01.pdf> [<https://perma.cc/DB2M-WNGF>].



tionists call “reformists reforms”<sup>50</sup>—but for the most part, we take the system, warts and all, as a given. Even during this great pandemic, when one would think we would band together, there is still the sense that the incarcerated should be at the back of the line.<sup>51</sup>

And of course, these are just some of the problems that permeate the system. One could add police violence and the farce of qualified immunity.<sup>52</sup> Or the coercion of plea “bargaining.”<sup>53</sup> Or the fact that we elect prosecutors and judges.<sup>54</sup> Or the unbridled power of prosecutors, and increasing diminution in power of “we, the people.”<sup>55</sup> Or the fact that our prisons are hell-holes.<sup>56</sup> Trust me, I do not mean to diminish these other problems.

I began by referencing the “Reconstructions: Architecture and Blackness in America” show at the MoMA in New York. In his preface to the catalogue that accompanies the show, the historian Robin D.G. Kelley writes, “[D]ismantling racism depends on transforming the built environment.”<sup>57</sup> If that is true, and I am persuaded it is, then my larger point is simply this: It is time for us to think seriously about the architecture of courthouses and the environment around them.

### III. THE ARCHITECTURE OF THE FOURTH AMENDMENT

Allow me to return to race, which for me remains the overarching problem when we talk about the criminal system. Some may disagree, especially those who are more removed from the criminal system. Especially too, those who are not burdened by a “racial tax,”<sup>58</sup> but instead benefit from a “racial privilege.”<sup>59</sup> I am thinking here of an observation made by the historian Khalil Gibran Muhammad: “White people, by and large, do not know what it is like to be occupied by a police force. They don’t understand it because it is not the type of policing they experience. Because they are treated like individuals, they believe that if ‘I am not

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50. See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1826 (2020).

51. See David Montgomery, *Prioritizing Prisoners for Vaccines Stirs Controversy*, THE PEW CHARITABLE TRUSTS (Jan. 5, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/05/prioritizing-prisoners-for-vaccines-stirs-controversy> [https://perma.cc/5LXX-QCHP].

52. Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html> [https://perma.cc/X6DC-9528].

53. See, e.g., Bennett Capers, *The Prosecutor’s Turn*, 57 WM. & MARY L. REV. 1277, 1290 (2016).

54. See, e.g., Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009).

55. See Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1572 (2020).

56. Yvonne Jewkes, *Fear-Suffused Hell-Holes: The Architecture of Extreme Punishment*, in EXTREME PUNISHMENT 1 (Karamet Reiter & Alexa Koenig eds., 2015).

57. Robin D.G. Kelley, *Preface to ANDERSON ET AL.*, *supra* note 1, at 10.

58. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159 (1997).

59. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 593 (2016).

breaking the law, I will never be abused.’”<sup>60</sup>

But if one is closer to the criminal system and willing to be honest, then the overarching problem of race seems beyond dispute. There are the disparities in incarceration.<sup>61</sup> There are the perplexing twin problems of both over- and under-policing.<sup>62</sup> There is the assumption that “young plus black plus male” practically “equals probable cause.”<sup>63</sup> There is the much greater risk of physical harm at the hands of police,<sup>64</sup> to say nothing of the risk of death; across the nation police violence is the sixth leading cause of death for young black men.<sup>65</sup> One study calculates the risk of a black youth being killed by the police as twenty-one times greater than the risk of a white youth being killed by the police.<sup>66</sup> Add to this the fact that almost every parent of a black child, especially a black male child, is obligated to give that child “the talk,” a “talk” so well known that Justice Sotomayor referred to it in *Utah v. Strieff*.<sup>67</sup> I am reminded of a panel I was recently on at Michigan Law School with Aya Gruber and Andrew Crespo. I asserted that when it comes to criminal justice, race is the elephant in the room. When it was Andrew Crespo’s turn to speak, he agreed, but took it a step further. “Race isn’t just the elephant in the room. In many ways, it is the room.”<sup>68</sup>

Crespo was right, of course. But two things strike me now. First, how this assertion—race is the room—brings me back to architecture, especially if we think of the term “architecture” even more expansively. Second, how even as I was nodding my head, agreeing with Crespo’s

60. Nikole Hannah-Jones, *A Letter from Black America*, POLITICO MAG. (Apr. 2015) (quoting Khalil Gibran Muhammad), <https://www.politico.com/magazine/story/2015/03/letter-from-black-america-police-115545> [<https://perma.cc/6BK6-UNA3>].

61. See ASHLEY NELLIS, THE SENT’G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4* (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/3JFG-MM8U>].

62. See Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1715–19 (2006).

63. See generally Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 *FORDHAM URB. L.J.* 621 (1993).

64. PHILLIP ATIBA GOFF, TRACEY LLOYD, AMANDA GELLER, STEVEN RAPHAEL & JACK GLASER, *CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE 14* (July 2016), [https://policingequity.org/images/pdfs-doc/CPE\\_SoJ\\_Race-Arrests-UoF\\_2016-07-08-1130.pdf](https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf) [<https://perma.cc/C5QS-5Y5D>].

65. See *Police: Sixth-Leading Cause of Death for Young Black Men*, INST. FOR SOC. RSCH., UNIV. OF MICH. (June 1, 2020), <https://isr.umich.edu/news-events/news-releases/police-sixth-leading-cause-of-death-for-young-black-men-2> [<https://perma.cc/7SRT-6J8P>].

66. Ryan Gabrielson, Eric Sagara & Ryann Grochowski Jones, *Deadly Force, in Black and White*, PROPUBLICA, (Dec. 23, 2014) <https://www.propublica.org/article/deadly-force-in-black-and-white> [<https://perma.cc/2C4L-V489>].

67. 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back . . . all out of fear of how an officer with a gun will react to them.”). For another example of the “talk,” see Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 *COLUM. L. REV.* 653, 696–97 (2018).

68. See Michigan Journal of Race & Law (@UMichRaceLaw), TWITTER (Mar. 4, 2021, 7:31 AM), <https://twitter.com/UMichRaceLaw/status/1367467670409510914> [<https://perma.cc/5GM9-G7JH>].

intervention, I was still thinking too narrowly. For me, in that moment, race being the room was on par with everything I was already thinking about the criminal system. It was on par with saying nearly every decision in the criminal system is inflected by race. And in the criminal procedure context, it was on par with what several scholars, myself included, had been arguing for years: that so many of the criminal procedure protections we take for granted owe much to race.<sup>69</sup>

It was only later, when I was revisiting *Utah v. Strieff* in my Criminal Procedure class, that I began to see Crespo's "room" comment differently, perhaps in a way he did not intend. I was borrowing a class exercise from my friend, the brilliant scholar Jocelyn Simonson. For the class exercise, which she calls "*Strieff*, the Annotated Dissent," I asked students to re-read Justice Sotomayor's dissent in *Utah v. Strieff*—we'd previously read the decision when we first discussed the exclusionary rule under the Fourth Amendment and its subsequent erosion—but now, later in the semester, I wanted them to focus on the last five paragraphs of her opinion and the cases she cited there, none of which relate directly to the exclusionary rule or its exceptions.<sup>70</sup> I asked the students to ponder how these cases relate to her legal argument, which at bottom objects to the majority's decision to further dilute the exclusionary rule.<sup>71</sup> Following Jocelyn Simonson's lead, I also provided students with excerpts from the secondary sources Justice Sotomayor cited and asked the students to read at least one of these sources and ponder how it fits into Justice Sotomayor's dissent.

The cases Justice Sotomayor cited include *Terry v. Ohio*, in which the Court gave its blessing to stop-and-frisks based merely on reasonable suspicion,<sup>72</sup> and *Illinois v. Wardlow*, the case that essentially said flight from police in a high-crime neighborhood equals reasonable suspicion.<sup>73</sup> Her dissent further included *Whren v. United States*, the case allowing pretextual vehicle stops,<sup>74</sup> and *Florida v. Bostick*, which held that a "stop" is not a seizure within the meaning of the Fourth Amendment if "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter," a reasonable person of course "presuppos[ing] an innocent person."<sup>75</sup> And she cited to *Atwater v. City of Lago Vista*, in which the Court ruled that the Fourth Amendment permits officers the discretion to make a custodial arrest for a minor offense for which the only possible sanction is a fine<sup>76</sup>—a decision which in turn opened the door to the ability of officers to conduct searches incident to arrest.<sup>77</sup> Again, none of the cases address the exclusionary rule per se, let alone

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69. See, e.g., Capers, *supra* note 67, at 692–95.

70. *Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting).

71. See *id.* at 2070.

72. *Id.* at 2069 (citing *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968)).

73. *Id.* (citing *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000)).

74. *Id.* (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

75. *Id.* at 2070 (citing *Florida v. Bostick*, 501 U.S. 429, 436, 438 (1991)).

76. *Id.* (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)).

77. See *United States v. Robinson*, 414 U.S. 218, 236 (1973).

the exception the majority relied on in *Utah v. Strieff*: attenuation.<sup>78</sup>

The secondary sources Justice Sotomayor cited were even more interesting. She cited to Michelle Alexander's *The New Jim Crow*, and to W.E.B. Du Bois's *The Souls of Black Folk*.<sup>79</sup> She cited to James Baldwin's *The Fire Next Time*, and to Ta-Nehisi Coates's *Between the World and Me*.<sup>80</sup> She cited to Lani Guinier and Gerald Torres's *The Miner's Canary*.<sup>81</sup>

I had read Justice Sotomayor's dissent numerous times and had previously written about it; I even opened an article with it.<sup>82</sup> And we had already covered it in class, when we first discussed the exclusionary rule. But this time, as I was preparing for class and thinking too about Crespo's observation that race is the room, I saw her dissent differently. It was as if a proverbial light bulb went off. Or since I have been talking about architecture, let me say I experienced something similar to what the novelist and essayist Toni Morrison describes in *Playing in the Dark*, about an epiphany she had as she was reading American literature:

It is as if I had been looking at a fishbowl—the glide and flick of the golden scales, the green tip, the bolt of white careening back from the gills; the castles at the bottom, surrounded by pebbles and tiny, intricate fronds of green; the barely disturbed water, the flecks of waste and food, the tranquil bubbles traveling to the surface—and suddenly I saw the bowl, the structure that transparently (and invisibly) permits the ordered life it contains to exist in the larger world.<sup>83</sup>

Suddenly, I too was seeing the bowl, the structure that holds it all together. I already knew much of our criminal procedure jurisprudence was inflected by race. I had myself previously argued that criminal procedure cases should be thought of as “race cases,” even as “master texts that contribute to an ideology of race and racial hierarchy.”<sup>84</sup> But in preparing for class, in “reading black,”<sup>85</sup> I was suddenly thinking not only of criminal procedure cases as race cases. I was thinking of race being embedded in the Fourth Amendment itself—as part of its structure, its architecture, or at least the architecture we have built around it. Whereas in the past, I had thought of our “rights” as a happy product of the Court's concern about race—think about the right to counsel,<sup>86</sup> or the right to be free

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78. *Strieff*, 136 S. Ct. at 2063 (majority opinion).

79. *Id.* (first citing MICHELLE ALEXANDER, *THE NEW JIM CROW* 95–136 (2010); and then citing W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903)).

80. *Id.* (first citing JAMES BALDWIN, *THE FIRE NEXT TIME* (1963); and then citing TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015)).

81. *Id.* at 2071 (citing LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 274–83 (2002)).

82. Capers, *supra* note 67, at 654.

83. TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 17 (1992).

84. Capers, *supra* note 67, at 693.

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

86. *Gideon v. Wainright*, 372 U.S. 335, 344 (1963). Even though Gideon was white, the concern about racial minorities lies just beneath the surface. See Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS.

from coercion during interrogation,<sup>87</sup> or the right to Miranda warnings,<sup>88</sup> or the right to a jury trial,<sup>89</sup> or for that matter the entire process of incorporation<sup>90</sup>—now I was seeing that this same architecture, like the architecture of courthouses, was also a means of justice and injustice. Race was baked-in in more ways than I had first realized. It was there in the “reasonable expectation of privacy” test that determines whether the Fourth Amendment provides protection at all,<sup>91</sup> which of course privileges those with means over those without, those who live in the suburbs over those who live in the projects.<sup>92</sup> It was there in the “reasonable person would feel free to . . . terminate the encounter” test,<sup>93</sup> which presupposes not only an innocent person<sup>94</sup> but also a person who looks nothing like me, a person who never has to worry that police violence is the sixth leading cause of death for young black men.<sup>95</sup> It was there in the architecture around pretext stops which, given the hundreds of possible traffic violations, boils down to permission to discriminate.<sup>96</sup> It was there in the Fourth Amendment’s fifty-four words and its application to only “unreasonable searches and seizures,”<sup>97</sup> which has always protected the value judgments of the wider—and whiter—society. And it was there in the Fourth Amendment’s language of “persons, houses, papers, and effects,”<sup>98</sup> and the fact that it was ratified at a time when people who looked like me were themselves property, when the only papers people who looked like me were entitled to—passes or free papers—were “subject to inspection and rejection at any time by slave patrols.”<sup>99</sup> And as for effects, “as property themselves, slaves had none to claim as their own.”<sup>100</sup> And it was there in the Court’s decision in *Whren* to reject the very reconstruction—because we are back at architecture again—that the

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81, 83 (1995); see also Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 8 (2011).

87. *Brown v. Mississippi*, 297 U.S. 278, 287 (1936).

88. *Miranda v. Arizona*, 384 U.S. 436, 467–72 (1966).

89. *Duncan v. Louisiana*, 391 U.S. 145, 160–62 (1968).

90. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 62–67 (2000); Tracey L. Meares, *What’s Wrong with Gideon*, 70 U. CHI. L. REV. 215, 222–24 (2003); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841–44 (1994).

91. See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

92. See Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 411–12 (2003); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266–67 (1999).

93. *E.g.*, *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

94. *Id.* at 438.

95. *Police: Sixth-Leading Cause of Death for Young Black Men*, *supra* note 65. See generally Tracey Maclin, “*Black and Blue Encounters*”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243 (1991).

96. See Devon Carbado, *Whren v. United States*, in CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND LAW (Capers et al. eds., forthcoming 2021).

97. U.S. CONST. amend. IV.

98. *Id.*

99. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1288 (2017).

100. *Id.*

Reconstruction Amendments offered.<sup>101</sup> For it was in *Whren* that the Court made clear that the Fourth Amendment does not care about race discrimination.<sup>102</sup> It was in *Whren* that Justice Scalia, writing a unanimous opinion, wrote, “[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”<sup>103</sup> This spatial segregation of constitutional rights, this adoption of the view that rights are “hermetically sealed units whose principles must not contaminate one another,”<sup>104</sup> is also a kind of architecture.

I don’t mean to sound like an “Afropessimist,”<sup>105</sup> especially since so much of my recent work has been about Afrofuturism, about optimism.<sup>106</sup> But it does make one wonder: If the very architecture of the Fourth Amendment is the problem—not just its interpretation but its very design—what are we to do?

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101. See *Whren v. United States*, 517 U.S. 806, 813 (1996).

102. *Id.*

103. *Id.*

104. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 193.

105. See FRANK B. WILDERSON III, *AFROPESSIMISM* (2020).

106. See Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 58–60 (2019).

