



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 93

Number 5 Symposium 2014: *Vulnerable Defendants  
in the Criminal Justice System*

Article 8

---

6-1-2015

# Always Already Suspect: Revising Vulnerability Theory

Frank Rudy Cooper

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

Frank R. Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339 (2015).

Available at: <http://scholarship.law.unc.edu/nclr/vol93/iss5/8>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## ALWAYS ALREADY SUSPECT: REVISING VULNERABILITY THEORY\*

FRANK RUDY COOPER\*\*

*Martha Fineman proposes a post-identity “vulnerability” approach that focuses on burdens we all share; this article argues that theory needs to incorporate recognition of how invisible privileges exacerbate some people’s burdens. Vulnerability theory is based on a recognition that we are all born defenseless, become feeble, must fear natural disasters, and might be failed by social institutions. It thus argues for a strong state that takes affirmative steps to insure substantive equality of opportunity. While vulnerability theory might help explain and remedy situations like Hurricane Katrina, it also might be susceptible to an argument that racial profiling is a necessary sacrifice of those overrepresented in arrest statistics for the greater good of protecting the majority from vulnerability to crime.*

*I argue that acknowledging relative privilege can help us analyze practices such as racial profiling. Privileges are invisible, unearned assets that automatically attach to people because an aspect of their identity is made socially normative. Because privileges can make the impact of racially targeted policing of others invisible to their holders, vulnerability theory needs to incorporate this concept if it wishes to address racial profiling. A revised vulnerability theory could then use the fact of our shared vulnerabilities and its justification of a strong state to call for extensive federal monitoring of policing. Linking vulnerability*

---

\* © 2015 Frank Rudy Cooper.

\*\* Professor, Suffolk University Law School. J.D. Duke, 1995; B.A. Amherst College, 1990. I thank my research assistants and librarians, Rubby Wuabu, Debbie Aderinto, Phillip Cosmos, Kim Napoli, Mathew Wahrer, Diane D’Angelo, and Katherine Durlacher. I also thank the following people: Nancy Dowd, Babe Howell, Daniella Courban, Patrick Shin, Micky Lee, Patricia Reeves, Yue Wang, Angela P. Harris, and Kathleen Engel. I appreciate the excellent work done by the staff of the *North Carolina Law Review*, especially Heather Hillaker, Annalise Farris, and Bradley Harder. I presented earlier versions of this Article to the Taslitz Galaxy conference at Howard University Law School, the Vulnerabilities versus Identities conference at Emory Law School, a faculty colloquium of the Western New England School of Law, Linda McLain’s Feminist Theory class at Boston University Law School, and the Vulnerable Defendants in the Criminal Justice System Symposium hosted by the *North Carolina Law Review*.

*theory to analysis of privilege is a necessary precursor to such a conversation.*

INTRODUCTION .....	1340
I. THE PROBLEM: ONGOING RACIAL PROFILING.....	1347
A. <i>The Legal and Social Underpinnings of Racial Profiling</i> .....	1348
B. <i>Floyd v. City of New York</i> .....	1353
C. <i>Where Are We Now?</i> .....	1354
II. WHAT IS VULNERABILITY THEORY? .....	1355
A. <i>The Elements of Vulnerability</i> .....	1355
B. <i>Implications of Vulnerability Theory</i> .....	1360
III. CRITIQUING VULNERABILITY THEORY .....	1363
A. <i>Universals Hide Particularity</i> .....	1365
B. <i>Identities Are Socially Constructed but Materially Crucial</i> .....	1367
C. <i>Reconsidering Elements of Vulnerability Theory</i> .....	1370
1. <i>Universality</i> .....	1370
2. <i>Constancy</i> .....	1371
3. <i>Complexity</i> .....	1371
4. <i>Particularity</i> .....	1372
5. <i>A Missing Element: Privilege</i> .....	1373
D. <i>Potential Objection to Revising Vulnerability Theory</i> .....	1373
IV. PROPOSAL: REVISE VULNERABILITY THEORY SO THAT IT ACKNOWLEDGES RELATIVE PRIVILEGE .....	1373
A. <i>Incorporating Analysis of Privilege into Vulnerability Theory</i> .....	1374
B. <i>A Revised Vulnerability Theory</i> .....	1376
C. <i>Revising Racial Profiling</i> .....	1378
CONCLUSION .....	1378

## INTRODUCTION

The United States of America has a problem: police officers continue to target men of color for suspicion of wrongdoing.<sup>1</sup> For

1. “Racial profiling” occurs when individuals or institutions use racial characteristics to associate individuals possessing those characteristics with bad behavior. *See, e.g.*, Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 857–58 (2006) (describing image of the “Bad Black Man” as rooted in stereotype of black male criminality); Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1691 (2000) (detailing racial profiling of a Chinese scientist as a spy); Bernard

example, Judge Shira Scheindlin found as fact that the New York City Police Department's ("NYPD") aggressive "order-maintenance"<sup>2</sup> stop and frisk<sup>3</sup> program disproportionately hounded young men of color and was not justified by any disparities in arrest or crime statistics.<sup>4</sup> To respond, we need a capacious theory for addressing differential policing of men of color.

In light of ongoing police racial profiling, the recent trend of construing equality as requiring a move beyond identities is a turn in the wrong direction. For instance, consider the "colorblind" and "antibalkanization" post-identity approaches. Colorblindness is exemplified by U.S. Supreme Court Chief Justice John Roberts's argument that the way to end racial inequality is to act as though race

---

E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1283–84 (2004) (showing how racial profiling is illogical); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962 (1999) (arguing that police use stereotypes of blacks as criminals).

2. Order-maintenance policing, sometimes known as "quality of life" policing, involves arresting people for petty offenses, such as sneaking free rides in public transportation or trying to squeegee car windows for tips, in order to improve the quality of life, particularly for mainstream civilians. *See, e.g.*, Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 461–62 (2000) (explaining order-maintenance policing); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 276–80 (2009) (describing the development and problems with order-maintenance policing in New York City). Order-maintenance policing derives from "broken windows" theory, which notes that if you let one window remain broken, it may encourage people to break other windows and thereby contends that if you allow minor crime to go unchecked, major crimes will follow. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, at 3–4, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

3. A police "stop" occurs when an officer restricts the suspect's freedom of movement and ability to terminate the encounter, but only temporarily and for purposes of investigating potential crime. *See, e.g.*, Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 852, 882 n.205 (2002) (describing a stop). A police "frisk" occurs when an officer feels up the suspect or her effects, but only on the outside and in ways objectively designed to find weapons. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 17 n.13 (describing a frisk as "feel[ing] with sensitive fingers every portion of the prisoner's body . . . [including] the groin and area about the testicles . . ."); Cooper, *supra*, at 882 n.206. These forced seizures and searches were approved by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 20, 27 (1968) (deciding the Fourth Amendment allows limited police seizures and searches of persons upon reasonable suspicion rather than the traditional, and higher, probable cause standard).

4. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013), *appeal dismissed*, 770 F.3d 1051 (2014) (identifying disproportionate targeting of NYPD stops and frisks); *id.* at 585–86 (rejecting arrest or crime rates as the proper measure of expected stop ratios because the stopped population is overwhelmingly innocent).

does not exist.<sup>5</sup> Antibalkanization is exemplified by Justice Anthony Kennedy's assumption that identity groups must be disbanded in order to create racial equality.<sup>6</sup> Both those arguments are "out of touch" with the reality that police officers continue to racially profile young men of color.<sup>7</sup> The post-identity Justices are out of touch because they assume that racial hierarchy is at or near its end even as that idea is belied by the ongoing disproportionate policing of racial minorities.<sup>8</sup> Fortunately, there is a post-identity theory that holds promise.

Preeminent legal scholar Martha Fineman's potentially better post-identity approach, known as vulnerability theory, says that people have a shared human condition of being susceptible to various forms of harm and argues for state protection of substantive equality.<sup>9</sup>

---

5. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (announcing judgment and stating opinion as to colorblindness: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

6. Justice Kennedy voices this antibalkanization rationale for his anti-affirmative action stance in the *Parents Involved* and *Ricci* cases. See *Ricci v. DeStefano*, 557 U.S. 557, 557 (2009) (Kennedy, J., delivering the opinion of the Court) (finding that a city's discarding of a written qualification test on the grounds that the results prevented promoting qualified black firefighters in a heavily black city violated the equal protection rights of white and Latino firefighters who had performed highly on the written test); *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment) ("The enduring hope is that race should not matter; the reality is that too often it does."); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1282 (2011) (arguing that Justice Kennedy articulates an emerging antibalkanization approach). *But see* Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 3-7 (2015) (documenting how antibalkanization rationale facilitates racial domination).

7. See *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1675 (2014) (Sotomayor, J., dissenting) (criticizing Roberts' (in)famous call for colorblindness as "out of touch").

8. See Darren Lenard Hutchinson, "Continually Reminded of Their Inferior Position": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 J.L. & POL'Y 23, 101-05 (2014) (applying social dominance theory to unpunished acts of racial violence); Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 654 & nn.256-57 (pointing to racial profiling as an example of "the Supreme Court and several lower courts . . . immuniz[ing] law enforcement practices that take race, along with other factors, into account to burden persons of color in a way that replicates their historical domination").

9. Vulnerability theory has sparked a rich and growing literature. See, e.g., Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1718-19 (2012) [hereinafter Fineman, *Beyond Identities*] (arguing that the difference between the conception of equality in the United States of America and the conception of equality in other democracies arises from differing perceptions of human need and vulnerability); Martha Albertson Fineman, *Feminism*,

“Vulnerability” is the concept that we are born unable to protect ourselves, we become feeble with age, we must fear natural disasters, and our social institutions might work against us.<sup>10</sup> For example, the people of New Orleans suffered both from the natural disaster of Hurricane Katrina and the social dysfunction of President George W.

---

*Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 634–35 (2013) [hereinafter Fineman, *Feminism, Masculinities*] (critiquing multidimensional masculinities theory for considering particularized forms of identity); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008) [hereinafter Fineman, *Vulnerable Subject*] (emphasizing that embodiment creates vulnerability); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 267–70 (2010) [hereinafter Fineman, *Responsive State*] (highlighting that vulnerability is a shared human condition). For further examples of vulnerability theory, see generally VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha Albertson Fineman & Anna Grear eds., 2013) (collecting articles exploring vulnerability theory); *Vulnerability and the Human Condition: Publications*, EMORY U., <http://web.gs.emory.edu/vulnerability/resources/Publications.html> (last visited Feb. 27, 2015) (collecting resources regarding vulnerability theory).

Nancy Dowd has challenged vulnerability theory to account for race and gender by showing how the case of black boys requires attention to interpersonal aggressions and institutional hurdles that make them vulnerable in unique ways. See Nancy E. Dowd, *Unfinished Equality: The Case of Black Boys*, 2 IND. J.L. & SOC. EQUALITY 36, 36 (2013) [hereinafter Dowd, *Unfinished Equality*] (arguing for mixing vulnerability theory with identities theories); see also Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1051 (2012) (considering application of vulnerability theory to fatherhood). Dowd also challenges vulnerability theory to incorporate identities in an article on elder law. Nancy E. Dowd, *Conceptualizing Elder Law*, in INTRODUCTION TO THE NORMA ELDER LAW RESEARCH ENVIRONMENT: DIFFERENT APPROACHES TO ELDER LAW 11, 11–15 (Ann Numhauser-Henning ed., 2013).

Many others have entered the field of vulnerability theory. Kirsten Davis applies vulnerability theory to family law. See Kirsten K. Davis, *Extending the Vision: An Empowerment Identity Approach to Work-Family Regulation as Applied to School Involvement Leave Statutes*, 16 WM. & MARY J. WOMEN & L. 613, 619–20 (2010). Nina A. Kohn has also written an insightful analysis of vulnerability theory. See Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1, 4–5 (2014) (considering vulnerability theory’s application to debates over equality and limited government). Darren Rosenblum provocatively considers vulnerability theory in relation to women’s rights under international law. See Darren Rosenblum, *Unisex Cedaw, or What’s Wrong with Women’s Rights*, 20 COLUM. J. GENDER & L. 98, 140 (2011). Aziza Ahmed has also applied vulnerability theory to international rights. See Aziza Ahmed, *Rugged Vaginas and Vulnerable Rectums: The Sexual Identity, Epidemiology, and Law of the Global HIV Epidemic*, 26 COLUM. J. GENDER & L. 1, 5–7 (2013). Osamudia James recently considered vulnerability and race. See Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 425–26 (2014). Even more recently, Michèle Alexandre uses vulnerability theory to argue that certain areas of law and culture are stagnated by sexual profiling and attachment to illusory gender-based distinctions. For her discussion on this topic, see generally MICHÈLE ALEXANDRE, *SEXPLOITATION: SEXUAL PROFILING AND THE ILLUSION OF GENDER* (2015).

10. Fineman, *Vulnerable Subject*, *supra* note 9, at 9.

Bush's Federal Emergency Management Agency.<sup>11</sup> Vulnerability theory thus argues that the government has an affirmative duty to protect substantive equality of opportunity not only by preventing vulnerability to natural disasters but also by correcting for social hurdles rooted in cultural stereotypes.<sup>12</sup> Akin to colorblindness and antibalkanization approaches, vulnerability theory contends that identity theory thwarts the effectiveness of politically progressive<sup>13</sup> coalitions.<sup>14</sup> Unlike colorblind and antibalkanization approaches, vulnerability theory acknowledges that our shared susceptibility to physical and social harms makes people dependent on one another.<sup>15</sup> I think these principles of interdependency and affirmative government duty are ones that people who disagree with racial profiling can build upon.

Critics of racial profiling will have to revise vulnerability theory, though, because its post-identity approach prevents it from addressing police officers' differential treatment of men of color. Vulnerability theory currently suggests that since law operates through generalization, legal theorists should reject calls for specifying the

---

11. See Sheryll Cashin, *Katrina: The American Dilemma Redux*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 29, 29–37 (David Dante Troutt ed., 2006) (arguing that race played a role in FEMA's response to Hurricane Katrina). For an interesting insight into the evacuation experience of New Orleans natives, see Mitchell F. Crusto, *Letters from a Native Son: Do You Know What It Means to Miss New Orleans*, in *HURRICANE KATRINA: AMERICA'S UNNATURAL DISASTER* 23, 23–34 (Jeremy I. Levitt & Matthew C. Whitaker eds., 2009).

12. See Fineman, *Feminism, Masculinities*, *supra* note 9, at 638 (discussing need for state to foster resiliency); see also Dowd, *Unfinished Equality*, *supra* note 9, at 36 (defining vulnerability theory as placing affirmative duties upon state); Fineman, *Beyond Identities*, *supra* note 9, at 1752 (arguing that state has responsibility to ameliorate injuries). Family Law scholar Linda C. McClain also calls for using substantive equality as our means of seeking a more progressive society. See Linda C. McClain, *What's So Hard About Sex Equality?: Nature, Culture, and Social Engineering*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 67, 82 (Martha Albertson Fineman ed., 2011).

13. By “progressive,” I mean the cluster of ideas centering on assumed interdependence of individuals, willingness to regulate markets, comfort with strong government, and generally seeking ever-increasing progress toward greater equality of opportunity. By “conservative,” I refer to a cluster of ideas centering around small government, traditional social values, assumed individual autonomy and liberty, and unregulated markets.

14. See Fineman, *Feminism, Masculinities*, *supra* note 9, at 628 (suggesting that identity theory has contributed to the destruction of political alliances and has impeded the creation of effective coalitions).

15. Fineman, *Vulnerable Subject*, *supra* note 9, at 11 (describing feminist model of subjectivity “in which the liberal subject is enmeshed in a web of relationships and . . . dependent upon them”).

particular experiences of social groups.<sup>16</sup> That cannot work because of the reality that people have understood,<sup>17</sup> and will continue to understand, themselves and others through the lens of identities.<sup>18</sup> Worse yet, vulnerability theory is susceptible to the argument that we need more order-maintenance policing, not less. Police departments could easily argue that racial minority overrepresentation in arrest statistics should be reflected in race-based stops and frisks for the greater good of protecting the most people from vulnerability to crime.<sup>19</sup> Since vulnerability theory refuses to focus on race, gender, and age identities, it would be unable to respond to such an argument by showing how and why order-maintenance policing is facially neutral but implicitly racially biased.<sup>20</sup> The ultimate problem with vulnerability theory is that while, unlike colorblindness and antibalkanization approaches, it does not deny the existence of racial hierarchy, it still proposes a solution that ignores race.

A revised vulnerability approach would keep what is most beneficial in vulnerability theory, the concepts of people's interdependence and the necessity of a strong state, but would add the element of recognizing relative privilege. A privilege is "a special advantage, immunity, permission, right, or benefit granted to or

16. See Fineman, *Feminism, Masculinities*, *supra* note 9, at 620–26.

17. See generally RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (Juan F. Perea et al. eds., 2d ed. 2007) (teaching about race and law with substantial attention to historical construction of legal meanings of blacks, Native American, Latina/o, Asian, and white identities).

18. On ongoing prejudice, see, for example, MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE*, at xii (2013) (describing how implicit bias continues and affects behavior); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 119 (2014) (connecting implicit bias and masculinity threat to violence).

19. In fact, former Republican New York City Mayor Michael Bloomberg made just such an argument following Judge Scheindlin's *Floyd* decision. Michael R. Bloomberg, "Stop and Frisk" Keeps New York Safe, WASH. POST (Aug. 18, 2013), [http://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aaf5a5f84\\_story.html](http://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aaf5a5f84_story.html); see also HEATHER MAC DONALD, ARE COPS RACIST? 28–34 (2003) (arguing there is no systematic racial profiling because racially disparate arrest rates (assumed to be legitimate) justify racially disparate suspicion). But see ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 10–11 (Andrea McArdle & Tanya Erzen eds., 2001) (collecting articles critiquing rationales for order-maintenance policing in New York City). Scholars have shown that the empirical support for race as an indicator of suspiciousness is lacking. For an example, see generally Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006).

20. See, e.g., Dorothy E. Roberts, *Supreme Court Review: Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 790 (1999) (arguing order-maintenance policing is inherently racially biased).



enjoyed by an individual, class, or caste.”<sup>21</sup> Privilege makes the harms of police targeting invisible to those who do not fit the profile. I suggest thinking of a privilege as an unearned benefit that has already been conferred on you by the invisible operation of social norms and will continue to operate to your benefit unless you affirmatively disgorge the privilege. The theory of privilege shows that whiteness, maleness, heterosexuality, and other privileged statuses are the unacknowledged norms for how society is structured.<sup>22</sup> Because of the way those norms interact in social practices, the status of being young, male, and of color makes one vulnerable to racial profiling. While vulnerability theory helps us challenge the state to address the harm of racial profiling, the theory of privilege is necessary to understand why elites allow racial profiling to continue. I thus argue for revising vulnerability theory such that it acknowledges the ways identities and privileges influence social practices.

Part I of this Article defines the problem by reviewing *Floyd v. City of New York*<sup>23</sup> and its holding that the NYPD unconstitutionally racially profiled young black and Latino men<sup>24</sup> and traces that disparate treatment to the NYPD’s order-maintenance approach to policing. Part II explicates vulnerability theory, especially its reasons for a post-identity approach. It describes the elements of vulnerability—its universality, constancy, complexity, and particularity—as well as its implications: that the state must foster people’s resilience by continually reviewing its institutions to ensure

21. STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 13 (1996) (citation omitted), *quoted in* Danielle Kie Hart, *Revealing Privilege—Why Bother?*, 42 WASH. U. J.L. & POL’Y 131, 134 (2013). The source of this topic is Peggy McIntosh’s work, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies* (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988) (coining the term “white privilege”). For examples of this concept’s use, see Phoebe A. Haddon, *Has the Roberts Court Plurality’s Colorblind Rhetoric Finally Broken Brown’s Promise?*, 90 DENV. U. L. REV. 1251, 1251 (2013) (arguing that the Supreme Court has “wrongly embraced a colorblind interpretation of the Equal Protection Clause”); Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 383 (discussing privilege in the area of heterosexual and homosexual relationships); Stephanie M. Wildman, *Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 707, 710 (2004) (discussing the concept of systemic privilege as it relates to the Fourteenth Amendment); Mara Shulman Ryan, Note, *Invisible in the Courtroom Too: Modifying the Law of Selective Enforcement to Account for White Privilege*, 34 W. NEW ENG. L. REV. 301, 302 (2012) (arguing that white privilege and racism impacted a criminal investigation and prosecution).

22. See Hart, *supra* note 21, at 134–35 (discussing invisibility of hierarchized binary statuses of privilege and disadvantage).

23. 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013).

24. *Id.* at 562 (noting demographics of stops).

that they foster equality of opportunity. Part III finds fault with aspects of vulnerability theory. Specifically, it contends that a universal perspective is impossible and that identities, while socially constructed, are materially crucial. Part IV proposes a better model for progressive scholarship by infusing vulnerability theory with acknowledgement of the relative privileges that identity statuses create. This Part more thoroughly illustrates the theory of privilege and suggests what a post-privilege vulnerability theory would look like. Part V briefly concludes.

### I. THE PROBLEM: ONGOING RACIAL PROFILING

Racial profiling is an ongoing problem rooted in legal and social ideologies. The legal ideology is the idea that police ought to have wide discretion. We see this in the low threshold of justification for *Terry v. Ohio*<sup>25</sup> stop and frisks. We also see this in the pretext doctrine's refusal to consider even admittedly racially prejudiced policing to be "unreasonable" under the Fourth Amendment.<sup>26</sup>

The social roots of racial profiling are explicit and implicit bias against racial minorities, as exacerbated by acceptance of certain policing methodologies. First, many police officers explicitly use arrest statistics to justify a belief that racial minorities are more crime prone. Second, pervasive and deep-seated implicit bias against racial minorities means that racial minorities tend to look more suspicious even when engaged in the same behaviors as racial majorities. Third, the "order-maintenance" policing methodology of aggressively policing minor offenses, particularly in certain neighborhoods, results in racially disparate policing.<sup>27</sup> Order-maintenance policing was influential nationwide, so it is unsurprising that the racial disparities found in the *Floyd* case are typical.<sup>28</sup>

---

25. 392 U.S. 1 (1968).

26. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (concluding Fourth Amendment's reasonableness analysis precludes considering police officers' subjective intentions, thereby destroying defendant's Fourth Amendment challenge despite the fact that undercover vice officers targeted two young black men in violation of local police regulations).

27. See generally Kelling & Wilson, *supra* note 2 (propounding the theory).

28. See, e.g., ACLU, *BLACK, BROWN AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007-2010*, at 5-10 (2014), available at [https://www.aclum.org/sites/all/files/images/education/stopandfrisk/black\\_brown\\_and\\_targeted\\_online.pdf](https://www.aclum.org/sites/all/files/images/education/stopandfrisk/black_brown_and_targeted_online.pdf) (Boston); Katherine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 435-36 (2005) (Seattle); ACLU *Takes Battle to End Racial Profiling to the Turnpike*, ACLU (Oct. 4, 2001), <https://www.aclu.org/racial-justice/aclu-takes-battle-end-racial-profiling-turnpike> (New Jersey).

In section A of this Part of the Article, I trace the roots of racial profiling to excessive legal discretion afforded to police officers, implicit bias, and the order-maintenance approach. In Part B, I review the *Floyd* decision as a means of demonstrating that we need a theoretical approach to law and culture that addresses racial profiling.

A. *The Legal and Social Underpinnings of Racial Profiling*

By now, the legal and social underpinnings of widespread racial profiling are relatively clear. The power of police to racially profile is created by the incredible discretion afforded them by federal criminal procedure doctrine.<sup>29</sup> Officers often may conduct intermediate seizures and searches of suspects upon merely articulating suspicion of crime or the presence of weapons that amounts to little more than a hunch.<sup>30</sup> This power derives from the decisions in the *Camara v. Municipal Court*<sup>31</sup> and *Terry* cases. In *Camara*, the Supreme Court implicitly overturned the then-assumed rule that if an intrusion constituted a “seizure” or “search” under the Fourth Amendment, it had to be supported by probable cause.<sup>32</sup> Such an assumption makes sense, given that the Fourth Amendment specifies that warrants pre-authorizing a search must be based upon probable cause.<sup>33</sup> However, the *Camara* Court held that the Amendment’s earlier statement of a prohibition of “unreasonable” searches and seizures could govern intrusions made for regulatory purposes rather than law enforcement

---

29. See generally Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 392–93 (2004) (arguing that citizens are made more vulnerable to police discretion by an “Iron Triangle” of cases preventing considering police officer’s subjective intentions during searches incident to arrest during vehicle searches).

30. See *Alabama v. White*, 496 U.S. 325, 330–32 (1990) (holding that a “totality of the circumstances” approach was the correct way to assess reasonable suspicion); see, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (concluding that running at sight of police in a high-crime neighborhood can give rise to reasonable suspicion).

31. 387 U.S. 523 (1967).

32. See *Camara v. Mun. Court*, 387 U.S. 523, 529, 534 (1967) (issuing landlord writ of prohibition preventing warrantless apartment search and characterizing *Frank v. Maryland*, 359 U.S. 360 (1959), as warrant-probable cause “exception”). On this implicit rule, see Frank Rudy Cooper, *Cultural Context Matters: Terry’s “Seesaw Effect”*, 56 OKLA. L. REV. 833, 852 (2003) (suggesting there was a pre-*Terry* understanding that probable cause is required for a search or seizure).

33. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” (emphasis added)).

purposes.<sup>34</sup> Thus, the validity of a search under a municipal code requiring proper trash collection or working fire extinguishers is judged under a flexible “reasonableness” standard.<sup>35</sup>

The lower threshold of justification for regulatory searches in *Camara* set the stage for a sea change the following year in *Terry*. Well before the *Camara* and *Terry* cases, police had been doing “field interrogations” in which they “stopped” suspicious persons and “frisked” them for weapons despite lacking probable cause to arrest or search those civilians.<sup>36</sup> Legal scholar John Q. Barrett reveals that stops and frisks were created in order to control Italians in New York City in the early 1900s, which may itself have been a form of racial profiling.<sup>37</sup> These stops and frisks were basically outside the usual federal constitutional rules, as police often argued they were not “searches” and state courts sometimes allowed them on less than the usual probable cause standard.<sup>38</sup> The *Terry* Court split the proverbial baby by applying *Camara*’s reasonableness analysis rather than requiring probable cause.<sup>39</sup> As I have argued elsewhere, the *Terry* Court created a “scope continuum” approach to the Fourth Amendment by saying that the fact that stops and frisks were less intrusive than arrests and “full blown” searches meant they could be allowed upon a showing of an intermediate level of justification.<sup>40</sup> What would come to be known as “reasonable suspicion” justifies a stop or frisk, whereas no justification is required to conduct a nonseizure or nonsearch and probable cause is required to conduct an arrest or full blown search.<sup>41</sup> The only limit on stops and frisks is that

34. *Camara*, 387 U.S. at 534. See generally Cooper, *supra* note 3, at 852–56 (arguing that *Camara* limited the application of the “reasonableness” balancing approach).

35. See Cooper, *supra* note 3, at 852 (explicating *Camara* case).

36. See, PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, U.S. DEPT OF JUSTICE, NO. 147374, TASK FORCE REPORT: THE POLICE 39–40 (1967).

37. See John Q. Barrett, *Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, in CRIMINAL PROCEDURE STORIES: AN IN-DEPTH LOOK AT LEADING CRIMINAL PROCEDURE CASES 295, 299–300 (Carol S. Steiker ed., 2006) (noting early usage of stops and frisks). See generally JENNIFER GUGLIELMO & SALVATORE SALERNO, ARE ITALIANS WHITE?: HOW RACE IS MADE IN AMERICA (2003) (analyzing treatment of Italians as a nonwhite race).

38. Cf. *Terry v. Ohio*, 392 U.S. 1, 10 (1968) (describing then-existing legal landscape for stops and frisks).

39. See *id.* at 30.

40. Frank Rudy Cooper, *The “Seesaw Effect” from Racial Profiling to Depolicing: Toward a Critical Cultural Theory*, in THE NEW CIVIL RIGHTS RESEARCH 139, 142–43 (Benjamin Fleury-Steiner & Laura Beth Nielsen eds., 2006).

41. See 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4(e) (5th ed. 2012) (distinguishing stop and frisk from arrest and full blown search).

the officer must assert “specific and articulable” facts amounting to more than a “hunch.”<sup>42</sup> This low reasonable suspicion threshold makes it easy for police officers to conduct searches and seizures on civilians when they do not have much basis for the intrusion. For example, if the police officer has more than a hunch as a basis for stopping someone, she will usually be able to frisk the suspect, which includes careful exploration of the “groin.”<sup>43</sup> If the police officer then “plain feels” a marijuana cigarette or unlicensed gun, she may arrest that suspect.<sup>44</sup> So, one way police officers have excessive discretion is that they only need a little more than a hunch in order to seize and search civilians.

The pretext doctrine is another source of excessive police officer discretion. The pretext doctrine says that when police officers objectively have probable cause to arrest or fully search someone, it is irrelevant to the Fourth Amendment reasonableness analysis that the police officers were actually using the objective justification as a pretext for a seizure or search they could not justify. Hence, in *Whren v. United States*,<sup>45</sup> the Supreme Court held that whenever a police officer objectively has a “fair probability” that crime is afoot, any actual racist reason for arresting or fully searching someone is insulated from Fourth Amendment scrutiny.<sup>46</sup> Elsewhere, the Court has held that probable cause may be established by a mere one in three chance.<sup>47</sup> Moreover, if a police officer may arrest someone, she may also fully search them incident to arrest without any further justification.<sup>48</sup> In practice, then, an officer’s pure hunch of a drug crime, in conjunction with a less than fifty percent chance of any petty crime, such as jaywalking, may become an excuse for an arrest and full blown search.<sup>49</sup> The pretext doctrine is thus a second important source of excessive police officer discretion.

---

42. *Terry*, 392 U.S. at 21–22.

43. *Id.* at 17 n.13.

44. *See, e.g., Illinois v. Andreas*, 463 U.S. 765, 771–72 (1983) (defining police officer seeing an object immediately identifiable as evidence of crime as non-search under Fourth Amendment).

45. 517 U.S. 806 (1996).

46. *See id.* at 813.

47. *See Maryland v. Pringle*, 540 U.S. 366, 372 (2003) (holding probable cause established on theories that one of three suspects or all three in concert possessed drugs in a car); *Illinois v. Gates*, 462 U.S. 213, 214, 246 (1983) (creating “totality of circumstances” approach to probable cause).

48. *See United States v. Robinson*, 414 U.S. 218, 236 (1973) (holding that, during a search incident to arrest, an officer’s subjective rationales for the search are irrelevant).

49. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

Given implicit bias against racial minorities in society at large<sup>50</sup> and explicit belief among police officers in particular that minorities are more likely to be criminals,<sup>51</sup> it should not be a surprise that officers most often use their wide discretion to target racial minorities.<sup>52</sup> Indeed, studies show that everyone has implicit biases against socially stigmatized groups.<sup>53</sup> These biases are generally stronger among normative groups, but deriving from history and culture, they are pervasive.<sup>54</sup> For our purposes, it suffices to say that widespread implicit bias has been scientifically proven.<sup>55</sup>

Further research shows that implicit bias against racial minorities is at least as strong, if not stronger, among police officers. Notwithstanding the fact that police officer bias in targeting could produce racially disparate arrest statistics, officers often use arrest statistics to justify targeting racial minorities. Sociologist and legal scholar Bernard Harcourt has criticized the “ratchet effect” created by targeting people of color for arrest, then rationalizing further targeting of racial minorities based on the racial disparate arrest statistics that the targeting itself produces.<sup>56</sup> Legal scholar L. Song Richardson has pointed out that police officers’ insistence on racial profiling is irrational.<sup>57</sup> She cites many jurisdictions where the “hit rates” for finding evidence of crime on suspects are much lower for racial minorities than for whites.<sup>58</sup> For Richardson, the over targeting of racial minorities is the result of conscious racial profiling magnifying implicit biases.<sup>59</sup> It should be no surprise that a legal landscape that provides excessive discretion to police officers,

50. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1108–10 (2006) (arguing for debiasing method of confronting broad societal bias).

51. See Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing,* 17 PSYCHOL. PUB. POL’Y & L. 419, 419–20 (2011) (noting consensus that police have traditionally targeted racial minorities).

52. See, e.g., *id.*

53. See generally BANAJI & GREENWALD, *supra* note 18 (summarizing the research on implicit bias and showing that everyone has implicit biases against socially stigmatized groups).

54. See generally *id.* (discussing nature and source of implicit bias).

55. See generally *id.* (detailing the social science methodology that has revealed implicit bias). To take an implicit bias test, see *Overview*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/education.html> (last visited Mar. 7, 2015).

56. See BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 145–72 (2007) (discussing police officer use of arrest statistics to justify targeting racial minorities).

57. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2035–37 (2011).

58. *Id.* at 2037–38.

59. *Id.* at 2039–40.

coupled with a culture where implicit bias against racial minorities is rampant, leads to racial targeting.

Since about 2000, the police methodology of order-maintenance policing has exacerbated the legal and cultural factors leading to racial profiling. Scholars have linked the dramatic racial disparities in stop and frisk statistics to order-maintenance policing.<sup>60</sup> Order-maintenance policing is based on a theory that police officers must prevent the appearance of disorder.<sup>61</sup> For reasons of implicit bias, racial minority communities are disproportionately perceived as disordered.<sup>62</sup> Accordingly, they will continue to be targeted and patrolled at a higher rate. This is a self-fulfilling prophecy: the perception of a disordered community justifies excessive police officer targeting of its residents, with those arrest statistics then being used to justify further scrutiny.<sup>63</sup>

Legal scholar K. Babe Howell ties together the legal, social, and police methodology elements of racial profiling in her article, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*.<sup>64</sup> As Howell poignantly shows, the overall impact of racial profiling of young men of color is to create a distinct justice system for young men of color:

When police stop suburban kids and find marijuana, they throw away the drugs and speak to their parents. On the rare occasions when suburbanites or wealthy people are arrested for minor offenses, they hire attorneys, point to their clean records, and refuse to accept a disposition short of dismissal.

On the other hand, people who live in New York City's communities of color are subjected to [zero tolerance policing].<sup>65</sup>

Howell's assessment of the way order-maintenance policing imposes differential costs should lead us to challenge this form of racial

---

60. See Fagan & Davies, *supra* note 2, at 477.

61. See Kelling & Wilson, *supra* note 2, at 1.

62. L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 268 (2012).

63. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 365 (1998).

64. See generally Howell, *supra* note 2 (providing her discussion of legal, social, and police methodology elements).

65. K. Babe Howell, *From Page to Practice and Back Again: Broken Windows Policing and the Real Costs to Law-Abiding New Yorkers of Color*, 34 N.Y.U. REV. L. & SOC. CHANGE 439, 442 (2010).

profiling. Such a challenge was undertaken in litigation culminating in Judge Scheindlin's *Floyd v. City of New York* decision.

*B. Floyd v. City of New York*

In light of widespread racial profiling nationwide, the *Floyd* court's decision to ban NYPD racial profiling stands as a potential watershed moment. In sum, Judge Scheindlin found, sitting as trier of fact, that the NYPD had a policy and practice of aggressively *Terry*-stopping and frisking "the right people."<sup>66</sup> The result of the NYPD's practice was 4.4 million stops between 2004–2012.<sup>67</sup> Of those stops, fifty-two percent were of blacks, who constituted twenty-three percent of the New York City population.<sup>68</sup> Meanwhile, thirty-one percent of stops were of Latinas/os, who were twenty-nine percent of the population.<sup>69</sup> Somehow, though, only ten percent of stops were of whites, who amounted to fully thirty-three percent of the population.<sup>70</sup> Despite this practice, there was a statistically significant lower chance of finding evidence of crime on racial minorities.<sup>71</sup> It is thus hard to explain the racial disparities in whom the NYPD targeted. Worse yet, police used more force on racial minorities.<sup>72</sup> Based on expert testimony, Judge Scheindlin determined that these disparities could not be explained by any racial disparities in arrest or crime rates.<sup>73</sup> Finally, and alarmingly, Judge Scheindlin found as a fact and conclusion of law that "at least 200,000" of the stops were unconstitutional.<sup>74</sup>

Clinical law professor Nicole Smith Futrell has pointed out two especially telling statements about NYPD's racial profiling effects on New York City's racial minorities.<sup>75</sup> First, one stop and frisk victim said, "When you're young and you're black, no matter how you look,

---

66. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013).

67. *Id.* at 558.

68. *Id.* at 559.

69. *Id.*

70. *Id.*

71. *See id.* at 559–60.

72. *Id.* at 560.

73. *Id.* ("The City and its highest officials believe that blacks and Hispanics should be stopped at the same rate as their proportion of the local criminal suspect population. But this reasoning is flawed because the stopped population is overwhelmingly innocent—not criminal. There is no basis for assuming that an innocent population shares the same characteristics as the criminal suspect population in the same area.").

74. *Id.* at 559.

75. *See generally* Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597 (2015) (using narratives of African American men to highlight NYPD's stop and frisk racial profiling).



you fit the description.”<sup>76</sup> This statement, which is supported by the *Floyd* statistics, illustrates police officer feelings that their reason for stopping racial minority suspects did not matter. Second, at the *Floyd* bench trial, stop and frisk victim Tyquan Brehon testified that “I have been taken in a lot of times because if you are stopping me I am gonna want to know why and that is when you hear a change in their tone.”<sup>77</sup> Here, we see that police felt they could act with immunity to challenge and essentially arrest people for “contempt of cop.”<sup>78</sup>

The *Floyd* decision is so interesting because it uses the equal protection doctrine to strike down racial profiling. Until this opinion, the equal protection doctrine had been seen as an inadequate means of remedying racial profiling.<sup>79</sup> Nonetheless, Judge Scheindlin struck down the NYPD’s racial profiling as a facial violation of the equal protection doctrine based on the policy of stopping “the right people.”<sup>80</sup> She also struck down the policy in the alternative on grounds that, if deemed facially neutral, the discriminatory purpose of the program could be inferred from the starkness of the racial disparities in stops as well as rates of discovering evidence of crime.<sup>81</sup>

### C. *Where Are We Now?*

In the wake of the election of Mayor Bill de Blasio, New York City dropped its appeal of Judge Scheindlin’s opinion.<sup>82</sup> Part of the cost of that decision, though, has been police officer resentment of the Mayor.<sup>83</sup> On multiple occasions recently, large numbers of NYPD officers have physically turned their backs on Mayor de Blasio as he

76. Ross Tuttle & Erin Schneider, *Stopped-and-Frisked: “For Being a F\*\*king Mutt”*, NATION (Oct. 8, 2012), <http://www.thenation.com/article/170413/stopped-and-frisked-being-fking-mutt-video> (video).

77. Julie Dressner & Edwin Martinez, *The Scars of Stop-and-Frisk*, N.Y. TIMES (June 12, 2012), <http://www.nytimes.com/video/opinion/100000001601732/the-scars-of-stop-and-frisk.html> (video).

78. “Contempt of Cop” is a means of describing situations where police officers punish civilians for disrespecting them. Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 15 (2010).

79. *Brown v. City of Oneonta*, 221 F.3d 329, 333–34 (2d Cir. 2000) (upholding stop of all young black males in town upon description of suspect as black).

80. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013).

81. *Id.* at 662.

82. Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), [http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html?\\_r=0](http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html?_r=0).

83. See Adam Klasfeld, *Stop-and-Frisk Reform Talks Will Include NYC Cop Unions*, COURTHOUSE NEWS SERVICE (Mar. 19, 2015), <http://www.courthousenews.com/2015/03/19/stop-and-frisk-reform-talks-will-include-nyc-cop-unions.htm>.

gave speeches.<sup>84</sup> This suggests that police disrespect for civilian review of their practices is at very high levels. Meanwhile, the racial profiling identified in New York City has been discovered elsewhere as well. For example, the New Jersey ACLU and the Massachusetts ACLU have issued reports on stop and frisk suggesting the problem is pervasive.<sup>85</sup> Our present condition of hyper-policing of men of color raises this question: what perspective can deliver us from this predicament?

## II. WHAT IS VULNERABILITY THEORY?

Based on her perception that identity-based theories are inadequate,<sup>86</sup> Fineman proposes that we base a progressive theory on the universal human condition of vulnerability. Her model for vulnerability theory boils down to a desire to see everyone as sharing a universal human condition and a call for the state to take greater responsibility for arranging institutions such that they will prevent and ameliorate injuries.<sup>87</sup> Despite generally agreeing that the state must take greater responsibility for providing people with the resources they need to flourish, identities theorists have several reasons to be worried about vulnerability theory's post-identity approach. I discuss those concerns in the next Part of the Article.

My goal in this Part is to be fair to vulnerability theory before critiquing it. This Part will proceed as follows. Section A explicates some essential ingredients of vulnerability theory. Section B discusses implications of the theory for methodology and governance.

### A. *The Elements of Vulnerability*

Vulnerability theory is built upon “the realization that many [physically or psychologically harmful] events are ultimately beyond human control.”<sup>88</sup> For example, we are far from capable of preventing weather disasters, such as hurricanes. Similarly, the social world can make people vulnerable. For instance, the administration of the second President Bush was widely criticized for its response to

---

84. See Rebecca Kaplan, *NYPD Chief: “Inappropriate” for Officers to Turn Backs on Mayor Again*, CBS NEWS (Dec. 28, 2014, 12:13 PM), <http://www.cbsnews.com/news/nypd-chief-bratton-inappropriate-for-officers-to-turn-backs-on-mayor-again/> (discussing officers turning their backs on the Mayor in the wake of the deaths of Michael Brown and Eric Garner).

85. ACLU, *supra* note 28, at 1.

86. See Fineman, *Responsive State*, *supra* note 9, at 254 n.11 (declaring “insufficiency of identity-focused equality”).

87. *Id.* at 269.

88. Fineman, *Vulnerable Subject*, *supra* note 9, at 9.

Hurricane Katrina.<sup>89</sup> Further, vulnerability is the possibility of injury to both oneself and one's relationships. The relationships that are injured could be between two individuals, such as between a father and son, or between institutions of the state and the individual or groups of individuals. As an example of how the relationship between institutions and groups can itself be broken and injurious to individuals, consider the fact that black and Latino boys (as well as less-lauded Asians such as Cambodians) are disproportionately doubted academically and suspended.<sup>90</sup> According to vulnerability theory, these examples show that we are all constantly subject to injury to the self and to our relationships.

Vulnerability theory goes beyond the harms that occur to individuals and makes social institutions themselves vulnerable. According to Fineman, "institutions such as the family . . . are unable to eliminate individual vulnerability and are themselves vulnerable structures susceptible to harm and change."<sup>91</sup> Institutions like the family are vulnerable in that families are recognized by the state and may be supported or harmed by its laws, such as through tax benefits.<sup>92</sup> So, vulnerability is personal, relational, and institutional, all at once.

Vulnerability is also co-constituted by all three of those aspects.<sup>93</sup> Hence, individuals influence relationships and institutions, relationships influence individuals and institutions, and institutions influence individuals and relationships. None of these aspects is completely separate from the other. We thus see vulnerability cutting

---

89. See generally AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA, *supra* note 11 (collecting articles on fallout from Hurricane Katrina); MITCHELL F. CRUSTO, LIBERTY: HOW CRISIS DEFINES OUR RIGHTS (forthcoming Carolina Academic Press, 2015) (using Katrina stories to illustrate constitutional principles).

90. See PEDRO A. NOGUERA, THE TROUBLE WITH BLACK BOYS: AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION, at xxi (2008) (summarizing negative stereotypes about and treatment of black boys in schools); see also Dowd, *Unfinished Equality*, *supra* note 9, at 51 (citing Tyrone C. Howard, *Who Really Cares? The Disenfranchisement of African American Males in PreK-12 Schools: A Critical Race Theory Perspective*, 110 TCHR. C. REC. 954, 974 (2008)) (citing research on low expectations and over-punishment of black boys).

91. Fineman, *Vulnerable Subject*, *supra* note 9, at 11.

92. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (holding that a lesbian spouse could not be denied tax benefits under the Defense of Marriage Act).

93. "Co-constituted" means that two or more institutions, identities, etc., are reciprocally influencing one another. See Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185, 1195 (2013).

through all of those aspects of life and must ask, what are the elements of vulnerability itself?

In her article, *The Vulnerable Subject and the Responsive State*, Fineman identifies four key elements of vulnerability: universality, constancy, complexity, and particularity.<sup>94</sup> The universality aspect of Fineman's definition is based upon her seeing everyone as having the shared condition of being vulnerable. She says the following of the term "vulnerability": "[M]y work has developed the concept of vulnerable detached from specific subgroups, using it to define the very meaning of what it means to be human."<sup>95</sup> The key to vulnerability theory, then, is that it conceives of vulnerability as a universal part of the human condition. While Fineman does not claim that vulnerability is the *foundation* of "what it means to be human," it seems clear from her language that it is important to her that vulnerability be understood as shared by all.<sup>96</sup>

A necessary assumption of universality as conceptualized in vulnerability theory is the idea that we can establish universals in the first place. Many would say that there is no "view from nowhere" that would allow us to understand "what it means to be human" under all circumstances.<sup>97</sup> Fineman would say that, to the extent it is impossible to create a universal, we must construct one anyways because we are dealing with law. This is implied by her claim that "[w]hen we deal with the law . . . we employ a system dependent on the process of classification, generalization, and universal applicability."<sup>98</sup> For Fineman, this means "the most important task for those interested in a social justice project . . . is to construct a legal subject with which to replace the abstract liberal subject with its accompanying and unrealistic constructs of autonomy, self-sufficiency, and independence."<sup>99</sup> Those references to "universal applicability" and the "abstract liberal subject" demonstrate that vulnerability theory seeks to construct a universal subject. Since "the subject" is the thinker in the Cartesian model of "I think, therefore I am," and subjectivity is "one's awareness of oneself as a subject in the world," vulnerability theory's claim that there is a universal subject is a

---

94. Fineman, *Responsive State*, *supra* note 9, at 268.

95. *Id.* at 266.

96. *Id.*

97. See generally THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986) (challenging ability to have purely objective perspective).

98. Fineman, *Feminism, Masculinities*, *supra* note 9, at 619–20.

99. *Id.* at 620.

significant assertion about personhood.<sup>100</sup> As a claim about subjectivity, vulnerability theory is an attempt to create a vantage point from which we can see everyone as similar enough that we feel bound to one another. If we agreed that we are all vulnerable, maybe we could agree that we need a strong state to help us prevent injuries and recover from those that occur anyways.

In addition to the universality of vulnerability, a second important aspect of vulnerability theory is the constancy of dependency on others. Fineman joins feminist critiques of the liberal subject's supposed autonomy by contending that "the liberal subject is enmeshed in a web of relationships and . . . dependent upon them."<sup>101</sup> Vulnerability should be "understood as a state of constant possibility of harm" that "cannot be hidden."<sup>102</sup> Because vulnerability is constant, we are unavoidably dependent on each other and on the state. The element of constancy thus also sets up vulnerability theory's argument for a strong state.

The third prong of vulnerability theory is complexity. Vulnerability is complex because "it can manifest itself in multiple forms."<sup>103</sup> We could suffer simple physical harm, but that physical harm could itself create harms to our relationships.<sup>104</sup> Those relationships could be with other people or with institutions.<sup>105</sup> That second-level harm to relationships with others or with institutions could be economic or it could be social.<sup>106</sup> Moreover, physical or other injuries to the individual could also result in intergenerational transfer of the consequences of injuries. As Fineman notes, the United States of America has among the very lowest rates of movement from the lower- to middle-classes of Western industrial nations.<sup>107</sup> The reason for the calcification of social statuses relates to the way social groupings work in our society:

[N]egative economic and institutional harms may cluster around members of a socially or culturally determined grouping who share certain societal positions or have suffered discrimination based on constructed categories used to

---

100. See Thomas A. King, *A Few Thoughts About "Subjectivity,"* MAPPING BRANDEIS PROJECT (Mar. 27, 2006), <http://people.brandeis.edu/~mappingbrandeis/subjectivity.html> (defining terms).

101. Fineman, *Vulnerable Subject*, *supra* note 9, at 11.

102. *Id.*

103. Fineman, *Responsive State*, *supra* note 9, at 268.

104. See *id.* (describing complexity of injuries).

105. See *id.*

106. See *id.*

107. See *id.* at 268 n.57 (describing lack of intergenerational mobility).

differentiate classes of persons, such as race, gender, ethnicity, or religious affiliation.<sup>108</sup>

For vulnerability theorists, then, the existence of social groups is part of what makes the human condition complex. In turn, those social groupings are an additional source of vulnerability. The element of complexity is in tension with vulnerability theory's post-identity approach, however, because it acknowledges that identities help create vulnerabilities.

Vulnerability theory's final element, the particularity of the human condition, is meant to explain complexity without reference to identities. According to vulnerability theory, we differ in our "embodiment" and in our social location "within webs of economic and institutional relationships."<sup>109</sup> Having a different phenotype or a different social status changes how we are treated. Thus, variation among humans means that we have particular experiences of vulnerability.<sup>110</sup>

The first way in which particularity affects vulnerability is in embodied differences. That is, we are particularized by "physical/mental/intellectual and other variations . . ."<sup>111</sup> Fineman acknowledges that such variations "are not socially neutral, and historical reaction to some human variations, particularly race and gender, has led to the creation of hierarchies, discrimination, and even violence."<sup>112</sup> So, identities did matter at one point. Fineman goes on to insist, however, that continuing to use differences in embodiment to define who is vulnerable "obscures the reality of universal vulnerability" and "stigmatizes" those groups.<sup>113</sup> So, we should respond to embodied particularity by emphasizing our overarching shared human condition of vulnerability.

The second way that particularity affects vulnerability in Fineman's analysis is through social location. She says that our differential locations within relationships with other people and institutions "structure our options and create opportunities."<sup>114</sup> Social location is so important because institutions provide us with access to resources for addressing our vulnerabilities.<sup>115</sup> Those resources might

---

108. *Id.* at 268.

109. *Id.* at 269.

110. *Id.*

111. Fineman, *Feminism, Masculinities*, *supra* note 9, at 637.

112. *Id.*

113. *Id.*

114. *Id.* at 638.

115. *Id.*

be child care or food or unemployment insurance. But if our relationship to our family or local businesses or the government is fractured, we cannot access those resources. Because social location is key to acquisition of the resources to address vulnerabilities, vulnerability theorists suggest that identities are not especially important. Such a conception fits with Fineman's pervasive description of phenomena that could be explained as rooted in identities as instead rooted in institutional arrangements.<sup>116</sup> Vulnerability theory's goal in rejecting identities is laudable: connecting vulnerability to a greater responsibility for society to configure institutional arrangements so that they will prevent and ameliorate injuries.<sup>117</sup> Again, then, vulnerability theory helps justify a strong state.

Together, Fineman's elements of vulnerability theory describe a universal human condition and how it varies. Overall, the elements create a post-identity way of seeking social progress. What the elements leave somewhat open is the means of accomplishing that goal. In the next section, I will briefly describe the implications of vulnerability theory as the means of seeking social progress.

### B. *Implications of Vulnerability Theory*

If we accept vulnerability theory, we are led to two principal conclusions. First, it seems that vulnerability theory would have us reject identities. In *The Vulnerable Subject*, Fineman explicitly claims that the current understanding of suspect classifications under the Fourteenth Amendment's equal protection clause "define[s] individual legal identities . . . ."<sup>118</sup> Fineman also takes "[t]his system of identity categories" to "define[] the organization of interest groups."<sup>119</sup> Relating her theory that individuals are better defined as positioned by systems of power than by identity theory's concept of intersectionality,<sup>120</sup> Fineman states as follows:

116. See generally Fineman, *Beyond Identities*, *supra* note 9 (calling for dumping identities from equal protection analysis); Fineman, *Feminism, Masculinities*, *supra* note 9 (criticizing multidimensional masculinities theory).

117. Fineman, *Feminism, Masculinities*, *supra* note 9, at 639.

118. Fineman, *Vulnerable Subject*, *supra* note 9, at 2–3.

119. *Id.* at 3.

120. Intersectionality is the concept that when two or more categories of identity intersect, the identity formed there is unique. So, the identity "black woman" is not reducible to the addition of a lowest common denominator experience of women and blacks in general. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243–44 (1991) (coining the term "intersectionality"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) (identifying essentialism in

[W]ith respect to the assets any one person possesses, it is not multiple *identities* that intersect to produce compounded inequalities, . . . but rather systems of power and privilege that interact to produce webs of advantages and disadvantages. Thus, . . . a vulnerability analysis provides a means of interrogating the institutional practices that produce the identities and inequalities in the first place.<sup>121</sup>

The heart of this quote is that systems of “power,” by which Fineman seems to mean wealth and control of institutions rather than “privilege,” as I use the term, position people more than systems of identity do so.<sup>122</sup> I see Fineman’s contrasting of power and identities as resting on two propositions. First, “systems of power” are distinct from systems of identities. Preeminent feminist theorist Martha Chamallas refers to vulnerability theory as part of a movement toward “feminism without feminism” because of its post-identity stance.<sup>123</sup> In this sense, identities are simply irrelevant to the broader progressive goal of making society less influenced by hierarchical power relations. A second proposition is that systems of power affect a person’s resources for addressing vulnerabilities more than do identities. Vulnerability theory thus prioritizes analysis of power over analysis of identities. As I will discuss in the next Part of this Article, I reject the propositions that identities are irrelevant or subsumed by generalized analysis of power relations based on the fact that identities are materially crucial.

The second key implication of vulnerability theory is that it is the best way to justify a strong government (state). Vulnerability theory’s overall goal is to foster “resilience.”<sup>124</sup> Resilience is the ability to bounce back from injury.<sup>125</sup> Vulnerability theory’s primary method of fostering resilience is to promote a responsive state.<sup>126</sup> A responsive

---

feminist legal theory). For more information on intersectionality, see generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2003).

121. Fineman, *Vulnerable Subject*, *supra* note 9, at 16 (citations omitted).

122. *See id.* Fineman is not using the word “privilege” in the way that I advocate, for she does not cite its major explicators, Peggy McIntosh and Stephanie Wildman, nor the related literature. *See id.*

123. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 137 (3d ed. 2012); *see also* Marc Spindelman, *Feminism Without Feminism*, 9 ISSUES LEGAL SCHOLARSHIP, art. 8 (2011) (coining term).

124. Fineman, *Responsive State*, *supra* note 9, at 269; Fineman, *Vulnerable Subject*, *supra* note 9, at 13.

125. Fineman, *Responsive State*, *supra* note 9, at 270.

126. *Id.* at 273–74 (explaining the responsiveness of state institutions is under suspicion in American society for fear of interference with entrenched ideals of autonomy and liberty).



state provides and supports the institutions that help create resiliency in the face of vulnerabilities.<sup>127</sup> It does so by continuously monitoring, evaluating, updating, and reforming its institutions. The focus should be on the state's responsibility to its citizens in assuring the equality of opportunity, treatment, and access to resources that would allow individuals to be resilient.<sup>128</sup> Such constant reevaluation of state institutions to ensure equal opportunity and access is necessary because institutions, like humans, are vulnerable to harm, here in the form of corruption of institutions such that they do not provide everyone with equality of opportunity.<sup>129</sup> For instance, the recent Department of Justice report on the Ferguson, Missouri Police Department demonstrates how institutions are vulnerable to corruption.<sup>130</sup> Vulnerability theory's solution would seem to require institutions to constantly monitor themselves and be externally monitored to make sure they are fully serving all of the people. In Ferguson, Missouri, vulnerability theory would help explain the need for long-term federal monitoring.

Vulnerability theory's means of enforcing a responsive state is to create an equal protection claim that requires the state to affirmatively create equality of opportunity. This is a substantive

---

127. *Id.* at 274.

128. For instance, Fineman's version of equal protection doctrine starts from the premise that the state must treat everyone equally as well unless the state carries its burden of justification for a deviation. See MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* 154–55 (1995); Fineman, *Vulnerable Subject*, *supra* note 9, at 2. She wants our constitutional and statutory antidiscrimination laws to reach the “combined workings of the economic, political, cultural, and social systems.” Fineman, *Beyond Identities*, *supra* note 9, at 1736 n.99. As Fineman acknowledges, the Fourteenth Amendment had the potential to guarantee substantive equality. See *id.* at 1726. The fault for the demise of substantive equality seems to lie at the feet of conservative politicians and judges going back to the 1970s (and earlier), though, not identities theorists. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (rejecting societal discrimination as a basis for affirmative action). For example, political historian Jeremy Mayer reveals that political conservatives made fighting racial progress the secret core of their agenda from Goldwater through Reagan. See JEREMY D. MAYER, *RUNNING ON RACE: RACIAL POLITICS IN PRESIDENTIAL CAMPAIGNS, 1960–2000*, at 293 (2002). I would like to see Fineman more clearly acknowledge that conservatives ruined equal protection doctrine, not identities theorists.

129. Fineman, *Beyond Identities*, *supra* note 9, at 1716 (contending that events such as market fluctuations, changing international policies, institutional and political compromises, and prejudices harm institutions and that those in control often hide institutional vulnerabilities).

130. See generally, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (2015), available at [http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf) (criticizing Ferguson, Missouri Police Department for pattern and practice of racially discriminatory policing).

equality. In contrast, the current formal equality approach to equal protection is based on an extreme version of the Lockean conception of individuals as autonomous.<sup>131</sup> As to equality, conservative jurisprudence guarantees only a negative right not to be treated differently when the discrimination is explicitly based on specified prohibited grounds.<sup>132</sup> Substantive equality would start from the premise that the state must treat everyone equally as well unless the state carries its burden of justification for a deviation.<sup>133</sup> Borrowing from Vermont's state constitutional jurisprudence, Fineman's version of substantive equality would establish "a positive right to access the social goods or resources necessary to sustain equally valued individuals."<sup>134</sup> Vulnerability theory's substantive equality approach would thus reach the "combined workings of the economic, political, cultural, and social systems."<sup>135</sup> I am on board with vulnerability theory's acknowledgement of everyone's interdependence and call for a substantively responsive state but believe it will not fulfill its promise unless it is responsive to the effects of identities. The next Part more fully explains why I believe vulnerability theory must grapple with identities.

### III. CRITIQUING VULNERABILITY THEORY

My criticisms of vulnerability theory's rejection of identities revolve around this insight: when it comes to men of color, we are always already suspect.<sup>136</sup> Even if we accept vulnerability theory's description of particularity as a matter of embodiment, men of color are distinguishable from the universal human condition based on our

131. See Fineman, *Vulnerable Subject*, *supra* note 9, at 2.

132. See, e.g., CRAVEN, *supra* note 128, at 154–55; Fineman, *Vulnerable Subject*, *supra* note 9, at 2.

133. See CRAVEN, *supra* note 128, at 154–55; Fineman, *Vulnerable Subject*, *supra* note 9, at 2.

134. Fineman, *Beyond Identities*, *supra* note 9, at 1718–19. Fineman particularly lauds the Vermont doctrine requiring equal treatment, which she sees as requiring that social success derives only from "differences of capacity, disposition, and virtue, rather than governmental favor or privilege." *Id.* at 1729–30 (citations omitted). Vermont's doctrine specifically prohibits "the conferral of advantages or emoluments upon the privileged." *Id.* at 1730 (citations omitted). Fineman does not emphasize the wrongness of the status of being privileged; she is most concerned with the wrongness of the state conferring benefits on some but not others. See *id.* Because I see privilege as systematically conferred by social norms, especially through understandings about the meanings of identities, my emphasis is different.

135. *Id.* at 1736 n.99.

136. See LOUIS ALTHUSSER, ON THE REPRODUCTION OF CAPITALISM: IDEOLOGY AND IDEOLOGICAL STATE APPARATUSES 265 (G.M. Goshgarian trans., 2014) (referring to "always already" being subjected to, and made a subject by, ideology).

racial phenotype and gender. The “historical reaction”<sup>137</sup> to our particular intersection of race and gender, which is different than historical reactions to black women and white men, is an ongoing social fact.<sup>138</sup> And, at least in the context of policing, it is significantly worse than the reaction to other individuals.

In vulnerability theory’s other way of describing particularity, our social location is that of permanent outsider. We are not just temporarily defined as culturally inferior and dangerous. As Fineman acknowledges, “Individuals who have certain characteristics have been subordinated and excluded from the benefits of society, often because their differences are thought to indicate they are dangerous, or interpreted as inadequacy, inferiority or weakness.”<sup>139</sup> In this society, young, urban, black or Latino males are the symbol of dangerousness beyond all others.<sup>140</sup>

Vulnerability theory does not work for analysis of racial profiling because the always already suspect status of young black males is unlikely to change in the near future. As Angela Harris has described, because the United States of America has been founded upon the subordination of blacks in general, there is an “African-American exception[]” to the usual “melting . . . pot” narrative that social groups are quarantined for a while and then allowed into the mainstream.<sup>141</sup> Harris contrasts the former negative treatment of white ethnics with ongoing subordination of blacks under the rubric of “black exceptionalism.”<sup>142</sup> I take the concept of black exceptionalism to mean that progress for white ethnics, and even Asians or Latinas/os, may not be extended to blacks. This conflicts with Fineman’s belief that neither privilege nor advantage is tied to identities.<sup>143</sup> But identification of young men of color as suspicious is so pervasive as to make identities, not a universalizable vulnerability,

---

137. Fineman, *Feminism, Masculinities*, *supra* note 9, at 637.

138. *See generally* Cooper, *supra* note 1 (discussing uniqueness of black male attributed identity).

139. Fineman, *Feminism, Masculinities*, *supra* note 9, at 637.

140. *See generally* VICTOR M. RIOS, *PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS* (2011) (studying police treatment of black and Latino boys in Oakland).

141. *Cf.* Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1596 (1997) (conversing about ways in which the black-white binary paradigm of race is productive and unproductive). For an excellent festschrift on Angela Harris’s work, *see generally* Camille Gear Rich, *Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. 1027 (2014).

142. Espinoza & Harris, *supra* note 141, at 1596.

143. *See* Fineman, *Vulnerable Subject*, *supra* note 9, at 17.

foundational to their subjectivity.<sup>144</sup> Because of racial profiling, young black men are vulnerable in a special way. This fact presents a serious challenge to vulnerability theory's insistence on a universal human condition.

While I admire vulnerability theory's utopian, "people are people" mentality, I fear that its universal approach masks real differences amongst people. In section A, I argue that vulnerability theory's universal approach hides the continuing existence of particular experiences based on identities. In section B, I then discuss how identities are merely socially constructed but remain materially crucial. In section C, I briefly consider a potential objection to my critique.

#### A. *Universals Hide Particularity*

Vulnerability theory necessarily assumes that there can be a standard version of personhood.<sup>145</sup> Based on the teaching of critical theory, and especially critical race theory, I argue that there is no universal that does not in fact hide an intrinsic particularity.<sup>146</sup> The legal realists had already debunked the idea that law could be neutral enough to describe a universal perspective.<sup>147</sup> Critical race theorists further contend that the particularity that is smuggled back into the universal is likely to be the same norms we traditionally have seen in the West. For example, in the West, the "universal" perspective has been based on the experiences and viewpoints most common to straight, white, able-bodied Christian men who are economically advantaged.<sup>148</sup> That means the universal description of the human condition has really been a particularity making a *claim* to universality. Accordingly, Iris Marion Young has described a "scaling

---

144. On the black-male-as-criminal stereotype, see, for example, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1492 (2005) (summarizing research showing black males associated with criminality); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381, 381 n.1 (2002) (discussing how the drug war exploited and reinforced stereotype of black criminality).

145. Fineman, *Feminism, Masculinities*, *supra* note 9, at 619–20 (referring to model's "universal applicability").

146. See generally *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii–xxxii (Kimberlé Crenshaw et al. eds., 1995) (describing and extending Critical Legal Studies' critique of objectivity).

147. Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 633–35 (1989) (summarizing uses of Legal Realism).

148. See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 126–28 (1990) (describing Western epistemology as rooted in a "scaling of bodies"); Cooper, *supra* note 1, at 870–73.

of bodies” in Western culture whereby attributes are hierarchized.<sup>149</sup> Race is hierarchized as white over black, gender as male over female, religion as Christian over “infidel,” and so on.<sup>150</sup> Because the scaling of bodies is built into Western culture, accepting Western culture’s invitation to generalize into a universal is likely to implicitly accept the scaling of bodies.

The ultimate problem with universals is that we have a race, a gender, a sexual orientation, and a class status whether we choose to acknowledge all of those statuses or not.<sup>151</sup> For instance, as Barbara Flagg has pointed out, whites have tended to think of themselves as having no racial identity.<sup>152</sup> Blacks, Asians, and Latinas/os have not been afforded that luxury.<sup>153</sup> Moreover, whites do not actually lack racial identity. Their whiteness is simply “transparent” in that the experiences and viewpoints shared by most whites, or at least whites in power, are presumed to be normal and norm-setting.<sup>154</sup> These white norms thus serve as the background principles for reasonability and objectivity. So, when we assume that “people are people,” we end up installing a particular group’s experiences and worldview as an objective vantage point. That is a crucial reason that we cannot replace identities theory with an assumption of a universal vulnerability.

Criminal procedure provides an example of the problem with generalizing. Scholars in the field have long debated the utility of generalizing and concluded that rigid, bright-line rules must bear a strong resemblance to reality. For example, the search incident to arrest rule says that police may search the area within the “immediate control” of the suspect when they have probable cause to arrest him.<sup>155</sup> The Court used to generalize this rule by presuming that the passenger compartment of a car is within the immediate control of the

---

149. See *supra* note 148.

150. See YOUNG, *supra* note 148, at 126–28 (defining scaling of bodies).

151. See, e.g., BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* 1 (1998) (defining “the [white] transparency phenomenon”); see also Barbara J. Flagg, “*Was Blind but Now I See*: White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 957, 977–78 (1993) (defining “the [white] transparency phenomenon”).

152. See Flagg, *supra* note 151, at 957.

153. See, e.g., Espinoza & Harris, *supra* note 141, at 1603–04 (discussing theory of black exceptionalism).

154. See Flagg, *supra* note 151, at 970 (describing how whiteness becomes transparent).

155. See *Chimel v. California*, 395 U.S. 752, 763 (1969). I use “universal pronoun” (male pronoun) because the vast majority of criminal suspects are men. If you noticed its genderization, you may not be in favor of universals.

suspect when he is stopped in a car.<sup>156</sup> This rule reached its breaking point when the Court acknowledged that police officers almost always lock the arrestee in a police cruiser before conducting a search of his car.<sup>157</sup> The Court thus moved away from its generalization and created a new rule requiring that the suspect either actually have the passenger compartment within his immediate control or be subjected to a special exception.<sup>158</sup> So generalization is not an inevitable rule of legal method. Nor should it be a rule of subjectivity.

Vulnerability theory seems to acknowledge that its generalizations about the human condition will not always reflect reality. Fineman admits that attempting to change law through her vulnerability lens “may overlook some differences among people in the interests of furthering reforms to benefit the larger group.”<sup>159</sup> I ask: Whose interests will be overlooked? Who will choose the nature of the common goals? Unfortunately, the minority’s interests are the ones that are usually overlooked and the majority is usually the group that chooses the supposedly common goals.

*B. Identities Are Socially Constructed but Materially Crucial*

Meanwhile, the problem with subsuming identities under vulnerability theory’s principles of complexity and particularity is that we are not all vulnerable in the same ways or even to the same degrees. To say that we are all united by vulnerability is to say that, at rock bottom, we are all the same. That is true in an abstract sense but not in reality. If all we had was what unites us, we could never identify ourselves as unique and particular individuals. We are all human, but we are different types of humans. The differentiation of humans into social groupings provides us with a key, perhaps even inescapable, way of coming to understand ourselves. I am not saying that we have to identify ourselves solely based on race and gender body types. Nonetheless, to say, “I am human” is to say very little when talking to another human. To say, “I am from the United States of America” to a nonresident of the United States, or, “I am a northerner” to

---

156. See *New York v. Belton*, 453 U.S. 454, 463 (1981), *overruled by* *Arizona v. Gant*, 556 U.S. 332 (2009) (allowing *per se* search incident to arrest of passenger compartment of car).

157. See *Thorton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring); see also Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia’s Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law*, 82 TUL. L. REV. 77, 110 (2007) (arguing for the approach to *Belton* advocated by Justice Scalia in *Thorton*).

158. See *Arizona v. Gant*, 556 U.S. 332, 350 (2009) (overturning *Belton*).

159. Fineman, *Feminism, Masculinities*, *supra* note 9, at 634.

someone from the southern United States, or, “I am black,” or, “I am male,” or, “I am straight” to my interlocutor, assuming they cannot tell that I am these things, starts to separate me from the mass of humanity. While I cannot gainsay vulnerability’s claim that law operates through processes of classification and generalization,<sup>160</sup> I wonder, do those generalizations not have to be roughly accurate? Since it is inevitable that I must sometimes distinguish myself as from the United States, the North, and so on, we ought to recognize that fact by refusing to pretend that there is a universal human condition that does not have to be differentiated in practice.

With this insight in mind, I want to return to the first implication of vulnerability theory: its claim that “systems of power” subsume identities. Vulnerability theory’s propositions that systems of power are distinct from identities and that they affect people more than identities are nothing short of a rejection of the central insight of critical race feminists. For us, the fundamental social system is that we are born into a world that positions us within a web of categories of identity.<sup>161</sup> Moreover, the intersection of categories of identities, such as black and female, creates a unique identity that is not generalizable to the lowest common denominator of the two categories.<sup>162</sup> So, a black woman should not have her interests lumped in with those of all blacks, or all women, or all humans. As a consequence, both of vulnerability theory’s propositions about identities are wrong because identities are co-constituted with, and thus inextricable from, systems of power.

We can demonstrate another problem at the heart of vulnerabilities theory by debunking its notion of identity formation. For instance, Fineman claims that “institutional practices . . . produce the identities and inequalities in the first place.”<sup>163</sup> At best, Fineman’s claim is only partially right. Identities and institutional practices are co-constituted in that they reciprocally influence one another.<sup>164</sup> To say that identities and institutional practices are co-constituted is to

---

160. *See id.* at 619–20 (defending universality).

161. *See generally* PATRICIA HILL COLLINS, *FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE* 7 (1998) (arguing black women’s positionality affects their subjectivity).

162. *See* Adrien Katherine Wing, *Introduction*, in *CRITICAL RACE FEMINISM: A READER*, *supra* note 120, at 1, 1–18 (discussing women of color’s unique positionality).

163. Fineman, *Vulnerable Subject*, *supra* note 9, at 16.

164. Ann C. McGinley & Frank Rudy Cooper, *Introduction: Masculinities, Multidimensionality, and Law: Why They Need One Another*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 1, 11 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

say that they are imbricated in one another. People form their identities based in part on their interactions with institutions, but at the same time, institutions operate only through the actions of individuals who themselves have pre-formed senses of the meanings of their own and others' identities. That means that identity formation precedes, but is also simultaneously influenced by, institutional practices.

Moreover, identities are both unreal in that they are socially constructed and also materially crucial. If all Fineman's critique means is that we are all human, it would be hard to disagree with her. That would imply that identities such as race are not "real," but socially constructed. As a critical race theorist, I subscribe to the theory of social construction. Identities are "formed" by social conditions rather than derived directly from nature.<sup>165</sup> There is nothing more to race than our interpretation of certain bodily characteristics as constituting a "race," which we then take to connote certain personality traits. It is nurture, not nature that creates identities.<sup>166</sup> As a biological matter, there is no such thing as race: we are all human. And this point has been made with respect to other identities.<sup>167</sup> Vulnerability theory thus seems to suffer from what critical race theorist Kimberlé Crenshaw calls "vulgar constructionism."<sup>168</sup> This is the fallacy that because identities are not real in the biological sense, we should not organize around them.<sup>169</sup>

The remaining problem is that, in the social world, identities are very much real. That is, identities are socially constructed but materially consequential.<sup>170</sup> For example, pretending I am human and not a black male could get me shot by the police. Numerous sources have reported about the tradition of black parents warning their black boys not to try to seek equal treatment from the police, lest they be shot.<sup>171</sup> The "don't get yourself shot" talk that parents must have with

165. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 105–15 (3d ed. 2015) (explicating racial formation theory).

166. See generally JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 12 (1999) (classically stating that "there is no recourse to a body that has not always already been interpreted by cultural meanings").

167. Judith Butler, *Restaging the Universal: Hegemony and the Limits of Formalism*, in CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT 11, 29 (Judith Butler, Ernesto Laclau & Slavoj Žižek eds., 2000).

168. Crenshaw, *supra* note 120, at 386 n.75 (defining vulgar constructionism).

169. *Id.*

170. Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama's Feminine Side*, 86 DENV. U. L. REV. 633, 643 (2009).

171. See James H. Burnett III, *After Trayvon Martin, It's Time for "The Talk,"* BOSTON.COM (Apr. 7, 2012), <http://www.boston.com/news/local/massachusetts/articles/>



black boys is a powerful symbol of the material consequences of identities.

As a matter of biology, we are all human, but as a matter of our social lives, we have identities. If vulnerability theory is suggesting that just because identities are socially constructed, we can get outside of them, it is mistaken. Accordingly, vulnerability theory is wrong when it implicitly suggests that the constructedness of identities makes them unimportant in relation to our shared human condition of being vulnerable. In sum, identities continue to matter and they are not sufficiently recognized in vulnerability theory as presently constructed.

### C. *Reconsidering Elements of Vulnerability Theory*

This section applies the critiques of vulnerability theory as creating a false universal and neglecting the material consequences of identities by reconsidering Fineman's four elements of the theory. The subsections thus review vulnerability theory's principles of universality, constancy, complexity, and particularity. The last subsection argues there is an element missing from vulnerability theory: privilege.

#### 1. Universality

Law may be "dependent on the process of classification, generalization, and universal applicability," but that dependence has always been false and, accordingly, our imagination of a better world should not be limited to universals.<sup>172</sup> As I discussed in Part III.A of this Article, the critical race theory movement has debunked the idea that there can be an objective and universal perspective. Given that fact, law's call for universality should not be answered. We should not set up false equivalences between all types of people. Black men are always already suspect, which is simply different than being a white male who encounters the police. Consequently, we should revise universality out of vulnerability theory.

Having said universality is impossible, I believe that we are all vulnerable and that this theory does the best job of elaborating the ways that is so. The key is that vulnerability reveals our interdependence and thus provides a reason for coalition-building.

---

2012/04/07/in\_light\_of\_trayvon\_martin\_case\_black\_fathers\_in\_boston\_are\_scrambling\_to\_have\_safety\_talk\_with\_sons/ (discussing ritual of parents telling black boys that police may shoot them).

172. Fineman, *Feminism, Masculinities*, *supra* note 9, at 619–20.

While there is a shared human condition of being vulnerable, however, people remain differentially privileged. We should not refer to one *universal* human condition but to the fact that people are *universally* vulnerable.

## 2. Constancy

Recognizing the constancy of vulnerability seems much less problematic than referring to a singular human condition. While we are not all the same, our shared condition of vulnerability does provide a basis for solidarity. Since we cannot escape our inevitable dependency, we might as well band together to fight for a strong state. The exemplary illustration of privilege that I will relate in Part IV.A will help demonstrate what we already know: The privileged and the disadvantaged are both harmed by the game of seeking to accumulate more wealth than the next person. Helping those of us with privileged statuses to recognize that the game of trying to be as rich as possible harms them as well would encourage coalition politics.<sup>173</sup> The privileged will be made more likely to join coalitions if they are shown that being vulnerable is a constant of the human condition.

## 3. Complexity

I agree that vulnerability is complex. There are myriad ways that we could be physically, mentally, relationally, institutionally, or otherwise harmed.<sup>174</sup> And those harms can interact with one another to exacerbate our vulnerabilities.

Nonetheless, the element of complexity requires a major revision. Vulnerability theory needs to acknowledge that, because of the scaling of bodies, vulnerabilities have and will continue to be structured around identities. This was the lesson of Part III.B, which showed how identities are materially crucial. Moreover, the structuring of vulnerabilities around identities is far from past. The literature on implicit bias amply demonstrates that the scaling of bodies continues to have an afterlife.<sup>175</sup> Fineman is right that

---

173. As the movie *Sweet Bird of Youth* puts it, “Anyone can be a millionaire, so everybody’s got to try it.” See *Sweet Bird of Youth*, SUBZIN, <http://www.subzin.com/quotes/M4203b905/Sweet+Bird+of+Youth/Anyone+can+be+a+millionaire%2C+so+everybody%27s+got+to+try+it> (last visited Feb. 15, 2015).

174. Fineman, *Responsive State*, *supra* note 9, at 268.

175. See BANAJI & GREENWALD, *supra* note 18, at 46 (explicating implicit bias); YOUNG, *supra* note 148, at 128–30 (explicating the scaling of bodies).

categories of identity are merely “constructed”<sup>176</sup> but underestimates the way they continue to have material consequences. Consequently, the most important revision of vulnerability theory will be the incorporation of identities theories as an explanation for many forms of vulnerability.<sup>177</sup>

#### 4. Particularity

As with the complexity of vulnerability, the particularity of vulnerability seems to necessitate identities analysis. Again, particularity has and will continue to be defined largely by identities. The significance of the “embodiment” of vulnerabilities stems from the past and present practice of attaching meanings to particular forms of embodiment.<sup>178</sup> The use of identities to oppress is not just a “historical reaction”;<sup>179</sup> it is built into Western epistemology in the form of the scaling of bodies.<sup>180</sup> Furthermore, the “stigma” that attends to holding onto identity groupings stems from the majority’s reaction to minority status, especially when it comes to race.<sup>181</sup> Worse yet, paralleling a Justice Kennedy-esque antibalkanization rationale for attacking affirmative action and equal protection laws,<sup>182</sup> which Fineman clearly does not intend to do,<sup>183</sup> risks blaming the victims of the scaling of bodies for their own oppression,<sup>184</sup> which Fineman surely does not intend to do. Meanwhile, contrasting multiple identities with “systems of power”<sup>185</sup> does not hold up, for identities have themselves been a means of distributing resources that cut across social institutions.

176. Fineman, *Responsive State*, *supra* note 9, at 268.

177. Here, Nancy E. Dowd, Nancy Levit, and Ann C. McGinley’s use of “complexity theory” in order to build a feminist approach to masculinities could be helpful. *See, e.g.*, Nancy E. Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH*, *supra* note 164, at 25, 26–27, 46.

178. Fineman, *Responsive State*, *supra* note 9, at 269 (discussing embodiment).

179. Fineman, *Feminism, Masculinities*, *supra* note 9, at 637.

180. *See* YOUNG, *supra* note 148, at 128–30 (defining scaling of bodies).

181. *See* Fineman, *Feminism, Masculinities*, *supra* note 9, at 637 (arguing identities stigmatize their holders).

182. *See Ricci v. DeStefano*, 557 U.S. 557, 561–63 (2009) (holding that discarding a fire fighter test that had a negative disparate impact on racial minorities violated the equal protection rights of whites); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“The enduring hope is that race should not matter; the reality is that too often it does.”).

183. *See* Fineman, *Beyond Identities*, *supra* note 9, at 1754–55 (supporting affirmative action).

184. *See generally* WILLIAM RYAN, *BLAMING THE VICTIM* (1971) (defining and explaining this term).

185. Fineman, *Vulnerable Subject*, *supra* note 9, at 16.

### 5. A Missing Element: Privilege

Review of Fineman's elements of vulnerability theory calls for a revision of vulnerability theory that includes identities as an aspect of complexity and particularity. The way to accomplish that goal is by incorporating a theory of privilege. Again, a privilege is an unearned asset automatically conferred by the operation of social norms that favor your identity. The benefits of a privilege are often invisible, even to their holders. Analysis of privilege will fit well within vulnerability theory because vulnerability theory focuses on burdens. Adding analysis of privilege will better allow us to talk about who is benefitted by social norms. The revised vulnerability theory will then be able to explain how systems of power both benefit some identities and make others more vulnerable. Accordingly, the next Part advances the revision of vulnerability theory by further explicating the theory of privilege.

#### D. *Potential Objection to Revising Vulnerability Theory*

Before moving on, I want to acknowledge that my critique of vulnerability theory is subject to objections. For instance, my challenge to vulnerability theory may hit the theory where it is weakest and therefore not adequately represent its value. Certainly there is something to this. After all, vulnerability theory seems especially valuable for discussing disabilities.<sup>186</sup> Yet, I argue, it fails to adequately remedy racial profiling. Here the terms of the theory imply its own critique. Vulnerability theory is a total theory, at least in the sense that it seeks to explain all of antidiscrimination law and propounds a general approach to the state. Such a theory cannot leave out as important an issue as racial profiling without calling itself into question. The theory of privilege will help us account for racial profiling within the vulnerabilities framework.

#### IV. PROPOSAL: REVISE VULNERABILITY THEORY SO THAT IT ACKNOWLEDGES RELATIVE PRIVILEGE

Nathan W. Pyle describes a great illustration of the concept of privilege. He saw a high school teacher lead the following exercise.

---

186. See, e.g., Kate Kaul, *Vulnerability, for Example: Disability Theory as Extraordinary Demand*, 25 CANADIAN J. WOMEN & L. 81, 97 (2013) (applying vulnerability theory to disabilities); Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 523 (2008) (considering vulnerability theory's application to disability).

The students were sitting in rows of desks in a standard classroom. The teacher gave each student a crumpled piece of paper and then placed a waste basket in the front of the room. He informed the class that they represented residents of the United States who wished to move up to the highest class of wealth. Students who successfully threw their crumpled paper into the basket from their seat would be deemed to have moved into the upper class. The students in the back of the room complained that the exercise was not fair, as they had to throw their paper balls further than those who were seated in the front of the class. Students in the front of the class were satisfied with the rules. The students then took their shots. Most of those in the front of the room made it, but not all of them. Most of those in the back of the room did not make it, but some did. The teacher then acknowledged that those in front had a much better shot of making it than did those in the back. The teacher also noted that only those in the back complained about fairness; those in the front concentrated on their goal and did not notice the unfairness built into the game.<sup>187</sup>

In this Part of the Article, I add a new element to vulnerability theory: consideration of how people are differentially privileged. Section A defines privilege and discusses how its acknowledgement will alter vulnerability theory. Section B discusses what a revised vulnerability theory would look like. Section C briefly suggests how a revised vulnerability theory could be used to justify a federal mandate to overhaul policing throughout the country.

#### A. *Incorporating Analysis of Privilege into Vulnerability Theory*

The metaphor of the privilege game from Pyle's example is pretty straightforward: some people have built-in advantages in our supposed meritocracy. We know, for instance, that being born to rich, highly educated parents advantages you.<sup>188</sup> We know as well that women, as a group, face "built-in headwinds"<sup>189</sup> against their success

---

187. Nathan W. Pyle, *This Teacher Taught His Class a Powerful Lesson About Privilege with a Recycling Bin and Some Scrap Paper*, BUZZFEED (Nov. 21, 2014), <http://www.buzzfeed.com/nathanwpyle/this-teacher-taught-his-class-a-powerful-lesson-about-privil#.jxywo42xJW>.

188. See Matt Bruenig, *What's More Important: A College Degree or Being Born Rich?*, MATT BRUENIG POL. (June 13, 2013), <http://mattbruenig.com/2013/06/13/whats-more-important-a-college-degree-or-being-born-rich/> (analyzing tables from Pew Economic Mobility Project describing chances of changing class status); see also Fineman, *Responsive State*, *supra* note 9, at 268 n.57 (describing lack of intergenerational mobility).

189. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (discussing use of employment tests to prevent racial minorities from being hired).

in business.<sup>190</sup> Finally, as I noted in Part I.A of this Article, we know that racial minorities face implicit bias in a wide array of social sectors.

The theory of privilege also shows that identities are crucial to the maintenance of hierarchy. Hence, we tend to uncritically accept labeling racial minority students who achieve as “acting white,”<sup>191</sup> women who demonstrate strong leadership as “masculine,”<sup>192</sup> and conventional gays and lesbians as “straight-acting.”<sup>193</sup> In each case, our common sense way of thinking makes the privileged status the norm for behavior. Having an identity that is normative automatically benefits its holders.<sup>194</sup> As I described in Part III.B, racial privilege operates both because the scaling of bodies assigns negative value to non-white status<sup>195</sup> and because the white transparency effect makes experiences and viewpoints most common to whites the invisible norm.<sup>196</sup> Consequently, the scaling of bodies assigns whites to the figurative front of the class and blacks and Latinas/os to the figurative back of the class. The scaling of bodies and the invisibility of norms also affects women, sexual minorities, and so on. Identities, therefore, are a principal means by which privilege is maintained in this society. If it is to create a better society for all, vulnerability theory will have to acknowledge that identity groups are differentially privileged.

---

190. See generally, e.g., JOAN C. WILLIAMS & VETA T. RICHARDSON, *NEW MILLENNIUM, SAME GLASS CEILING?: THE IMPACT OF LAW FIRM COMPENSATION SYSTEMS ON WOMEN* (2010), available at <http://worklifelaw.org/Publications/SameGlassCeiling.pdf> (documenting glass ceiling in law firms).

191. See, e.g., ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* 202–09 (2000) (discussing “acting white” as an implicit requirement of academic success and put-down).

192. See generally Ann C. McGinley, *Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 *DENV. U. L. REV.* 709 (2009) (contrasting media treatment of Hillary Clinton, Sarah Palin, and Michelle Obama).

193. See, e.g., Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 844 (2002) (defining “straight-acting”).

194. See, e.g., *KEY CONCEPTS IN CULTURAL THEORY* 42–43 (Andrew Edgar & Peter Sedgwick eds., 1999) (discussing benefits of being the norm in a binary opposition). So, it is not my fault that I was born male in this society, but I need to recognize that it provides me with certain benefits, not the least of which is having to worry much less about my safety. See generally Ann C. McGinley & Frank Rudy Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 *NEV. L.J.* 326 (2013) (introducing a new perspective on identities, law, and culture). Furthermore, I will keep getting the benefit of male privilege unless I choose to refuse those privileges and/or work for women’s substantive equality. Hence, the concept of privilege can be scary to some because recognizing it might bring responsibility.

195. See *supra* notes 148–150 and accompanying text (describing scaling of bodies).

196. See *supra* notes 151–154 and accompanying text (describing white transparency effect).

Privilege is also revealed in the extent that white and/or upper-class New Yorkers did not complain about pervasive NYPD targeting of racial minorities in certain neighborhoods, which may be the result of their privilege not to notice the problem. As I noted in my Article *Cultural Context Matters: Terry's "Seesaw Effect,"* white New Yorkers supported order-maintenance policing as trumpeted by Mayor Rudy Giuliani because they implicitly knew it would be targeted upon racial minorities.<sup>197</sup> The cost of racial profiling for the people in the figurative back of the class was invisible to them. Privilege makes the costs of differential treatment invisible.

*B. A Revised Vulnerability Theory*

The move toward a better society should include vulnerability theory's critique of autonomy and embrace of interdependence.<sup>198</sup> I agree with vulnerability theory that the United States of America needs to wean itself from its over-prioritization of autonomy and liberty.<sup>199</sup> We cannot just balance liberty with equality; however, we must replace our current, oversized notion of liberty with recognition of the importance of relationships. That would mean significantly changing our notion of how autonomous people are. We need to recognize that people are inherently relational. Here, I am thinking of the work of feminist relational psychologists, such as Carol Gilligan.<sup>200</sup> Their basic insight is that, from birth, we only develop our individual sense of self in the context of our relationships with others.<sup>201</sup>

Since relationships include identities, a revised vulnerability theory should replace vulnerability theory's universal subject with a multifaceted one made up of gender, race, sexual orientation, class, and religious affiliations, among others.<sup>202</sup> This multifaceted subject

---

197. See Cooper, *supra* note 32, at 866 (arguing white Giuliani voters implicitly accepted racial profiling); Nunn, *supra* note 144, at 381 n.2 (discussing stereotype of black criminality).

198. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (critiquing assumption of autonomy, especially in family law).

199. See Fineman, *Beyond Identities*, *supra* note 9, at 1714.

200. See generally TOWARD A FEMINIST DEVELOPMENTAL PSYCHOLOGY (Patricia H. Miller & Ellin Kofsky Scholnick eds., 2000) (collecting articles on relational psychology).

201. See, e.g., Campbell Leaper, *The Social Construction and Socialization of Gender During Development*, in TOWARD A FEMINIST DEVELOPMENTAL PSYCHOLOGY, *supra* note 200, at 127, 134. See generally CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014) (revamping family law around the importance of varied forms of relationships).

202. See, e.g., LYN MIKEL BROWN & CAROL GILLIGAN, *MEETING AT THE CROSSROADS: WOMEN'S PSYCHOLOGY AND GIRLS' DEVELOPMENT* 29 (encouraging use

will be understood as having different aspects at the forefront depending on the social context.<sup>203</sup> In other words, it would be the multidimensional subject that Fineman rejects.<sup>204</sup> I am hoping, however, that after reconsidering the cruciality of identities in our present Western culture, Fineman and other vulnerability theorists will accept this revision of the theory. Meanwhile, after considering vulnerability theory, critical race feminists should come to see the constancy of vulnerability as a basis for productive coalitions encompassing varied groups and individuals.

Coalition-building among varied groups and individuals will be aided by vulnerability theory's recognition of how privilege operates. Recognizing that their privilege advantages them will allow the figurative front of the class to see that the game itself is corrupt. Further, vulnerability theory will allow the figurative front of the class to acknowledge that we are all dependent at some point. They can now see that there will be other "classrooms" where they will not be seated in the front, making them vulnerable in those environments. Since vulnerability theory says that, due to age, natural disaster, institutional dysfunction, and so forth, there is no exit from vulnerability, everyone has a stake in the fostering of resilience.

In fostering resilience, I would eschew the current U.S. model, which checks the federal government with state sovereignty and balances equality with liberty, and instead prioritize the federal government and equality of opportunity. To begin, therefore, we must have a strong state. Vulnerability theory helps us make the case for that state by creating an affirmative duty for the state to prevent and redress injuries. The means of fulfilling that duty would be a continuous reevaluation of whether state institutions, including those merely supported by it, such as the family, are truly fostering resilience. Accordingly, the state must have the power and flexibility to address regional and national problems.

The principle that courts would use to determine whether the strong state was truly fostering resilience would be a substantive approach to equality.<sup>205</sup> As I discussed in Part II.B, vulnerability theory's approach to substantive equality would assure meaningful

---

of Listening Guide that considers "who is speaking, in what body . . . from whose perspective, in what societal and cultural frameworks . . .").

203. See McGinley & Cooper, *supra* note 194, at 327–29 (explicating theory of multidimensional masculinities theory).

204. See Fineman, *Feminism, Masculinities*, *supra* note 9, at 634–35 (criticizing multidimensional masculinities theory).

205. See Fineman, *Beyond Identities*, *supra* note 9, at 1719, 1724–25.



opportunity for all. Under-educated children, currently taken as a norm in urban environments, would be an example of state failure. More specifically, vulnerability theory would now be able to look at both identities and privileges, so it could recognize both the under-tracking of low socioeconomic status boys of color and the silent shunting of mostly whites into the honors classes as state failures. We need a vulnerability theory that insists on a responsive state but makes that state aware of the ways that identities privilege some and disadvantage others.

### C. *Revising Racial Profiling*

Having concentrated in this Article on revising vulnerability theory, I will not canvas the extensive racial profiling literature but will describe one option. It seems to me that in a world governed by a revised vulnerability theory, young black males could bring a suit for the failure of police departments to treat them properly. The suit would be to have the responsive state act strongly by mandating a nationwide overhaul of police departments. I suggest that this be accomplished in three steps. First, require the tops of police departments to make clear declarations of a new day with respect to racial profiling. Second, change hiring policies into a comprehensive measure of likelihood not to racially profile. That would mean seeking college degrees, deemphasizing military backgrounds, testing for implicit bias, and any other measures necessary. Finally, I suggest retraining existing beat police officers to avoid racial profiling. Much more detail will be needed on these measures, but that will be a project for another day.

## CONCLUSION

I wrote this Article because I was both drawn to and concerned about vulnerability theory. I expressed my concern in Part I, wherein I detailed the factors contributing to continuing police targeting of young racial minority men. In Part II, I detailed aspects of vulnerability theory, emphasizing the value of its acknowledgement of our interdependence and call for a strong state with a substantive approach to equality. In Part III, I critiqued other aspects of vulnerability theory as failing to recognize that there is no universal subjectivity and that identities are materially crucial. In Part IV, I started the revision of vulnerability theory by calling for the incorporation of analysis of privilege.

I end my investigation of vulnerability theory with buoyed hope that, when linked to analysis of privilege, it can be the capacious

2015]

*ALWAYS ALREADY SUSPECT*

1379

theory that helps us fight targeting of young racial minority men. If young men of color are going to continue to be always already suspect to the police for the foreseeable future—and they are—then vulnerability theory must recognize that reality by incorporating recognition of the relative privileges conferred by different identity statuses. Revising vulnerability theory might be the necessary step toward a state that is strong enough and principled enough to remedy the vulnerability of being always already suspect.

