Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation

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In a disturbing development in tort litigation, defendants use deterministic, genetics-based ideas about individuals and their families to undercut and deflect attention from personal injury claims. This development has arisen in lead exposure litigation, which generally involves claims for cognitive injuries brought on behalf of children who have ingested lead paint. The most extreme manifestation of this development to date has been the efforts in several states to compel non-party relatives of lead-exposed children to submit to IQ and psychological testing.

Numerous studies show that lead exposure causes cognitive injuries in children, including brain injury, lowered IQ, and death. See infra notes 27-34 and accompanying text (discussing the harmful effects of lead exposure in children).

Ingestion of old, chipping paint and paint dust is the major source of lead for children. See CENTERS FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., PREVENTING LEAD POISONING IN YOUNG CHILDREN 18-19 (1991) [hereinafter CENTERS FOR DISEASE CONTROL] (stating that lead-based paint remains the major source of lead exposure for young children, and explaining that children ingest lead paint when they ingest dust and soil contaminated with lead from paint that flaked or chalked as it aged); Jane E. Schukoske, The Evolving Paradigm of Laws on Lead-Based Paint: From Code Violation to Environmental Hazard, 45 S.C. L. REV. 511, 515-16 (1994) (noting that residential lead, including lead-based paint, threatens young children). This litigation is generally brought on behalf of lead-exposed children against landlords of properties where lead paint has been found. See SEAN F. MOONEY, INSURANCE INFORMATION INSTITUTE, LEAD LIABILITY (1995), reprinted in 4 MEALEY’S LITIG. REP., LEAD 15, at C2 (May 3, 1995) (noting that the typical lawsuit is brought against the landlord of the residence of the lead-exposed child).

See infra notes 156-60 and accompanying text (discussing cases from the District of
The Secretary of the United States Department of Health and Human Services called lead poisoning “the No. 1 environmental threat to the health of children in the United States.” Lead poisoning affects African-American children in numbers disproportionate to their numbers in the population. Although federal law has banned lead paint for residential use since 1978, it continues to be the subject of a significant amount of legislation. In addition, a substantial amount of litigation is brought against landlords for children’s lead-related injuries, and a 1995 insurance industry report predicted massive claims in the future. To date, however, relatively little legal scholarship has been published in this area.

Columbia, Louisiana, Massachusetts, New Jersey, and New York, in which defendants have sought the IQ testing of the plaintiffs’ non-party relatives. Defendants have also sought to compel production of medical, educational, and employment records of the plaintiffs’ relatives. See infra note 169 and accompanying text (discussing cases involving production of the personal records of plaintiffs’ relatives).


5 See infra note 20 and accompanying text (discussing surveys of the incidence of blood lead levels in children and finding that the incidence is significantly higher among African-American children than among white children).

6 See CENTERS FOR DISEASE CONTROL, supra note 2, at 18 (noting that interior leadbased paint was available until the 1970s).


8 Lead poisoning cases for injuries to children have gone to trial in at least ten states. See generally Sonja Larsen, Annotation, Landlord's Liability for Injury or Death of Tenant's Child from Lead Paint Poisoning, 19 A.L.R. 5TH 405, 412-38 (1995) (discussing cases regarding landlords' liability for injury or death of an infant caused by lead paint poisoning).

9 See MOONEY, supra note 2, at C2 (estimating that the total insurance payout over the next decade would be three billion dollars, not counting defense costs).

In recent years, legal scholars have begun to examine various aspects of tort law, trying to understand how issues such as gender and race are at work. One of the lessons of such work is that gender and race often have an important role in tort law, but this role can be obscured by law’s stance of neutrality. I believe that gender and race play a significant role in the lead exposure litigation discussed in this Article. For example, the fact that efforts to compel IQ tests of non-party relatives have been directed at mothers but not fathers, raises gender issues. The fact that the only families where a non-party has been ordered to have her IQ tested have been African-American families, raises race issues. These issues, as this Article shows, are submerged but nonetheless present in this area of law.

Part I of this Article briefly discusses the effects of lead exposure. Part II focuses on several ideas involved in a shift occurring in childhood lead exposure cases, which is likely to extend to other types of personal injury cases.


See infra notes 76-93, 165-67, 206-13 and accompanying text.

See infra notes 99-111, 196 and accompanying text.
The first idea\textsuperscript{14} is that of "genetic essentialism," the notion that a person's characteristics can be explained, in a deterministic fashion, through her genes.\textsuperscript{15} The second idea\textsuperscript{16} is that of "maternal determinism," the idea that mothers and mothering are responsible for all characteristics possessed by children, bolstering the cultural emphasis on genetic explanations.\textsuperscript{17} These two ideas are used to explain children's characteristics through either the genetic contribution of the parents, the environment created by the mother, or both. Both ideas exaggerate and reify the influences of genetics and mothering, and distract from other influences such as economics and, in this context, lead exposure.\textsuperscript{18}

Part III discusses the history and current debates surrounding intelligence research. As Part III discusses, this history is steeped in race, gender, religious, and class prejudice. The 1994 publication of The Bell Curve\textsuperscript{19} provoked much discussion about these matters, and several key issues pertinent to that book are discussed in this context. This history forms a complex backdrop to lead exposure claims because lead exposure cases, which involve various kinds of cognitive harms, are often brought on behalf of African-American and Hispanic children.\textsuperscript{20} Part III argues that the conclusions

\textsuperscript{14} See infra Part II.A.

\textsuperscript{15} See Rochelle Cooper Dreyfuss & Dorothy Nelkin, The Jurisprudence of Genetics, 45 VAND. L. REV. 313, 320-21 (1992) (defining genetic essentialism as a concept that posits that personal traits are "predictable and permanent, determined at conception, 'hard-wired' into the human constitution").

\textsuperscript{16} See infra Part II.B.

\textsuperscript{17} See Dreyfuss & Nelkin, supra note 15, at 321 (noting that genetic essentialism stresses the importance of biological qualities and minimizes the importance of social context).

\textsuperscript{18} See infra notes 65-93 and accompanying text (arguing that the use of IQ and genetic information as explanations for human behavior is beyond the scientific basis for such explanations).

\textsuperscript{19} Richard J. Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life (1994) (analyzing intelligence testing data and discussing the correlation between scores on the Armed Forces Qualifying Test and educational level, income, anti-social behavior, and ethnic background); see also infra notes 115-26 and accompanying text.

\textsuperscript{20} In a six year survey of the health of the civilian, noninstitutionalized population two months old and older, the incidence of elevated blood lead levels among African-American children between one and two years old was 2.5 times higher than for white children. See Debra J. Brody et al., Blood Lead Levels in the U.S. Population, 272 JAMA 277, 279 (1994). A study of metropolitan areas of more than one million people determined that in 1988, in households earning less than $6,000 annually, approximately 68% of African-American children and 36% of white children had blood lead levels above 15 micrograms per deciliter. See Karen F. Florini et al., Legacy of Lead: America's Continuing Epidemic of Childhood Lead Poisoning app.1 tbl.A-1 (1990) (noting the increased incidence of potentially harmful lead levels among poor African-American children as com-
of *The Bell Curve* authors regarding the significance of IQ scores for social policy are unjustified, but acknowledges that IQ scores have legitimate uses in some contexts.

In Part IV, the ideas of genetic essentialism, maternal determinism, and IQ come together in the context of pretrial discovery in childhood lead exposure cases. Traditionally, in personal injury cases, causation and damages inquiries are plaintiff-centered. Discovery inquiries are accordingly directed almost exclusively at the plaintiff, because the plaintiff's condition is at issue. Therefore, determinations as to any harm suffered resulting from defendant's actions are made with reference to the plaintiff, regardless of the nature of the injury. In lead exposure cases, however, a significant departure from these traditions is taking place, shifting the focus of discovery to the plaintiff's family. Where claims are brought on behalf of lead-exposed children, defendants have argued for major departures from the traditional scheme, based on broadly deterministic arguments. This departure has immense significance in litigation, yet because it takes place in discovery, it has largely gone unnoticed by commentators.

Finally, Part V argues that the shift from plaintiff-centered discovery to maternal and sibling-based inquiries and tests is likely to continue. The reasons for the construction of this shift are the expansion in acceptance of non-

pared with poor white children); see also infra note 30 (discussing the blood lead levels that are considered dangerous). In households with incomes between $6,000 and $14,999, approximately 54% of black children and 23% of white children had blood lead levels above 15 micrograms per deciliter. See Florin et al., supra, at app. 1 tbl. A-1; see also Lively, supra note 10, at 312-13 ("The high proportion of minority exposure correlates to preexisting research indicating that poor minority children in central cities . . . are more susceptible to lead poisoning."). Therefore, the expansive discovery practices discussed throughout this Article should be considered in light of the potential racist implications given the racial composition of the litigants.


21 See infra notes 143-54 and accompanying text (noting the widespread practice of only requiring the plaintiff's personal records).

22 See infra notes 158-60, 239-49 and accompanying text (discussing lead exposure cases that have ordered testing and examination and production of non-plaintiff's records).

23 See infra notes 41-43, 84-89, 170-75 and accompanying text (discussing bases for defense arguments in support of access to records of relatives of lead-exposed children).
tions of genetic essentialism, the persistence of notions of maternal determinism, and current and anticipated scientific developments. Part V also provides reasons to resist this expansion, reviews current discovery protections, and concludes with several preliminary proposals to address the various interests involved.

I. EFFECTS OF LEAD EXPOSURE

This Part reviews the scientific background concerning the effects of lead on humans, particularly children. Lead has been known to be harmful since antiquity. Lead, a toxin, particularly affects the central nervous systems of children. In high enough doses, it can cause severe brain injury and death.

Scientific studies of the effects on children of lead exposure, at levels lower than those causing obvious brain injury and death, have attempted to measure the effects of lead exposure on IQ. Studies of children exposed to lead during the preschool period generally have found an inverse association between the level of lead in the blood and IQ. Such studies have compared

24 See infra Part IV.A (asserting that tests and other inquiries regarding non-parties are likely to expand given the directions taken in scientific research and other factors).
26 See id. at 177 (“Lead toxicity affects almost every organ system, most importantly, the central and peripheral nervous systems, kidneys, and blood.”).
27 See CENTERS FOR DISEASE CONTROL, supra note 2, at 9 (documenting that decreases in children’s cognition are evident even at low blood levels, and further decreases in IQ scores among children with greater exposure to lead); COMMITTEE ON MEASURING LEAD IN CRITICAL POPULATIONS ET AL., MEASURING LEAD EXPOSURE IN INFANTS, CHILDREN, AND OTHER SENSITIVE POPULATIONS 32 (1993) [hereinafter MEASURING LEAD EXPOSURE] (stating that “[c]hildren are much more sensitive than adults to the neuropathic effects of lead”). Studies of lead have resulted in various public health measures, other than banning lead paint, that have also reduced lead exposure, such as decreasing lead in gasoline and lead-soldered cans for food and beverages. See id. at 107.
28 See MEASURING LEAD EXPOSURE, supra note 27, at 32-33 (discussing the nature of central nervous system injuries, including lead encephalopathy, that carries a high mortality rate, cerebral edema, structural derangement in capillaries, neuronal necrosis, retardation, and severe behavioral disorders). Lead also has a variety of other deleterious health effects. See id. at 33 (describing the renal and hematological effects of lead exposure).
29 See id. at 46 (describing studies assessing the correlation between IQ scores of children and lead exposure).
30 See id. at 45-46, 55. Effects from lead have been found at levels as low as 10 micrograms per deciliter of blood, and no threshold has been found. See CENTERS FOR DISEASE CONTROL, supra note 2, at 9 (“Although researchers have not yet completely defined the impact of blood lead levels <10 μg/dL on central nervous system function, it may be that even these levels are associated with adverse affects that will be clearer with more refined research.”); MEASURING LEAD EXPOSURE, supra note 27, at 59 (noting that most studies
lead-exposed children's IQs with the IQs of otherwise similar children who have not been so exposed. Harms from lead, however, are not limited to brain injury, death, and lowered IQ; lead exposure has also been associated with poor performance on tests designed to assess children's attention skills. Some studies have also found that lead-exposed children are more likely to have learning disabilities and make slower progress in school than are other children. Another important recent study found links between

find a 2- to 4-point IQ decrease for every 10-15 microgram increase of lead per deciliter of blood within the range of 5 to 35 micrograms per deciliter; see also id. at 94 (summarizing data that blood lead levels of less than 10- to 15-micrograms per deciliter correlated to neurobehavioral development deficits and lower IQ). Recent studies have focused on effects of lead at relatively low levels, such as 10 and 20 micrograms per deciliter of blood, and have not focused on higher levels, such as 30 micrograms per deciliter and above, which researchers assume are harmful. See CENTERS FOR DISEASE CONTROL, supra note 2, at 2-3 (noting that at 20 to 44 micrograms per deciliter, a child “should” be evaluated and that the child “may” need medical intervention, including chelation therapy). Litigation most commonly involves levels of 30 micrograms per deciliter and above. See, e.g., 4 MEALEY'S LITIG. REP., LEAD 4 (Sept. 20, 1995) (noting that plaintiff had blood lead level of 46 micrograms per deciliter); 3 MEALEY'S LITIG. REP., LEAD 6 (Sept. 21, 1994) (discussing lead exposure settlement in which plaintiff had blood lead level as high as 58 micrograms per deciliter).


See MEASURING LEAD EXPOSURE, supra note 27, at 62-63 (discussing tests that assess children's attention skills that find children with larger exposure to lead are less attentive in the classroom).

See id. at 63 (noting that children with greater lead burdens make slower progress through school, have increased referral rates for remedial academic help, have higher rates of reading disability, and are more likely to fail to graduate from high school); see also Robert G. Feldman & Roberta F. White, Lead Neurotoxicity and Disorders of Learning, 7 J. CHILD NEUROLOGY 354, 354-55 (1993) (arguing that low levels of lead result in learning disorders).

Other measures, such as nerve conduction velocity, have been shown to be associated
childhood lead exposure and delinquent behavior.\textsuperscript{34}

Although the effects of lead exposure are significantly documented, the biological mechanisms of lead poisoning are not yet fully understood.\textsuperscript{35} The Centers for Disease Control and Prevention has lowered its recommended levels of acceptable exposure due to the developing research, which has found harmful effects at increasingly low levels of exposure.\textsuperscript{36} In sum, scientific evidence reveals that lead is a neurotoxin that has particularly harmful effects on the cognitive development of children.

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\textsuperscript{34} See Herbert L. Needleman et al., Bone Lead Levels and Delinquent Behavior, 275 JAMA 363, 365-66 (1996) (reporting results of a study revealing a correlation between elevated levels of lead burdens in the body and aggressive, delinquent behavior). Furthermore, animal studies have demonstrated harmful effects from lead exposure. See, e.g., S.G. Gilbert & D.C. Rice, Low-level lifetime lead exposure produces behavioral toxicity (spatial discrimination reversal) in adult monkeys, TOXIC. APPL. PHARMACOL. 484 (1987), cited in Herbert L. Needleman et al., The Long Term Effects of Exposure to Low Doses of Lead in Childhood: An 11-Year Follow-up Report, 322 NEW ENG. J. MED. 83, 87 (1990) (finding that rhesus monkeys that were administered lead had learning impairments).

\textsuperscript{35} See MEASURING LEAD EXPOSURE, supra note 27, at 77-87 (discussing the toxicity mechanisms and noting the difficulty of finding an explanation given the diversity of lead’s toxic effects).

\textsuperscript{36} See CENTERS FOR DISEASE CONTROL, supra note 2, at 1 (stating that the 1985 level of 25 micrograms per deciliter was being adjusted to a level of concern of 10 micrograms per deciliter of blood).
II. GENETIC ESSENTIALISM AND MATERNAL DETERMINISM

A. Genetic Research, Genetic Essentialism, and their Implications

1. Introduction

In recent years, genetic research has been expanding rapidly. The ultimate scientific, legal, and societal implications of this research cannot yet be calculated or anticipated. This Part describes how concepts from genetic research have already entered societal and legal discourse. The extent of this


38 See id. at 883-84 (warning against placing too much emphasis on genetic testing or its implications and stating that, "[t]he only true test is the test of time"). For analysis critical of genetic research and concerned about future implications, see Ruth Hubbard, Predictive Genetics and the Construction of the Healthy Ill, in PROFITABLE PROMISES: ESSAYS ON WOMEN, SCIENCE, AND HEALTH 31, 31-53 (1995) (assessing the problems resulting from genetic technology, notably using genetics and genes as predictors of health and disease and the societal implications). See also RUTH HUBBARD & ELIJAH WALD, EXPLODING THE GENE MYTH 117-57 (1993) (arguing that the importance of genes as determinative is exaggerated, and noting the dangerous effects that genetic research may have on education, employment, and insurance); DANIEL J. KELVES, IN THE NAME OF GENETICS: GENETICS AND THE USES OF HUMAN HEREDITY 114-28 (1985) (discussing the eugenics movement and criticizing its foundations, arguments, and implications, focusing on the critics of the movement at the time); Dreyfuss & Nelkin, supra note 15, at 343-48 (warning against conflating "the certainty of scientific findings with the legal relevance of research results" and arguing that science should not necessarily be used to solve real world problems).

Ruth Hubbard and Elijah Wald, among others, have documented how minor and/or unsubstantiated claims of genetic causes for human behavior are broadly trumpeted, while refutations of such claims get much less attention. See HUBBARD & WALD, supra, at 4-6 (noting that news stories about genetic links to particular traits are reported without documenting the weaknesses of such claims and the alternative explanations). For a recent example, compare Natalie Angier, Variant Gene Tied to a Love of New Thrills, N.Y. TIMES, Jan. 2, 1996, at A1 (reporting, on the first page, that researchers had located a "novelty seeking" gene), with Natalie Angier, Maybe It's Not a Gene Behind a Person's Thrill-Seeking Ways, N.Y. TIMES, Nov. 1, 1996, at A22 (reporting, on the twenty-second page, that studies questioned the earlier report regarding the discovery of the "thrill-seeking" gene).

For law review articles less critical of genetic research, and trying to consider some implications of genetic research, see Roger B. Dworkin, Medical Law and Ethics in the Post-Autonomy Age, 68 IND. L.J. 727, 738-39 (1993) (arguing that genetic medicine bolsters the arguments against the idea of individual autonomy in the medical law and ethics context); Robert Wachbroit, Biotechnology and the Law: Making the Grade: Testing for Human Genetic Disorders, 16 HOFSTRA L. REV. 583, 583 (1988) (asserting that human gene therapy is an important medical advance).
is such that some commentators have gone so far as to define "genetic essentialism" as a concept that purports to explain human traits and behavior through immutable genetic properties. The publicity and cultural importance accorded to "genetics," however, frequently far outweigh its actual significance.

As research continues, genetic explanations will be offered with increasing frequency in a variety of contexts, including litigation. For example, we can anticipate increased genetic testing of tort plaintiffs by defendants either challenging assertions that defendants' actions caused harm to plaintiffs, or arguing that plaintiffs' damages are less than plaintiffs claim. In addition, we may anticipate increased pressure in tort cases to expand and obtain various types of testing or personal records of non-parties. This would occur in order to make arguments that a plaintiff's problems were caused by genetic inheritance rather than the defendant's actions, or that a plaintiff's damages are less than they would otherwise be, due to the plaintiff's genetic inheritance. The recent efforts in lead exposure cases to perform IQ and psychological tests of parents and siblings of the lead-exposed child are partly based on the justification of "genetics," and reflect the recent heightened emphasis on genetic explanations.

39 See, e.g., Dreyfuss & Nelkin, supra note 15, at 320-21 (discussing genetic essentialism that posits, "personality traits are predictable and permanent").

40 See Hubbard & Wald, supra note 38, at 6 (questioning the scientific basis of the claimed importance of the "all-powerful gene"); Dorothy Nelkin & M. Susan Lindee, The DNA Mystique: The Gene as a Cultural Icon 2 (1995) (noting that the scientific reality of the gene differs from its cultural meaning); William Julius Wilson, When Work Disappears: The World of the New Urban Poor at xv-xvi (1996) (asserting that genetic research often downplays the role of environment); Dreyfuss & Nelkin, supra note 15, at 339-48 (arguing that the appeal of science and genetic research extends beyond actual findings and their actual relevance); see also Louis Menand, The Gods are Anxious: The Delightful Rise of Genetic Polytheism, New Yorker, Dec. 16, 1996, at 5, 6 (noting the prevalence of genetic explanations for human behavior).

41 See Rothstein, supra note 37, at 884-87 (discussing types of evidence defendants may submit to dispute plaintiffs' claims).

42 The efforts to obtain school, employment, and medical records of non-parties are also based on the same justifications. See Vasquez v. Hezekiah, No. 91-CV-0057, at 1 (Mass. Housing Ct. Apr. 18, 1995) (order denying defendants' motion to discover the educational records of plaintiff); Coren v. Cardoza, No. 90-CV-29101, at 1-2 (Mass. Housing Ct. Oct. 30, 1993) (granting the motion to compel the production of the medical records of parents of lead-exposed child, limited to the time period each learned of the lead poisoning of the minor plaintiff to time of discovery); see also infra note 169 (discussing additional cases).

43 Defendants have not sought to test the actual DNA of relatives, presumably because genes for IQ and other brain functions affected by lead have not been specifically identified. See Manfred Velden, The Heritability of Intelligence: Neither Known nor Unknown, 52 Am. Psychologist 72, 72 (1997) (noting that the molecular basis of intelligence is not yet known). For an explanation of the inaccuracy of the term "gene," see Hubbard &
2. Genetic Narratives and Genetic Essentialism

In the popular media, genes and DNA are often used as explanations for a wide range of human behaviors, often with limited or no scientific basis.44 Professor Ruth Hubbard has described the inaccuracy of many popular "genetic narratives,"45 arguing persuasively that genetic explanations for human situations are frequently misleading, and in some cases completely invalid.46 Professors Rochelle Dreyfuss and Dorothy Nelkin have identified the idea of "genetic essentialism" in order to account for the cultural treatment of genetics and acceptance of genetic explanations:

Genetic essentialism posits that personal traits are predictable and permanent, determined at conception, "hard-wired" into the human constitution. If comprehensively known and understood these inherent qualities would largely explain past performance and could predict future behavior. Standing in sharp contrast with the relational definitions of personhood observed in some societies, this ideology minimizes the importance of social context. By stressing the importance of immutable biological qualities, genetic essentialism also differs from traditions centered on the importance of life experiences in determining behavior.47

Dreyfuss and Nelkin have compiled examples in which courts have accepted generally unreliable genetic evidence48 and argue that this trend toward see-

Wald, supra note 38, at 11-12, 43 (explaining that the word "gene" is "only a simplification of a complex reality").

44 See, e.g., Hubbard & Wald, supra note 38, at 4-6 (discussing several newspaper articles regarding genetics and suggesting that the media exaggerates genetic findings); Dreyfuss & Nelkin, supra note 15, at 319-20 (noting the media’s role in extending the limits of science beyond established knowledge).

45 See Hubbard, supra note 38, at 17-29 (describing the limits of genetic science and warning against viewing human experience "through the lens of genetics"); see also Hubbard & Wald, supra note 38, at 117-57 (arguing that the importance of genes as determinative is exaggerated, and noting the dangerous effects that genetic research may have on education, employment, and insurance).

46 See Hubbard & Wald, supra note 38, at 63-71 (arguing that medicine and science tend to make sweeping generalizations to account for human conditions and that often such generalizations are of no such use to individuals).


48 See id. at 327-33 (discussing cases in which courts accepted evidence on the defendants’ genetic predisposition). Dreyfuss and Nelkin point out that in tort cases, genetic predisposition arguments often favor defendants because they make biological attributes of the victim determine whether the defendant is blameworthy, and thus narrow defendant’s liability. See id. at 327-28. On the other hand, they note that such arguments can at times favor plaintiffs. See id.; see also Starling v. Ski Roundtop Corp., 493 F. Supp. 507, 510 (M.D. Pa. 1980) (allowing use of evidence of genetic predisposition to arthritis to prove injury proximately caused by accident); Mose v. Brewer, 428 So. 2d 1212, 1213 (La. Ct.
ing human beings in largely biological and genetic terms must be closely examined.49

3. Research in Genetics and the Pressure to Expand Testing and Other Inquiries

Although genetic research is at a relatively early stage, we are rapidly learning more about the genetic connections linking people. Gene identification is one major area of research.50 For example, scientists have identified some of the genes linked with Alzheimer's51 and Tay-Sachs diseases.52 The Human Genome Project is in the process of identifying all of the human genes.53 Additionally, scientists have prepared a complete genetic blueprint of a living organism—a bacterium.54 A second area of research centers on identifying correlations of particular traits between genetically similar or identical individuals. An example of this research is the study of identical twins separated at birth.55 From such research, scientists hope to determine the respective effects of genes and environment on individual development, including IQ.56 A third category of research concerns manipulating DNA.57

49 See Dreyfuss & Nelkin, supra note 15, at 315-16.
50 See, e.g., Hubbard & Wald, supra note 38, at 54-57 (discussing the Human Genome Project and other genetic research).
51 See Third Gene Tied to Early Onset Alzheimer's, N.Y. Times, Aug. 18, 1995, at A12 (reporting that scientists identified a gene as causing the early onset of Alzheimer's disease).
52 See Hubbard & Wald, supra note 38, at 33 (noting that the development of a test to detect Tay-Sachs carriers allows at-risk couples to determine whether a fetus might develop the disease).
53 See id. at 54 ("The Human Genome Project is intended to produce first a map of DNA 'markers' associated with specific traits and eventually a complete sequence of nucleotide bases for a 'human prototype.'"). But see id. at 158-59 (arguing that even if scientists mapped the entire human genome, it is unclear what value such a map would have).
54 See Nicholas Wade, First Sequencing of Cell's DNA Defines Basis of Life, N.Y. Times, Aug. 1, 1995, at C1 (describing the first sequencing of a living organism and providing a brief overview of the DNA of Hemophilus influenzae, a bacterium).
56 See id. (concluding that genetic factors influence behavior and that rearing in the home has little effect on psychological traits); Lawrence Wright, Double Mystery, New Yorker, Aug. 7, 1995, at 45, 48-51 (discussing the study of twins and noting that the principal source of information about human heritability is from such twin studies). But see Adolph Reed Jr., Looking Backward, Nation, Nov. 28, 1994, at 654, 657-59 (critiquing studies using twins and calling into question the validity of their findings).
57 See, e.g., Hubbard & Wald, supra note 38, at 109-16 (discussing the process of genetic manipulation using the manipulation of human reproductive cells as an illustra-
For instance, in early 1997 researchers in Scotland announced that they had cloned a sheep. There appears to be no reason why scientists could not use this technique to clone humans. Although the potential for medical advances is thrilling, the potential for ethical nightmares and eugenic proposals is terrifying. Moreover, simplistic, popularized notions of genetics give rise to the possibility of using genetic information in court and other aspects of society before thorough research has been done.

59 See Kolata, supra note 58, at A1 (discussing the potential for cloning humans); Langreth, supra note 58, at B1 (same).

The authors of The Bell Curve note that, "[t]o [some], we will have made a case for steps to manipulate the fertility of people with high and low IQs." HERRNSTEIN & MURRAY, supra note 19, at 547. Several reviewers have pointed out that while The Bell Curve authors claim to eschew eugenics, the implications of their analysis and recommendations could lead to eugenics. See, e.g., HOWARD GARDNER, SCHOLARLY BRINKMANSHIP (1994), reprinted in THE BELL CURVE DEBATE 61, 64 (Russell Jacoby & Naomi Glauberman eds., 1995) [hereinafter THE BELL CURVE DEBATE] (noting that the authors "never quite say that . . . childbearing or immigration by those with low IQs should be curbed; yet they signal their sympathy for these options and intimate that readers ought to consider these possibilities"); LEON J. KAMIN, LIES, DAMNED LIES, AND STATISTICS (1995), expanded version reprinted in THE BELL CURVE DEBATE, supra, at 81, 105 (criticizing The Bell Curve's implications that those with high intelligence should breed more, but those with low IQs should breed less).
61 See Dreyfuss & Nelkin, supra note 15, at 314-15 (discussing the inclusion of genetic concepts into substantive legal doctrine); see also infra note 313 and accompanying text
In the future, people who are not parties to a legal action may be sought in litigation for genetic and other testing. Such tests, as in the lead context, would not necessarily involve simply getting a sample of a non-party's DNA; rather, they may involve both physiological and psychological tests aimed at gathering evidence supposedly useful in drawing genetic links between family members.\(^{62}\) In addition, medical and other records of non-parties may be sought on similar grounds.\(^{63}\)

Several examples can be imagined. In one possible scenario, a person with a genetic mutation claims it was caused by exposure to neighboring power plant lines. The power plant owners seek DNA samples of her parents to show that she inherited the genetic defect. In response, the plaintiff wants DNA samples taken of uncooperative neighbors, to show a high incidence of the defect in the neighborhood. In another example, the victim of an automobile accident claims it caused a back injury. The defendant claims that the injury was caused not by the accident, but by a genetic defect that doctors could detect by x-rays and blood tests of the victim's parents, siblings, and children. In a third example, a person suffering from depression claims it is the result of pain from an accident. The defendant claims that the person is unhappy largely due to genetic influences. Because geneticists have not yet identified the genes for depression, the defendant seeks psychological examinations of the parents and siblings of the person claiming injury, as well as medical and personal records of these individuals.\(^{64}\) As genetic research expands and pressure builds to use genetic findings in the courtroom, judges will have to decide whether to allow such examinations and require the production of such records.

4. Testing Non-Parties and Seeking Non-Parties' Personal Records Based on Genetic Arguments

Compelled testing and production of personal records of non-parties involves a balancing of the interests of such parties, litigants, and public policy.\(^{65}\) Even if science reaches the point where such tests may have probative value, courts should exercise caution before embracing such an approach be-

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\(^{62}\) See infra notes 156-61 and accompanying text (discussing cases involving compelling IQ tests and psychological tests).

\(^{63}\) See infra note 169 and accompanying text (discussing cases involving compelling the release of personal records).

\(^{64}\) See id. In this Article, "personal records" refers to medical, educational, and employment records of an individual.

\(^{65}\) In addition to genetic-related reasons, public policy reasons such as privacy of non-parties, expansion of litigation, and underlying goals of the tort system all should give rise to reluctance in allowing this type of discovery. See infra notes 162-68 (discussing the implications of broadening the scope of litigation beyond the parties).
cause there is a danger that both judges and juries would give such evidence excessive weight in relation to its certainty. Genetic science frequently uses terms such as “at risk” and “predisposed” to refer to vulnerabilities rather than certain causes.66 Popular notions of genetics, on the other hand, are far more simplistic and deterministic.67 Nevertheless, simplistic genetic essentialism increasingly serves as an actual explanation for human traits and behavior, and such vulnerabilities may be given more weight than they deserve.68

Additionally, there is danger in making policy and normative decisions about critical issues in the legal arena, or society in general, based solely on scientific research. Science is not always neutral, predictable, or certain, and its findings should not be uncritically transferred to the legal domain.69 Scientific studies and legal matters require that very divergent factors be taken into consideration.70 Ideas such as personhood, privacy, and autonomy

66 See Dreyfuss & Nelkin, supra note 15, at 342 (noting that the law considers the terms “predisposed” and “at risk” as definitions of an individual’s status, while science considers them terms of probability).

67 See supra note 40 and accompanying text (arguing that the popular media often exaggerate the implications of genetic research and findings).

68 As Dreyfuss and Nelkin note, “[t]he recent reemergence of a genetic perspective should be seen then, as stemming not only from dramatic advances in biomedical research, but also from a desire to utilize scientific explanations to justify a reorientation of social policy.” Dreyfuss & Nelkin, supra note 15, at 340; see also Wright, supra note 56, at 48 (discussing the different political views and their implications on society that stem from environmental determinism and behavioral genetics).

69 See STEPHEN JAY GOULD, THE MISMEASURE OF MAN 21-23 (1981) (arguing that science is imperfect and influenced by social phenomenon); WILLIAM H. TUCKER, THE SCIENCE AND POLITICS OF RACIAL RESEARCH 274 (1994) (distinguishing “aspirational” and “justiciable” entitlements and arguing that the former does not depend on a recipient’s genetic merit); Dreyfuss & Nelkin, supra note 15, at 338 (arguing that science gives definitions to “certainty” and “predictability” that do not readily transfer into the legal arena); David L. Faigman, The Evidentiary Status of Social Science Under Daubert: Is it ‘Scientific,’ ‘Technical,’ or ‘Other’ Knowledge?, 1 PSYCHOL. PUB. POL’Y & L. 960, 961 (1995) (acknowledging that the methodology of psychology is “uncertain” and “tentative”); see also Barbara Underwood, Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment, 88 YALE L.J. 1408, 1447-48 (1979) (concluding that the use of scientific methods of predicting human behavior are acceptable in some contexts but not in others).

70 For example, it is one thing for a parent to consent to an IQ test as part of a study on the effects of lead, and it is another for a parent to be compelled to submit to an IQ test in the context of litigation. Some, such as William Tucker, author of The Science and Politics of Racial Research, argue that scientists should disclose to potential research subjects the potential uses of the research before obtaining consent. See Tucker, supra note 69, at 280-89 (arguing from an ethical perspective that human research subjects have a right to informed consent regarding a researcher’s cause or purpose). Others, such as Sandra Scarr, argue to the contrary. See id. at 289-91 (“[A] scientist’s only ethical obligation is
are not based on scientific discoveries, but are essentially cultural constructs.\textsuperscript{71} Science should not have the last and only word on the continued validity of such long-accepted moral principles.\textsuperscript{72}

Third, given the history of ideas and practices concerning genetics and race,\textsuperscript{73} there are special grounds for concern that genetic science will be used to make particularly deterministic arguments about racial minorities in court.\textsuperscript{74} Dreyfuss and Nelkin note that, "[i]f it is accepted that genetic endowment determines the propensity to commit bad acts, then hereditary traits, which often reduce to ethnic group membership, may one day be considered evidence of the commission of a crime."\textsuperscript{75} In the civil context, similar arguments also may be made.

\textbf{B. Maternal Determinism and its Implications}

"Maternal determinism" is a cultural concept suggesting that a child's characteristics are determined by the mothering she receives.\textsuperscript{76} As Professor Shari Thurer has explained, the dominant ideology of the last forty years holds mothers almost entirely responsible for the ultimate well-being of their children\textsuperscript{77} and ignores the effects of economic and other factors on mothers

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\textsuperscript{71} See Dreyfuss & Nelkin, supra note 15, at 316 (noting that various cultures define personhood differently); Rayna Rapp, Moral Pioneers: Women, Men, and Fetuses on a Frontier of Reproductive Technology, in \textit{GENDER AT THE CROSSROADS OF KNOWLEDGE: FEMINIST ANTHROPOLOGY IN THE POSTMODERN AREA} 384 (Micaela di Leonardo ed., 1991) (maintaining that medical and scientific definitions of personhood are functions of cultural definitions); see also John Stuart Mill, \textit{On Liberty} 80 (Currin V. Shields ed., 2d ed. 1956) (noting that conceptions of the power of the individual have changed since the Middle Ages); John Stuart Mill, \textit{The Subjection of Women} (1869), \textit{reprinted in 11 ESSAYS ON EQUALITY, LAW, AND EDUCATION} 336-37 (John M. Robson ed., 1984) (claiming that personal autonomy is a basic human desire that leads to happiness).

\textsuperscript{72} See Dreyfuss & Nelkin, supra note 15, at 343-44 (arguing that because science operates under controlled conditions, it should not override established principles). "[R]ecognizing differences in human potential does not resolve the central debate over Great Society programs. Science may be able to quantify the resources necessary to create an environment that compensates for biological differences, but it cannot resolve questions about whether and where these resources should be expended." \textit{Id.} at 345.

\textsuperscript{73} See infra Part III.

\textsuperscript{74} See infra notes 94-111, 115-26 and accompanying text (discussing the racist history of IQ research and claims of current bias in testing).

\textsuperscript{75} Dreyfuss & Nelkin, supra note 15, at 331.

\textsuperscript{76} See Shari L. Thurer, \textit{The Myths of Motherhood} at xxi-xxii (1994) (noting the general acceptance of the idea that mothering determines a child's characteristics).

\textsuperscript{77} See \textit{id.} at 267-301 (noting that since World War II, mothers have been viewed as "the primary agent in her child's development").
and mothering. African-American women’s mothering is particularly devalued by the dominant culture, and African-American mothers—and implicitly their mothering—have been blamed for the economic and social conditions of the African-American community as a whole. Often, mothering is misnamed “parenting.”

For example, in *The Bell Curve*, the statistical analyses in the chapter titled “Parenting” exclusively discuss mothering. Regardless of how one phrases it, the message from many sources is that mothering is almost solely responsible for a child’s characteristics.

Maternal determinism bolsters genetic essentialism. For example, the defendants in *Campbell v. Bonner*, a lead exposure case in which a judge ordered that non-party relatives of a lead-exposed child had to submit to IQ tests and clinical interviews, made a two-pronged argument. First, they argued that IQ is genetically inherited. Second, they argued that children’s IQs tend to correlate with their mother’s IQ through child rearing practices that are IQ-related. Defendant’s expert Claire Ernhart stated in her affidavit:

78 See id. at xxii (discussing current views of the effects of motherhood that ignore class and adversity); see also BARBARA EHRENREICH & DEIRDRE ENGLISH, FOR HER OWN GOOD 190-210 (1978) (describing the rise in the recognition of mothers and mothering on children and thus on the future of society); Nancy Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother, in Rethinking the Family: Some Feminist Questions* 191, 192-96 (Barrie Thorne & Marilyn Yalom eds., 1992) (discussing feminist theory that assumes that mothering is totally responsible for how children turn out); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 279-81 (discussing politicians’ simplistic view that mothers are responsible for children’s social problems); Janet C. Jacobs, *Reassessing Mother Blame in Incest*, 15 SIGNS 500, 506 (1990) (asserting that mothers hold the dominant role in primary child care).


80 See THURER, supra note 76, at 293 (noting that parental usually means maternal).

81 See HERRNSTEIN & MURRAY, supra note 19, at 203-33 (questioning whether parental competence is affected by intelligence and finding, through statistics on mothers’ IQs, that in homes where mothers are at the low end of the intelligence distribution, the worst “parenting” takes place).


83 See id. at 3-4 (order granting defendant’s motions for leave to conduct clinical interview and intelligence testing on mother and sibling of minor plaintiff). For a more detailed discussion, see infra notes 243-80 and accompanying text (discussing the *Campbell* decision and rationale).

84 An affidavit from one of defendant’s experts in *Campbell*, Dr. Lawrence Charnas, stated that “there is a strong heritability [of intelligence] from multiple genes that have not been well characterized. These multiple genes contribute 50-70% of the predicted intelligence of a child.” Affidavit of Lawrence Charnas at 2, *Campbell* (No. 92-7771).

85 See id. ("There is a good correlation between the mother’s intelligence and her chil-
The relative contribution of genetic and child-rearing factors to IQ is not material . . . . What matters is that parent IQ is a major determinant of child IQ whether for genetic or child-rearing reasons. Information about parent IQ is thus necessary to make a meaningful judgment about the purported causation of observed deficits in child IQ.86

Similarly, in *The Bell Curve*, the authors state that intelligence is substantially immutable whether it is genetically inherited or environmentally determined.87

The idea that IQ is passed down in individual situations, either genetically or environmentally through child rearing practices reinforces the implicit idea of genetic determinism—that IQ is inevitable.88 The defendants' success in *Campbell* would have been unlikely had their experts argued only an environmental correlation between mother's and child's IQ without claiming that a significant portion of such was genetically determined, especially given the distinct social meanings of "genetics" versus "environmental influences" and the power of genetic narratives.89 At the same time, however, a genetic argument would call for testing the father and not the siblings, yet only the

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86 Affidavit of Claire B. Ernhart at 4, *Campbell* (No. 92-7771) (emphasis added). Interestingly, while Dr. Ernhart claims that "parent IQ" significantly determines child IQ, the IQ tests sought were of the mother and siblings. *See Campbell*, No. 92-7771, at 3-4.

87 *See Herrnstein & Murray, supra* note 19, at 314-15 (noting that there is a statistical correlation between parents and children, and arguing that this is true whether due to genes or environment). Stephen Jay Gould writes:

"If Herrnstein and Murray are wrong, and IQ represents not an immutable thing in the head, grading human beings on a single scale of general capacity with large numbers of custodial incompetents at the bottom, then the model that generates their gloomy vision collapses, and the wonderful variousness of human abilities, properly nurtured, reemerges.


88 Plaintiffs’ expert in *Campbell*, Dr. John Rosen, stated that:

"There is no medical or scientific support for the notion that intellectual function or capability passes in measurable form from generation to generation. Nor is there any medical or scientific basis for an assertion that neuropsychological impairment may be caused by a history of family success or failure rather than lead poisoning.

Affidavit of John F. Rosen at 4-5, *Campbell* (No. 92-7771).

89 *See supra* Part II.A.2 (discussing genetic narratives and the possible deficiencies of such).
mother and siblings were ordered to be tested in Campbell. This result reflects the power of maternal determinist notions. The synergistic combination of the primary genetic argument and the subsidiary aspect of maternal determinism were convincing. 90 Of course, mothers have very significant effects on their children, but the idea that mothers determine or cause all of their children’s characteristics is false. 91 The idea that genetic inheritance causes all children’s characteristics is similarly incorrect. 92 In any event, subjecting mothers to unwanted testing is unjustifiable, regardless of the amount of influence mothers may have. 93

III. IQ RESEARCH: HISTORICAL BACKGROUND AND CURRENT MANIFESTATIONS

Any discussion of issues pertaining to cognitive ability takes place against a powerful historical backdrop—the backdrop of racist, sexist, anti-Semitic, classist intelligence research. 94 Accompanying this history, there has been

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90 Judge Graae concluded:
Defendant has demonstrated good cause for the examinations requested as, according to the facts alleged by Defendant, the requested tests directly relate to the extent of injuries that Plaintiffs allege they have suffered. Defendant has meticulously described the role that environmental and genetic factors may play in mental and developmental deficiencies . . . . Since the tests would be probative on the issues of causation and damages, while the extent of the intrusion to [the mother and sister] would be relatively minor, the equities favor the Defendant.

Campbell, No. 92-7771, at 3-4.

91 See supra notes 76-81 and accompanying text (discussing the cultural acceptance of the notion that mothering determines the characteristics of children, thus ignoring other possible causes).

92 See supra notes 45-61 and accompanying text (arguing that genetics cannot be used to explain all human traits and behavior).

93 See infra notes 203-13 and accompanying text (arguing that adequate basis for testing the mother and siblings of a lead-exposed child is not established).

94 This history includes central assumptions of African-American genetic intellectual inferiority and has strong connections to eugenics movements and legislation. See infra notes 99-111 and accompanying text (discussing the racist history of intelligence research and its social and political implications); see also Gould, supra note 69, at 22 (noting that the history of the “scientific” study of intelligence mirrors social movements with resulting racist attitudes, using the eugenics movement as an example); John S. Haller, Jr., Outcasts from Evolution: Scientific Attitudes of Racial Inferiority, 1859-1900, at 19-34 (2d ed. 1995) (noting that the Civil War was a catalyst in the anthropometry movement that had far reaching effects on institutionalized racism, giving it “scientific” support); Leon J. Kamin, The Science and Politics of IQ 6 (1974) (discussing the “Stanford-Binet” test that was accompanied by claims that it would result in “curtailing the reproduction of feeble-mindedness”); William Stanton, The Leopard’s Spots: Scientific Attitudes Toward Race in America 1815-59, at 24-44 (1960) (discussing the craniology movement of the nineteenth century and its “findings” that Caucasians were intellectually superior because of a larger interior cranial capacity); Tucker, supra note
wide-ranging questioning of IQ testing. In the 1920s, for example, Walter Lippman attacked the idea of measuring IQ. Moreover, some courts have held IQ tests unconstitutional when used to classify African-American children in schools. At the same time, however, research into the harmful effects of lead exposure on children often focuses on IQ loss. This Part argues that it is possible, and necessary, to recognize the racist history, the current legacy of intelligence testing, and the limits of traditional intelligence testing, while acknowledging that loss of IQ can be indicative of some negative effect.

A. Historical Background

A backdrop to present day discussions of IQ is the historical use of "science" to argue that African-Americans are genetically intellectually inferior and that intelligence is genetically inherited. Many early twentieth century arguments for the inherent intellectual inferiority of African-Americans have been a cornerstone of white supremacy. See, e.g., Gould, supra note 69, at 77-82 (discussing the 1906 craniometric study by Robert Bennett Bean that concluded that because the front of whites' brains are larger than those of African-Americans', the latter are intellectually inferior); Haller, supra note 94, at 82 (discussing scientist Josiah Nott's theory that mulattos are intellectually inferior to whites and intellectually superior to African-Americans); Winthrop D. Jordan, White Over Black at xii (discussing Thomas Jefferson's belief that African-Americans are intellectually inferior to whites); id. at 187-89 (discussing eighteenth century conceptions of intelligence and the related belief that African-Americans were unintelligent); Stanton, supra note 94, at 35-37 (discussing phrenologist George Combe's study and comparison of African-Americans, Native American,
century mental testing advocates were also active in the eugenics movement.\footnote{101} This movement was instrumental in passing anti-immigration legislation,\footnote{102} miscegenation legislation,\footnote{103} and sterilization legislation.\footnote{104} The

and Anglo-Saxons); TUCKER, supra note 69, at 169 (discussing works by racist leader Henry E. Garrett, including a pamphlet entitled IQ and Racial Differences); see also KAMIN, supra note 94, at 176-77 (arguing that early IQ tests were inherently biased; citing a World War I Army Alpha test that asked questions about names of baseball teams and manufacturers of American firearms).

For a recent detailed review of the role of intelligence research in furthering ideas of racism and eugenic practices, see Horsburgh, supra note 60, at 538-55 (describing studies in the nineteenth century that maintained the intellectual inferiority of African-Americans, and noting that such gave support to the eugenics movement and social policy such as segregation and miscegenation laws and immigration policy). For a thorough historical summary, see Delgado et al., supra note 94, at 131-44 (recounting the history of controversy surrounding theories of race and IQ from the late 1800s through the early 1980s); Randall Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745, 1751-54 (1989) (summarizing history of ideas and practices assuming African-American intellectual inferiority). As Professor Randall Kennedy has noted, “of all the many racially derogatory comments about people of color, particularly Negroes, none has been more hurtful, corrosive, and influential than the charge that they are intellectually inferior to whites.” Id. at 1751.

Deterministic white assumptions of black intellectual inferiority were part of the justification for exclusion of blacks from participation in all aspects of academia throughout the century following slavery’s abolition. See id. (noting that the denial of education to African-Americans was facilitated by the acceptance of the idea of African-American intellectual inferiority). For an example of the widespread academic acceptance of the inferiority of African Americans, see WALTER FRANCIS WILLCOX, ENCYCLOPEDIA BRITANNICA, THE NEGRO (1911), reprinted in THE BELL CURVE DEBATE, supra note 60, at 438, 438-39 (under the entry for “negro,” asserting that “mentally the negro is inferior to the white” and that mostly “the mental constitution of the negro is very similar to that of a child”).

\footnote{100} See infra notes 108-11 and accompanying text (discussing how notions of racial categorization and inheritance of “racial” characteristics were used to bolster white supremacy).

\footnote{101} See Horsburgh, supra note 60, at 547 (discussing IQ testing advocates and their related contribution to eugenics). For additional historical background, see generally Garland E. Allen, Eugenics Comes to America, in THE BELL CURVE DEBATE, supra note 60, at 441 (recounting the historical development of the American eugenics movement in the early 1900s); LEON J. KAMIN, THE PIONEERS OF IQ TESTING (1994), excerpted in THE BELL CURVE DEBATE, supra note 60, at 476, 476-507 (recounting the history of IQ testing and its impact on American society from 1900-1930s). For statements made by eugenics advocates, see generally FRANCIS GALTON, HEREDITARY TALENT AND CHARACTER (1865), reprinted in THE BELL CURVE DEBATE, supra note 60, at 393 (outlining fundamental eugenic theory); KARL PEARSON, ON BREEDING GOOD STOCK (1903), reprinted in THE BELL CURVE DEBATE, supra note 60, at 410 (analogizing humans to breeding animals and arguing that to preserve “good stock” in humans, humans must breed accordingly).

\footnote{102} The immigration law was the Immigration Act of 1924, §§ 31-32, 153-164, 43 Stat. 190, which limited immigration of southern and eastern Europeans, especially Jews and
most famous legal monument to the eugenics movement was *Buck v. Bell*, in which Justice Holmes, upholding a 1924 Virginia statute allowing involuntary sterilization of "mental defectives," wrote that "[t]hree generations of imbeciles are enough."
Society's emphasis on certain genetic ties and heritability of race has also played a part in the establishment of white supremacy. Professor Dorothy Roberts and others have shown, for example, that while children of white male slaveowners and their white wives enjoyed the inheritance rights and social status of their fathers, the biological links between slaveowners and their children borne by African-American slave women were ignored. Laws excluding anyone with "any trace of Negro blood" from membership in the white race reflect this focus on defining race as tied to genetics. Miscegenation laws were also aimed at keeping the "blood" of the white race pure and uncontaminated by "black blood," which was thought to transmit inferior intellect and other inferior traits.

The racist and otherwise bigoted history of intelligence research and the use of genetic ties to further racism form a powerful combination in debates on race, intelligence, and genetics.

B. Heritability

Central to much of the debate regarding IQ and intelligence is the issue of whether and to what extent IQ is genetically inherited. The Bell Curve authors claim that intelligence is forty to eighty percent "heritable." The concept of "heritability" is group-based, and does not apply to an individual's IQ:

Heritability . . . is a ratio that ranges between 0 and 1 and measures the relative contribution of genes to the variation observed in a trait . . . .

[Heritability describes something about a population of people, not an

immigrants, see id. at 356-69 (asserting that America has increasing social problems and implying that it is a result of low IQ among immigrants).

108 See Roberts, supra note 60, at 223-30 ("The genetic tie's prominence in defining personal identity arose in the context of a racial caste system that preserved white supremacy through a rule of racial purity."); see also Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1707, 1738 (1993) (arguing that white supremacy was influenced by ideas of the inheritability of race and the invention of "race" itself).

109 See Roberts, supra note 60, at 225-30 (discussing several reasons why slave status passed through the mother, including increasing the capital assets of the master/father); see also MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 42 (1994) (discussing the historic practice of basing a child’s status on the father’s status unless the mother was African-American); Harris, supra note 108, at 1738-39 (noting that under common law, a child's status was determined by her father's status, but during the slave era, status passed through the mother).

110 Roberts, supra note 60, at 228-29 (citation omitted) (discussing common law and statutes defining the ancestry of different races, noting that the "black genetic tie, no matter how minuscule, both contaminate[d] and subordinate[d]").

111 See id. at 229 ("Racist ideology dictated that Black bodies, intellect, character, and culture were all inherently vulgar.").

112 See Herrnstein & Murray, supra note 19, at 105.
individual. It makes no more sense to talk about the heritability of an individual’s IQ than it does to talk about his birthrate. A given individual’s IQ may have been greatly affected by his special circumstances even though IQ is substantially heritable in the population as a whole . . . . [T]he heritability of a trait may change when the conditions producing variation change.\textsuperscript{113}

As the quotation notes, heritability does not mean that environmental influences will have no affect on the heritable trait.\textsuperscript{114} Arguably, if the heritability varies depending on environmental conditions, then a heritability estimate of forty to eighty percent seems to mean little or nothing.

C. Bias

One of the central issues of the intelligence debate, since the inception of mental ability testing, has been whether test results reflect test takers’ genuine innate ability, opportunities, neither, or both.\textsuperscript{115} The issue of whether

\textsuperscript{113} \textit{Id.} at 106; see also \textsc{Tucker, supra} note 69, at 221-24 ("Since heritability is the proportion of differences between persons that is genetic, it is applicable only to groups, not to individuals."); Marcus W. Feldman, \textit{Heritability: Some Theoretical Ambiguities, in Keywords in Evolutionary Biology} 151, 151 (Evelyn Fox Keller & Elisabeth Lloyd eds., 1992) ("Heritability is a number between zero and one which is intended to indicate . . . . the variance among genotypic means in the population."); \textsc{Shipman, Legacy of Racism} (1994), \textit{reprinted in The Bell Curve Debate, supra} note 60, at 325, 327 (noting that heritability is "always time- and population-specific" and that "[s]ome populations have a genuinely higher heritability for intelligence than others, which renders cross-population comparisons of IQ and its correlates problematic").

\textsuperscript{114} Cf. Halley, \textit{supra} note 60, at 522-23 (discussing differences in identical twins).

\textsuperscript{115} For examples of the early debate, see \textsc{Lippman, A Future for the Tests} (1922), \textit{reprinted in The Bell Curve Debate, supra} note 60, at 566, 569 (arguing that attempts to design tests to “discount training and knowledge” have made them less useful); \textsc{Termin, The Measurement of Intelligence} (1916), \textit{reprinted in The Bell Curve Debate, supra} note 60, at 542, 543 (noting early recognition of errors in assumptions of the first tests). For examples of the current debate, see \textsc{Herrnstein & Murray, supra} note 19, at 23 ("Properly administered IQ tests are not demonstrably biased against social, economic, ethnic, or racial groups."); \textsc{Gould, supra} note 87, at 3, 9-10 (discussing the absence of statistical bias and the inability to scientifically control for cultural bias); \textsc{Jensen, Paroxysms of Denial} (1994), \textit{reprinted in The Bell Curve Debate, supra} note 60, at 335, 335-36 ("The IQ distribution in two population groups socially recognized as 'black' and 'white' is represented by two largely overlapping bell curves with the means separated by about 15 points, a difference not due to test bias."); \textsc{Kamin, supra} note 60, at 81, 91 (criticizing Herrnstein and Murray for "d[ismiss][ing socioeconomic status] as a major factor . . . . on the self-reports of youngsters"). For an approach that examines IQ and mental ability internationally, see \textsc{Sowell, Race and Culture} 157-58 (1994) (describing international differences in intelligence test performance), and historically, see \textit{id.} at 224-58 (arguing that any discussion of IQ and mental ability must consider history).
and how IQ tests are biased has provoked much controversy over the last three decades.\textsuperscript{116} The authors of \textit{The Bell Curve} claim that the tests used in their analysis were not biased against African-Americans or other groups.\textsuperscript{117} Professor Stephen Jay Gould approaches the issue by stating:

As for ... cultural bias, the presentation of it in \textit{The Bell Curve} matches Arthur Jensen's and that of other hereditarians, in confusing a technical (and proper) meaning of 'bias' (I call it S-bias, for 'statistical') with the entirely different vernacular concept (I call it V-bias) that provokes popular debate. All these authors swear up and down (and I agree with them completely) that the tests are not biased—in the statistician's definition. Lack of S-bias means that the same score, when it is achieved by members of different groups, predicts the same thing; that is, a black person and a white person with identical scores will have the same probabilities of doing anything that IQ is supposed to predict.

But V-bias, the source of public concern, embodies an entirely different issue, which, unfortunately, uses the same word. The public wants to know whether blacks average 85 and whites 100 because society treats blacks unfairly—that is, whether lower black scores record biases in the social sense. And this crucial question (to which we do not know the answer) cannot be addressed by a demonstration that S-bias doesn't exist, which is the only issue analyzed, however correctly, in \textit{The Bell Curve}.\textsuperscript{118}

In essence, Gould argues that IQ scores are equally predictive for African-

\textsuperscript{116} See, \textit{e.g.}, \textit{HERRNSTEIN & MURRAY}, \textit{supra} note 19, at 280-86 (arguing that there is no evidence of external or internal bias); \textit{THEODOSIUS DOBZHAMSKY}, \textit{DIFFERENCES ARE NOT DEFICITS}, \textit{reprinted in THE BELL CURVE DEBATE}, \textit{supra} note 60, at 630, 632 (noting that there is “always the danger that IQ tests are biased in favor of the race, social class, or culture of those who devised the tests”).

\textsuperscript{117} See \textit{HERRNSTEIN & MURRAY}, \textit{supra} note 19, at 22-23 (claiming that IQ tests were not biased toward any ethnicities). \textit{The Bell Curve} discussed correlations between the Armed Forces Qualifying Test (“AFQT”) and educational level, income, ethnic background, and other measures. The correlations were based on a multiple regression analysis of a large data set, the National Longitudinal Survey of Youth, which began in 1979, and has followed more than 12,000 Americans aged 14-22, all of whom had taken the AFQT. \textit{See id.} at 118-20. Herrnstein and Murray characterize the AFQT as an IQ test. \textit{See id.} at 580 (noting that the AFQT qualifies as one of the “better” IQ tests). The weakness of the correlations and the errors made in \textit{The Bell Curve} are discussed at length throughout \textit{Inequality by Design}. \textit{See generally FISCHER ET AL.}, \textit{supra} note 87 (criticizing the data on which \textit{The Bell Curve} authors rely); \textit{GOULD}, \textit{supra} note 87, at 9-10 (discussing the weakness of the correlations used in \textit{The Bell Curve}). Professor Stephen Jay Gould wrote that the authors used “the most appropriate technique and the best source of information[,]” but argued that their conclusions could not be “either supported or denied—by such a restrictive approach.” \textit{Id.} at 7-8.

\textsuperscript{118} \textit{GOULD}, \textit{supra} note 87, at 9-10.
Americans and whites, but that the issue remains open as to whether or not the lower average African-American score is due to societal discrimination.\textsuperscript{119}

The authors of \textit{Inequality by Design} go further, concluding that "[g]roups score unequally on tests because they are unequal in society."\textsuperscript{120} They propose that the socioeconomic deprivation, segregation, and stigmatized identity\textsuperscript{121} of those in subordinate groups lead to lower IQ scores.\textsuperscript{122} They support their argument with cross-cultural and historical materials indicating that the IQ scores of subordinate groups increase as the groups move toward parity with dominant groups.\textsuperscript{123} In the last twenty years, the advantage whites have had over African-Americans in standardized testing has "narrowed by the equivalent of several IQ points."\textsuperscript{124} The authors also assert that the predictive value of IQ tests has been exaggerated.\textsuperscript{125} Thus, \textit{Inequality by Design}

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\textsuperscript{119} An American Psychological Association Task Force report takes a similar position. See American Psychol. Ass'n Task Force, \textit{Intelligence: Knowns and Unknowns}, 51 AM. PSYCHOLOGIST 7, 93-94 (1996) [hereinafter Task Force] (noting that the difference in IQ scores between African-Americans and whites may be due to socioeconomic factors and discrimination). The report also asserts that IQ tests predict school performance reasonably well, and that they predict school performance for African-Americans as accurately as for whites, so that as predictors of school performance, they do not seem to be biased against African-Americans in a statistical sense. See id. at 93.

\textsuperscript{120} FISCHER ET AL., supra note 87, at 72.

\textsuperscript{121} For example, researchers studying test performance of African-Americans have found that they do worse when told a test is of cognitive ability than when told the same test is not of cognitive ability. See Claude M. Steele & Joshua Aronson, \textit{Stereotype Threat and the Intellectual Test Performance of African Americans}, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 808 (1995) (finding that mere knowledge that a test measures cognitive ability is enough to lower African-American participants' performance); see also Claude M. Steele, \textit{Race and the Schooling of Black Americans}, 269 ATLANTIC MONTHLY 68, 69 (1992) (asserting that the stigma connected to academic achievement among African-Americans is underappreciated).

\textsuperscript{122} See FISCHER ET AL., supra note 87, at 194-202 (discussing Jonathan Crane's study, which found six specific social factors that together could account for the difference in test performance).

\textsuperscript{123} See id. at 190-93 (discussing the increasing parity of IQ scores as the status changed of groups such as Eastern Europeans in the U.S. and Afrikaners in South Africa).

\textsuperscript{124} Id. at 188. Also, IQs generally have been rising worldwide ever since testing began, an unexplained phenomenon known as the Flynn Effect. See Task Force, supra note 119, at 89-90 (describing the "Flynn Effect," which maintains that intelligence test performance has steadily increased, about 3 IQ points per decade, since testing began).

provides a powerful argument that the relatively poor performance by some groups on such tests is due to social and political factors rather than race or genetics.126

D. The Uses of IQ

The proper uses of IQ tests have been a critical issue since their development.127 Although their developer, Alfred Binet,128 believed that they had limited purposes,129 others, such as Herrnstein and Murray, believe that they should be broadly utilized.130 Herrnstein and Murray believe that IQ scores and usefulness of cognitive ability tests is exaggerated).

126 The poor quality of schools in many inner city areas might be such a factor. See JONATHAN KOZOL, SAVAGE INEQUALITIES 83 (1991) (arguing that the poor quality of inner city schools results in the denial of “the means of competition”). William Julius Wilson discusses research about cognitive gains made by inner city children in early educational programs, which tend to dissipate as children get older. See WILSON, supra note 40, at xv (discussing the Head Start “fade-out,” which is the long term decline of any benefits that children derive from such programs). Wilson claims that given the harshness of the urban environment faced by such children, it should be expected that cognitive gains disappear as the children get older. See id. at xv-xvi. By contrast, The Bell Curve authors claim that quality of schools is a relatively unimportant contributor to IQ. see HERRNSTEIN & MURRAY, supra note 19, at 398 (concluding that “the amount or objective quality of schooling in America cannot be counted on to equalize cognitive ability much”), and that the dissipation of cognitive gains after preschool programs end is evidence of the limited mutability of IQ scores, see id. at 403-10 (discussing the Head Start program and others that do not appear to have long term effects on IQ, although they show short term gains).

These conclusions form part of the basis of their conclusion that cognitive ability is “substantially heritable.” See id. at 23.

127 See FISCHER ET AL., supra note 87, at 27 (noting that tests have been used for both good and ill, from promoting eugenics to identifying gifted children to provide them with opportunities). Other countries, such as Japan and China, use IQ tests sparingly compared with the United States. See HAROLD STEVENSON & JAMES W. STIGLER, THE LEARNING GAP: WHY OUR SCHOOLS ARE FAILING AND WHAT WE CAN LEARN FROM JAPANESE AND CHINESE EDUCATION 97 (1992) (noting that Asian societies make more restrictive use of intelligence than the U.S., in part because of the Asian emphasis on effort, which differs from the American emphasis on innate ability).

128 See GOULD, supra note 69, at 149 (discussing Alfred Binet’s approaches to measuring intelligence, noting that his “1908 version established the criterion used in measuring the so-called IQ ever since”).

129 See id. at 155 (noting that Binet believed that the tests do not define innate or permanent qualities, that the tests should be used only as a rough guide to identify children in need of special help, and that “[l]ow scores shall not be used to mark children as innately incapable”). These limitations have all been ignored, to society’s detriment, according to Gould. See id.

130 In The Bell Curve, Herrnstein and Murray lament that the use of IQ tests in society, particularly in employment, has been limited by court decisions finding them discriminatory. See HERRNSTEIN & MURRAY, supra note 19, at 63-89 (arguing that legislation and
have tremendous significance and should be used as a basis for generating social policy. Their work disregards other research suggesting that human ability cannot be measured by a single score, and that IQ scores as traditionally measured are less significant and more malleable than the authors believe. To base a whole set of judgments and policy decisions on statistical correlations with a test that may or may not be a valid test of intelligence is to unjustifiably reify the importance of IQ scores. Moreover, such reliance has dangerous implications.

Critics of *The Bell Curve* tend not to discuss any appropriate uses of IQ scores. Nevertheless, many critics might agree with various state criminal statutes that forbid the execution of persons deemed to have very limited mental ability or include limited mental ability as a mitigating factor in sentencing. In the context of criminal defense, critics might be likely to agree court decisions that limit the use of IQ in hiring have significant negative effects on the economy.

1.31 See id. at 106.

1.32 Compare id. at 120, 579 (noting that the Armed Forces Qualification Test ("AFQT") is a good measure of cognitive ability), with FISCHER ET AL., supra note 87, at 12, 40-43, 59-69 (characterizing the AFQT as a test of learned knowledge), and WILSON, supra note 40, at xvi (arguing that the AFQT is an achievement test, the results of which can be affected by additional schooling).

1.33 Possibilities of a revival of eugenics are presented by the arguments in *The Bell Curve*, as the authors acknowledge. See supra note 60 (acknowledging that some may view *The Bell Curve* as support for eugenics and other manipulation of reproduction). The former editor-in-chief of *Science* magazine, Daniel Koshland wrote:

If a child destined to have a permanently low IQ could be cured by replacing a gene, would anyone really argue against that? ... It is a short step from that decision to improving a normal IQ. Is there an argument against making superior individuals? Not superior morally, and not superior philosophically, just superior in certain skills: better at computers, better as musicians, better physically. As society gets more complex, perhaps it must select for individuals more capable of coping with its complex problems . . .


1.34 See, e.g., 730 ILL. COMP. STAT. ANN. 5/5-5-3.1(13) (West 1992) (defendant's mental retardation is mitigating factor in criminal sentencing); KY. REV. STAT. ANN. §§ 532.130, 532.140 (Michie 1990) ("[s]eriously mentally retarded defendant" is not subject to execution; one of the requirements for being a "seriously mentally retarded defendant" is IQ of 70 or below); N.C. GEN. STAT. § 15A.1340.169(e) (1995) (limited mental capacity of defendant is mitigating factor in criminal sentencing); TENN. CODE ANN. § 39-13-203 (1991) ("mentally retarded defendant" not subject to execution; one of necessary factors is IQ of 70 or below). Some of these statutes specify certain IQ levels as one of the factors in determining whether the defendant meets the standard. See, e.g., KY. REV. STAT. ANN. §§ 532.130, 532.140 (using IQ of 70 as cutoff for eligibility for execution); TENN. CODE ANN. § 39-13-203 (same). In addition, the mental condition of a victim can
with the arguments that a person's IQ is so low that a confession or strategy decision was not voluntary.\textsuperscript{135}

In the 1960s and 1970s, the use of IQ tests to place children in classes for mentally retarded students, or to track students of supposedly different ability levels, was successfully challenged on federal constitutional and statutory grounds.\textsuperscript{136} The authors of \textit{Inequality by Design}, however, recognize that extremely low IQ scores are indicative of mental retardation and/or mental handicap, and thus acknowledge that scores have meaning in some contexts.\textsuperscript{137}

Professors Herbert Needleman and David Bellinger, two prominent lead researchers, have noted the limitations of standardized IQ tests in lead research, stating that, "[a] global measure, such as an intelligence test, may not be the most valid or sensitive measure of the quality, efficiency, or flexibility of a child's cognition or of any effects lead may have on it."\textsuperscript{138} This is because, as cognitive psychology has shown, "cognitive function is not monolithic but the result of complex, context-dependent interplay among numerous aspects of information processing."\textsuperscript{139} Nevertheless, using standardized IQ tests has been a practical way to proceed with research. Profes-

\textsuperscript{135} These defenses, however, are often unsuccessful. See, e.g., People v. Perkins, 368 N.E.2d 675, 678 (Ill. App. Ct. 1977) (rejecting claim that guilty plea was involuntary because of defendant's low IQ—71—and mental condition); \textit{In re J.W.K.}, 724 P.2d 164, 164 (Mont. 1986) (rejecting the claim that confession was involuntary because of defendant's diminished mental capacity—IQ of 86—and evidence of mental illness); People v. Chafee, 42 A.D.2d 172, 173-74 (N.Y. App. Div. 1973) (holding that low IQ did not render confession involuntary).

\textsuperscript{136} See, e.g., Larry P. v. Riles, 495 F. Supp. 926, 985 (N.D. Cal. 1979) (invalidating use of IQ tests in placing children in special classes for the educable retarded because there was no showing of compelling state interest in the use of IQ where the program had an overwhelming effect on African-American enrollment); Hobson v. Hansen, 269 F. Supp. 401, 406 (D.C. Cir. 1967) (holding that track system based on IQ scores discriminates against disadvantaged students).

\textsuperscript{137} See \textit{FISCHER ET AL.}, supra note 87, at 65-66 (criticizing \textit{The Bell Curve} for including test results for mentally retarded and mentally handicapped people in the sample used for analysis). The authors of \textit{Inequality by Design} also state that the SAT "can be useful when applied properly." \textit{Id.} at 45.


\textsuperscript{139} \textit{Id.} Indeed, the most effective way to get a comprehensive picture of a child's cognitive function is through a thorough neuropsychological examination. \textit{See MURIEL DEUTSCH LEZAK, NEUROPSYCHOLOGICAL ASSESSMENT} 75-85 (3d ed. 1995).
sors Needleman and Bellinger state that:

[Intelligence tests . . . have played an important role in neurotoxicological assessment. Their administration and scoring are standardized and familiar, facilitating comparison of results from different studies. One should bear in mind that small changes in integrative indices such as IQ scores may be markers of substantial changes in more basic cognitive competences.]

In sum, despite the limitations of IQ tests, they can provide useful information in some circumstances and an IQ loss can be indicative of a negative effect.

IV. THE DISCOVERY SHIFT FROM THE PLAINTIFF TO THE MOTHER AND FAMILY

A. The Plaintiff-Centered Discovery Framework

Traditionally, the tort system focused on individuals. Consistent with this focus is the basic principle that a personal injury claim brought by an individual places that person’s physical and, in some cases, mental condition at issue, thereby waiving whatever confidentiality protections she otherwise has over her medical records. Very little attention is paid to questions of the defense’s right to seek other persons’ medical or personal records, or of

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140 Bellinger & Needleman, supra note 138, at 195.
141 Plaintiffs bringing claims for lead-caused injuries argue that reduced IQ and other functioning result in reduced earning capacity and lost earnings. See Benjamin Hiller & Jeffrey M. Feuer, Expert Testimony in Childhood Lead-Poisoning Cases, TRIAL, Mar. 1991, at 46 (noting that damages sought by lead-exposed plaintiffs include lost earnings and reduced earning capacity). This context might be an interesting one in which to consider Professor Martha Chamallas’s argument that data used to estimate lost earnings capacity should be based on average figures rather than gender- or race-specific figures. See Chamallas, supra note 11, at 75-76 (arguing that using race- and gender-specific future earnings data unjustifiably reduces the tort awards of women and minorities, while unjustifiably raising the recoveries of white men).
142 See, e.g., Judith Resnick et al., Individuals Within the Aggregate: Relationships, Representation, and Fees, 71 N.Y.U. L. Rev. 296, 298 (1996) (“Individualism pervades the traditional conception of civil litigation within the United States . . . .”).
143 See Rothstein, supra note 37, at 887-89 (noting that discovery requests for plaintiffs’ records are rarely challenged and usually granted).
144 See supra note 64 (defining “personal records” as used in this Article). In personal injury cases it is generally the condition of the plaintiff that is at issue, but occasionally issues arise concerning the physical condition of persons other than the plaintiff. See, e.g., Schlagenhauf v. Holder, 379 U.S. 104, 121 (1964) (considering whether to order an examination of a bus driver involved in an accident and concluding that an eye exam could be ordered). To my knowledge, however, no defendant in a car accident case has sought access to the medical records of the plaintiff’s relatives to argue that the plaintiff’s injuries
the court's ability to order mental or physical examinations of non-parties.\textsuperscript{145} There is a widespread, but largely implicit, understanding that such records either are not relevant or are privileged, and the Federal Rules of Civil Procedure indicate that examinations of non-parties are not allowed.\textsuperscript{146} Traditional tort discovery has recognized and endorsed these personal boundaries.

In a departure from this implicit understanding, defendants in eight hundred consolidated DES cases in the early 1990s sought the medical records of mothers of DES plaintiffs, arguing that such records were necessary to determine whether the plaintiffs' injuries were caused by genetic factors or exposure to defendants' products.\textsuperscript{147} The court held that the plaintiffs' waiver of their own doctor-patient privileges did not constitute a waiver of relatives' equivalent privileges; therefore, the records were not discoverable.\textsuperscript{148} The court noted the dangers of this type of discovery and the necessity for privacy protections in the face of increasing intrusions.\textsuperscript{149} Thus, the plaintiff-centered discovery framework persisted, despite the challenge posed by the DES cases.

Aside from the DES cases and recent developments in the lead arena, medical records of non-parties have also been sought to a limited degree in some cases in which plaintiffs claim that injuries to a child occurred \textit{in utero} or during delivery.\textsuperscript{150} In such instances, some defendants have sought rec-
ords of a mother's other pregnancies and deliveries to challenge causation. Despite the exception of pregnancy and delivery-related injuries, medical and personal records of non-parties are generally not obtainable in litigation.

Currently, childhood lead exposure litigation is the major area of tort litigation in which the defense seeks personal records and physical and mental examinations of non-parties. Damages are sought for injuries such as cognitive deficits, speech problems, learning disabilities, and lowered IQ. Although these types of claims are not unique to lead exposure, the practice of defendants seeking testing, examination, or records of non-party relatives is not conventional in other types of cases. Rather, through thorough ex-

(Granting motion compelling mother to permit discovery of her pregnancy and birth records for other children born before the brain-damaged infant); Palay v. Superior Court, 22 Cal. Rptr. 2d 839, 849 (Ct. App. 1993) (holding that prenatal medical records of non-party mother were discoverable and not subject to claim of physician-patient privilege or a right to privacy); Williams v. Roosevelt Hosp., 488 N.E.2d 94, 97 (N.Y. 1985) (holding that in a medical malpractice case where father and child sued for child's alleged brain damage from negligent obstetrical care, non-party mother must answer general questions as to health history and physical condition of minor child, but can invoke doctor-patient privilege to avoid telling of confidential communications); Kaplowitz v. Borden, Inc., 594 N.Y.S.2d 744, 746 (App. Div. 1993) (holding that mother waived her physician-patient privilege by alleging that defendant's actions affected mother's and child's health); Scharlack v. Richmond Mem'1 Hosp., 477 N.Y.S.2d 184, 187 (App. Div. 1984) (holding that non-party mother is deemed to have waived physician-patient privilege with respect to records relating to the period when the child was in utero, but can invoke physician-patient privilege regarding records of other pregnancies).

151 See supra notes 26-36 and accompanying text (noting that scientific studies have found causal links between lead exposure and such effects as speech problems, learning disabilities, and other cognitive defects). Non-parties in this discussion refers to individuals other than the lead-exposed child. They may in fact be parties to the litigation as next friends or other appropriate designation or because of their own claims of emotional distress. See infra notes 302-05 and accompanying text (regarding legal status of parents in childhood lead exposure litigation).

152 See, e.g., Mercado v. Ahmed, 974 F.2d 863, 865-66 (7th Cir. 1992) (claiming damages for six-year-old's head injury, including impairments processing visual and auditory information, and reading, writing, and arithmetic); Coastal States Gas Producing Co. v. Locker, 436 S.W.2d 592, 596-97 (Tex. 1968) (claiming four-year-old child's head injury from an automobile accident to be the cause of mental impairment and subsequent behavioral changes).

153 See David R. Price & Paul R. Lees-Haley, Defending Claims of Postconcussion Syndrome, 62 DEF. COUNS. J. 589, 592-93 (1995) (proposing numerous avenues for causation defenses to head injury claims without suggesting the examination of records of non-parties); Judith F. Tartaglia & Kevin F. Amatuzio, Using Substantial Factor Analysis in Closed Head Injury Cases, FOR THE DEFENSE, Feb. 1991, at 19, 23 (stressing defense strategies that "focus upon the pre-accident plaintiff" as key to handling causation concerns in head injury claims). But see Sellers v. Hendrickson, 360 N.E.2d 1235, 1240-41 (Ill. App. Ct. 1977) (allowing defendant to use expert testimony that disabilities claimed to be limited to a car accident were in fact linked to "environmental, heredity, [and] socio-
amination of plaintiffs' own records and other routine discovery, defendants have challenged plaintiffs' assertions where appropriate in such cases, as in tort cases generally.\footnote{See infra note 310 and accompanying text (noting that defendants challenge plaintiffs' assertions of injury by examining medical records). For a discussion of discovery relating to medical issues, see Rothstein, supra note 37, at 887-91 (noting that discovery requests for plaintiffs' records are usually liberally granted).}

B. Departures from the Plaintiff-Centered Discovery Framework

The assumption of personal boundaries of plaintiffs is central to the concept of relevance in tort discovery.\footnote{See supra notes 142-43 and accompanying text (noting the traditional focus on the plaintiff in tort discovery).} Ordering the production of relatives' medical, school, or employment records, or ordering non-parties to submit to mental or physical tests in order to dispute causation or to limit damages is a significant departure from plaintiff-centered discovery. Nonetheless, production of school, employment, and medical records, as well as IQ and psychological tests of persons other than the lead-exposed child, have been ordered in some cases. For example, while New Jersey\footnote{See Little v. McIntyre, 672 A.2d 1271, 1272-73 (N.J. Super. Ct. App. Div. 1996) (refusing to order plaintiff's mother to submit to a physical or mental examination because the mother was not a "party" and her condition was not "in controversy" within the meaning of New Jersey Rule 4:19).} and Massachusetts\footnote{See Brickley v. Sullivan, No. 89-CV-107 (Mass. Housing Ct. Mar. 18, 1992) (order denying defendant's motion for an independent neuropsychological examination of plaintiff's parents). There are also various decisions not allowing blood tests of mothers. See, e.g., Caminero v. Baker, No. 88-2226 (Mass. Super. Ct. Nov. 17, 1990) (order denying defendant's motion to compel mother of lead-exposed child to submit to a blood test); Pierre v. Dixon, No. 92-CV-00835 (Mass. Housing Ct. Mar. 19, 1993) (order denying defendant's motion for physical and mental examination of minor plaintiff's mother because mother had not placed her physical or mental condition in controversy); Maguire v. Restuccia, No. 22364 (Mass. Housing Ct. Nov. 30, 1990) (order rescinding prior order compelling discovery and holding that plaintiff, the child's mother, need not submit to a blood test).} courts have denied defendants' requests seeking examinations of plaintiffs' mothers, a District of Columbia court allowed the IQ testing and psychological examination of a plaintiff's mother and sibling.\footnote{See Campbell v. Bonner, No. 92-7771, at 3-4 (D.C. Super. Ct. Jan. 4, 1994) (order granting defendant's motions for leave to conduct clinical interview and intelligence testing on mother and sibling). The decision in Campbell allowing IQ tests and psychological tests of non-parties has been followed consistently by other judges in the District of Columbia, who typically issue handwritten endorsements of motions for such testing, citing Campbell. Telephone Interview with Elizabeth Jester, plaintiffs' attorney, Campbell (July 1, 1996).} New York courts or-
ordered IQ testing of a plaintiff’s mother in two cases,\textsuperscript{159} and a Louisiana court ordered the neuropsychological testing of a plaintiff’s siblings.\textsuperscript{160} Efforts by defendants to obtain this information are likely to continue, given the expansion in scientific research, the ascension of genetic essentialist notions, and the persistence of maternal determinist ideas.\textsuperscript{161}

If the assumption of personal boundaries on which traditional plaintiff-centered discovery is based is to be rejected, then consideration must be made of all implications of such a decision. For example, if defendants are able to test non-parties and obtain their personal records in order to challenge causation, then plaintiffs should be able to obtain non-parties’ records and tests in order to prove causation. Similarly, if defendants are able to obtain non-parties’ records and tests in order to argue that plaintiffs’ damages are less than plaintiffs claim, then plaintiffs should be able to do the same to prove damages. If litigants may compel non-parties to submit to mental or other tests and to supply personal records, this would imply a judgment in the interests of the litigants, but will essentially disregard those of non-party individuals’ autonomy and privacy. Expansion of this nature requires careful consideration before embarking upon it. Some of the consequences of rejecting plaintiff-centered discovery are considered below.


\textsuperscript{161} Much feminist scholarship has criticized the emphasis in law on individual boundaries and autonomy. It would seem that efforts to depart from plaintiff-centered discovery and to discount boundaries between people and emphasize connections linking people, would therefore be in line with such scholarship. Yet the consequences of this departure from individual boundaries both reflect and reinforce ideas of genetic essentialism and maternal determinism and may further racism. These consequences thus cast doubt on the broad application of boundary critiques. See, e.g., Leslie Bender, Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities, 1990 DUKE L.J. 848, 870-71 ("[T]he law must begin from the premises that human beings are interrelated in their lives . . . ."); Bender, supra note 11, at 579-80, 583 (applying the feminist theory of interconnectedness and responsibility to challenge the individualistic "no duty to rescue" doctrine); Handsley, supra note 11, at 472 (arguing that restrictive liability rules relating to mental injury caused by harm to another person neglect the connectedness experience and values of women); Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 13 (1988) (explaining the “connection thesis” that women, unlike men, are “actually or potentially materially connected to other human life”). But see Roberts, supra note 79, at 1470-71 (arguing that broad feminist critiques of privacy do not recognize that privacy ideas can have useful functions for women of color).
1. Broadening Scope of Litigation

Broadening the causation and damages inquiry beyond the plaintiff, by either party, is likely to dramatically broaden the scope of the litigation.\textsuperscript{162} Such an expansion is contrary to current trends in litigation, which aim to streamline and limit discovery procedures.\textsuperscript{163} As Justice Blackmun stated, "[l]aw... must resolve disputes finally and quickly.... [The] Rules of Evidence [are] designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes."\textsuperscript{164} For example, if the educational records of a plaintiff's sibling reveal a learning disability, the parties will need to consider the possible causes of that learning disability.\textsuperscript{165} If only one of two siblings of the plaintiff has a learning disability, the inquiry becomes more complicated.\textsuperscript{166} Similarly, knowing a mother's IQ creates more questions than it answers. A low-IQ mother might

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\textsuperscript{162} See, e.g., In re New York County D.E.S. Litig., 570 N.Y.S.2d 804, 805-06 (App. Div. 1991) (noting concern about expansion of litigation to distant relatives in rejecting defendants' demand for nonparties' records).

\textsuperscript{163} As the Advisory Committee Notes to the 1993 amendments to the Federal Rules of Civil Procedure states, "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. Amendments to Rule 30, 31, and 33 place presumptive limits on the number of depositions and interrogatories..." Fed. R. Civ. P. 26 advisory committee's note.


\textsuperscript{165} Such a learning disability could have been caused by a head injury, lead exposure, prenatal or perinatal events, or a host of other factors. For example, an anoxic event at birth can cause injury to the brain. See Bo K. Siesjö & Fred Plum, Pathophysiology of Anoxic Brain Damage, in Biology of Brain Dysfunction 319, 319 (Gerald E. Gaul ed., 1973) (noting that the stresses of birth can cause anoxia, which is one of the most common causes of brain injury). If anoxia causes the death of brain cells in a child, "the child can suffer some degree of mental deficiency" and the child may "exhibit impulsive hyperactivity...." VERNON H. MARK & FRANK R. ERVIN, VIOLENCE AND THE BRAIN 56 (1970). Attention deficit disorder can be caused by a genetic thyroid problem. See Peter Hauser et al., Attention-Deficit Hyperactivity Disorder in People with Generalized Resistance to Thyroid Hormone, 328 NEW ENG. J. MED. 997, 1001 (1993) ("[S]ubjects with generalized resistance to thyroid hormone have a markedly increased frequency of attention-deficit hyperactivity disorder as compared with their unaffected family members."); Dorothy Nelkin, After Daubert: The Relevance and Reliability of Genetic Information, 15 CARDOZO L. REV. 2119, 2123 (1994) (noting that "only one behavioral disorder, attention deficit hyperactivity," had been traced to a specific genetic defect); see also Natalie Angier, Hormone Imbalance Linked to Behavior, N.Y. TIMES, Apr. 13, 1993, at C3 (discussing studies of a rare familial disease linking a defect in the gene that produces the thyroid hormone receptor to attention-deficit disorder).

\textsuperscript{166} Both siblings' medical and school records would be considered, delivery records for all siblings would be considered, issues of what type of learning disabilities the children had and whether the learning disabilities were or were not properly diagnosed, all would become issues.
\end{footnotesize}
have been deprived of oxygen at birth, exposed to lead, or a myriad of other factors. Should she be x-rayed for an early lead exposure? Should her birth records be obtained? Are the father’s IQ, prenatal, perinatal, head injury, and lead exposure histories relevant? Should the grandparents’ histories be examined, as well? There is no logical end to the litigation inquiry once individual boundaries are crossed.

2. Intrusion

Discovery of the educational, medical, and employment records of persons other than the plaintiff can be intimidating and extraordinarily intrusive. The subjects of the discovered records may find the nonconsensual release of their records to be extremely embarrassing and invasive. In addition, disclosure may cause tangible harm to the subjects of the records. For example, medical or educational information could become public and possibly lead to extreme embarrassment for some children, and negative employment or insurance consequences for adults. The topic of, and arguments based on, that information also make this type of discovery particularly sensitive. Defendants essentially argue that the plaintiff has learning problems, not because of lead exposure, but due to either her genetic or environmental heritage.

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167 For example, in one case where a mother’s IQ was ordered to be tested, the mother may have had a difficult birth that may have affected her in some way, but her birth records were unavailable because they had been destroyed in a hospital fire many years prior. Telephone Interview with Elizabeth Jester, plaintiffs’ attorney, Campbell v. Bonner, No. 92-7771 (D.C. Super. Ct. Jan. 4, 1994) (July 1, 1996).

168 A recent article on lead exposure used bone x-rays to estimate lead burden to study lead exposure. See Needleman et al., supra note 34, at 364-65 (finding an association between high bone lead levels and attention problems, aggression, and delinquency).


170 See, e.g., Defendants’ Opposition to Supervisory Writ Application at 5, Stewart v. Nassau Corp., No. 96-C-0475 (La. Ct. App. Mar. 26, 1996) (arguing that the minor plaintiff’s condition is “more likely the result of [plaintiff’s] genetic makeup and/or the
Even the prospect of an argument concerning a sibling's or parent's learning ability status can be extremely unpleasant and insulting. Similarly, defendants may seek work records of a child's parents, based on the argument that if the parents did not maintain a steady job, it is because they had attention problems, low IQ, or both. For parents who have not been successful in the employment market—for whatever reasons—discovery of this nature could be extremely painful.

Even more intrusive are involuntary IQ and psychological tests. The stated argument for seeking IQ tests of mothers is that some portion of the child's intelligence is passed down maternally, either genetically or environmentally; therefore, if the mother has a low IQ, the plausibility of maternal responsibility increases. Although District of Columbia Judge Graae wrote in *Campbell v. Bonner* that an IQ test and clinical interview's degree of intrusion for the non-party mother and siblings was "relatively minor," this conclusion is highly debatable. At the outset, *Campbell's* reliance on the intrusiveness analysis of *Schmerber v. California* is questionable in the civil setting, given that *Schmerber* involves the reasonableness of government searches under the Fourth Amendment and generally is applied in the criminal context.

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171 See generally WILSON, supra note 40 (discussing structural changes in the labor market).
172 See supra notes 84-87 and accompanying text (discussing defendants' arguments that IQ is inherited and that a child's IQ correlates to her mother's IQ).
174 384 U.S. 757 (1966). In *Schmerber*, the defendant had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving. *See id.* at 758. At the direction of a police officer, a physician took a blood sample from the defendant despite the defendant's refusal on advice of counsel to consent to the test. *See id.* at 758-59. A report of the chemical analysis of the blood, which indicated intoxication, was admitted into evidence over the defendant's objection. *See id.* at 759. The Court held that states may be permitted to make minor intrusions into an individual's body under only stringent limited circumstances. *See id.* at 772. The Court found that in view of the time required to bring the defendant to a hospital, the consequences of delay in making a blood test for alcohol, and the time needed to investigate the accident scene, there was no time to secure a warrant and the search was an appropriate incident of the defendant's arrest. *See id.* at 770-71. The Court also found that the test chosen to measure the defendant's blood-alcohol level was a reasonable one because it was an effective means of determining intoxication, imposed virtually no risk, trauma, or pain, and was performed in a reasonable manner by a physician in a hospital. *See id.* at 771.
175 *See id.* at 758.
Assuming Schmerber's analysis of the intrusiveness issue is appropriate, consideration of several factors can lead to a different conclusion from that of Campbell. First, one way to measure the intrusiveness of an examination would be the involvement of physical intrusion, like the blood test in Schmerber. The use of this simplistic method to measure degrees of intrusiveness is inadequate, however, because it unjustifiably assumes that mental intrusions are fundamentally less intrusive than physical ones. Would a psychological examination inquiring about one's dreams and sexual fantasies be less intrusive than a blood test for alcohol after a car accident? Intrusion into one's mental processes, in some circumstances, can be more intrusive than, or equally intrusive as, intrusion into one's body.

Another way to approach the question might be to look at the ubiquity of the particular intrusion. The Supreme Court, in deciding that the blood test in Schmerber was a reasonable intrusion, considered the ubiquity of the intrusion, stating that "such tests are a commonplace in these days of periodic physical examinations, and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." Nonetheless, mere commonness alone does not provide satisfactory answers. For example, although IQ tests are

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177 See Schmerber, 384 U.S. at 758 (noting that the blood test was taken by a physician at the direction of a police officer). In determining that the intrusiveness of the clinical interview and intelligence testing would be relatively minor, the judge in Campbell applied the intrusiveness test of Schmerber and Beckwith. See Campbell, No. 92-7771, at 3-4.

178 See Jansen v. Packing Corp. of Am., 158 F.R.D. 409, 410 (N.D. Ill. 1994) (noting that mental examinations are usually more sensitive than physical examinations). The United States Supreme Court recently recognized the importance of the privacy of a patient's communications with a therapist and the significance of intrusions into mental processes. See Jaffee v. Redmond, 116 S. Ct. 1923, 1931-32 (1996) (protecting from disclosure under federal psychotherapist privilege, statements that defendant made during course of counseling session).

179 Schmerber, 384 U.S. at 771 (finding that admission of defendant's blood samples in defendant's trial for operating a vehicle under the influence of alcohol, taken over his objection, was constitutional).
commonly used in schools, employer no longer use such tests to choose employees. More importantly, commonness in one context, such as medical examinations, does not mean that the test is not intrusive in another context, for instance when a person is observed intoxicated following her involvement in a car crash. Similarly, the commonness of IQ testing in schools does not render them non-intrusive when applied to unrepresented non-parties in civil litigation. In any event, regardless of context, some may consider very common practices to be extremely intrusive. Thus, proof of the ubiquity of a practice should not be proof of its degree of intrusiveness.

A better approach is to look at the type and nature of information that is sought, to determine whether the degree of intrusion is minor or not. The blood test in Schmerber gave information about whether the defendant had been drinking, a fact already known by the defendant. An IQ test result, on the other hand, conveys a score that statistically correlates with academic achievement and income, but predicts little about what an individual is likely to achieve. Nonetheless, the information obtained through an IQ test can profoundly affect a person's self-image and her public perception. A person may have a strong interest in not knowing, or keeping private, her IQ score. A person may also reasonably fear the consequences of disclosure

180 See, e.g., MASS. GEN. LAWS ch. 71, § 87 (1997) (allowing IQ tests of school children, but ordering that scores be kept separate from the confidential school records); see also FISCHER ET AL., supra note 87, at 93 (noting that IQ tests function well as predictors in American schools).


182 See infra note 243 (noting that the mother and siblings in Campbell were unrepresented).

183 A commonplace example is telemarketing. See OSCAR H. GANDY, JR., THE PANOPTIC SORT 102-03 (1993) (discussing the telemarketing industry and the arguments by citizens and legislative representatives that the use of the telephone intrudes upon a person's privacy when it penetrates the house). Similarly, in a 1995 advertising campaign, AT&T distinguished itself from its competitors, not by mentioning price, but by emphasizing privacy. The text of an ad read: "Not all phone companies respect your privacy . . . Privacy. That's Your True Choice." N.Y. TIMES, Aug. 9, 1995, at A20.

184 See Schmerber, 384 U.S. at 771 (discussing the blood test and noting that such is "a highly effective means of determining the degree to which a person is under the influence of alcohol.")

185 See Task Force, supra note 119, at 82 (stating that IQ test scores predict years of education and, to a lesser extent, income).

186 See id. ("[I]ndividuals who have the same test scores may differ widely in occupational status and even more widely in income.").

187 See Steele & Aronson, supra note 121, at 808 (arguing, in the context of African-American students, that the threat of stereotype can actually impair intelligence test performance). As Howard Gardner notes:
of her score to others, such as employers. It is therefore arguable that although the test method itself is less physically intrusive than drawing blood, the nature of the information obtained through the test is such that the intrusion is not minor.

Another way to consider the issue of the degree of intrusion would be to look at the context more broadly, considering the societal interests at issue, the potential value, and the historical context. In Schmerber, the Court held that the blood sample, taken from the defendant while under arrest for driving under the influence of alcohol, was non-testimonial, and therefore the privilege against self-incrimination did not apply. Although not explicitly discussed, at stake in Schmerber were the societal interests in stopping drunk driving and providing constitutional protections for criminal defendants. The fact that the test was "a highly effective means of determining the degree to which a person is under the influence of alcohol," was key to the Court’s decision. In the setting of civil lead exposure litigation, the societal interest in testing non-parties is much less clear. Moreover, the heritability of IQ test results, as well as what IQ tests purport to measure, are the subject of intense scientific debate. Even those who argue for heritability of IQ posit heri-

How one thinks about oneself, one's prospects in this world and beyond, and whether one regards intelligence as inborn or acquired—all these shape patterns of activity, attention, and personal investments in learning and self-improvement. Particularly for stigmatized minorities, these signals can wreck any potential for cognitive growth and achievement.

GARDNER, supra note 60, at 68. The information can be analogized to unwanted medical information obtained through genetic tests ordered in litigation. Professor Rothstein has noted the problems in compelling testing and individuals’ desire not to know. See Rothstein, supra note 37, at 895-900 (arguing that ordering genetic testing not only violates one’s “informational” privacy, but also one’s “decisional” privacy). He has proposed that compelled genetic testing of anyone in civil litigation should not be allowed for challenging damages. See id. at 907.

Regardless of the implications of Griggs, see supra note 181, a person may still fear the consequences of such disclosure. For example, an employer may give increased scrutiny to a lower-IQ employee, which may have negative employment consequences.

In Campbell, the court did not discuss what the contents of the clinical interview would be, and one of the defendant’s experts had already interviewed the mother under an agreement of the plaintiff. Telephone Interview with Elizabeth Jester, plaintiffs' attorney, Campbell v. Bonner, No. 92-7711 (D.C. Super. Ct. Jan. 4, 1994) (July 1, 1996). Such interviews by defendant’s expert are beyond the usual expert discovery described in Rule 26(b)(4).

See Schmerber v. California, 384 U.S. 757, 764-65 (1966) (“Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved in the extraction or in the chemical analysis.”). Justice Black dissented, noting the strained reasoning of the Court in concluding that the blood test was not testimonial or communicative. See id. at 774 (Black, J., dissenting).

Id. at 771 (citing Breithaupt v. Abram, 352 U.S. 432, 436 n.3 (1957)).

See supra Part III.C (discussing the scientific debate regarding whether IQ testing
tability as a range of between forty to eighty percent, acknowledging that this concept applies to groups, not to inheritance between actual individuals.

The justification for invading the privacy interests of a non-party to a civil action by ordering IQ and other tests is not equivalent to the justification for infringing on the privacy rights of a criminal defendant by ordering blood tests. The purpose of testing the non-party is to show that the plaintiff’s IQ is low because the family has low IQs. However, this is far removed from the actual controversy. As such, the intrusiveness of the test is correspondingly greater. Further, given that plaintiff children in lead paint cases are generally from poor, African-American or Hispanic families, there may be an unconscious sub-text regarding this type of discovery, which implies that such people are less deserving of privacy rights than others.

See supra note 112 and accompanying text.
See supra note 113 and accompanying text.
This is why an IQ test of a plaintiff is less intrusive than an IQ test of a non-party.
In all four cases that I have found where a non-party has been ordered to have her IQ tested, the plaintiffs and their families have been African-American. Telephone Interview with Tracy Abatemarco’s office, defense attorney, Atkins v. New York City Hous. Auth., No. 12460195 (N.Y. Sup. Ct. Oct. 29, 1996) (Jan. 27, 1998); Telephone Interview with Erin Hurley, plaintiffs’ attorney, Salkey v. Mott, 656 N.Y.S.2d 886 (App. Div. 1997) (Jan. 26, 1998); Telephone Interview with Elizabeth Jester, plaintiffs’ attorney, Campbell v. Bonner, No. 92-7771 (D.C. Super. Ct. Jan. 4, 1994) (July 1, 1996); Telephone Interview with Terrence Lestelle, plaintiffs' attorney, Stewart v. Nassau Corp., No. 89-8214 (Civ. Dist. Ct. Orleans Par. Jan. 19, 1996) (Dec. 13, 1996); see also Horsburgh, supra note 60, at 579 (arguing that where rights are considered in economic terms, women on welfare are not included in the “institutional structure of the discourse on privacy”); Roberts, supra note 79, at 1441 (noting the prevalence of state intrusions on African-American women’s autonomy). The history of claims that African-Americans have genetically lower intelligence than whites exacerbates the offense associated with compelling non-party African-American family members to take IQ tests. In addition, the particular focus on seeking intelligence tests of mothers of children exposed to lead ties in with ideas of maternal determinism. See supra Part II.B (discussing maternal determinism and noting the devaluation of African-American mothering). Moreover, admission of testimony regarding African-American family members’ IQs may have harmful implications with predominately white juries, given the historical legacy. See supra notes 99-104, 108-11 and accompanying text (discussing the history of race-based IQ testing that has generally maintained that African-Americans test lower than whites); see also Eva S. Nilsen, The Criminal Defense Lawyer’s Reliance on Bias and Prejudice, 8 GEO. J. LEGAL ETHICS 1, 1-5 (1994) (discussing criminal defense lawyers’ use of harmful stereotypes in order to win cases). These efforts bring to mind the statement by Herman Melville that, “[o]f all the preposterous assumptions of humanity over humanity, nothing exceeds most of the criticisms made on the habits of the poor by the well-housed, well-warmed, and well-fed.” Herman Melville, Poor Man’s Pudding and Rich Man’s Crumbs, in THE WRITINGS OF HERMAN MELVILLE 289, 296 (Harrison Hayford et al. eds., Northwestern Univ. Press
In addition, acceptance of this type of discovery demands that whenever a plaintiff brings a personal injury case, she must consider that her relatives may be required to produce complete medical, educational, and employment histories, and submit to IQ or other testing. This may serve as a significant deterrent to participation in the tort system, two of the goals of which are compensation for injuries and removal of unreasonably dangerous products from the marketplace. For all of these reasons, the IQ or psychological test of a parent or sibling should not be ordered over an individual's objection unless the participant has put his IQ at issue, even if such testing may have probative value.

In sum, gross distinctions between mental and physical tests are insufficient to determine a test's degree of intrusiveness. Nor is the relative ubiquity, or lack thereof, of a test particularly useful in determining intrusiveness. Rather, examination of the type and nature of information that might be obtained, and the context in which the test is sought, are factors that are more instructive. Although the content of IQ test results are not personal in the same way that answers to questions about sex are personal, the test nonetheless involves access to one's mind, information about oneself, and purports to quantify that information, all of which is intensely personal. This presents a clear case for privacy and autonomy under various definitions. The intrusiveness of the IQ test and clinical examination is major, not minor, under any definition.

3. The Scientific Basis for Departures from Plaintiff-Centered Discovery is not Clearly Established

Science is a socially grounded human activity, subject to people's assumptions, preconceptions, and biases. Nonetheless, some scientific discover-

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1987 (1854).
197 See supra note 169 and accompanying text (discussing cases in which defendants have requested discovery of non-plaintiff's personal records).
198 See supra notes 156-60 and accompanying text (describing the cases in which non-parties have been required to submit to intelligence testing, clinical interviews, or to release other information).
199 See W. PAGE KEETON ET AL., ON THE LAW OF TORTS § 4, at 25-26 (5th ed. 1984) (noting that compensation for injuries and removal of dangerous products are goals of the tort system). Some writers believe the tort system has "gone too far" and might welcome this additional deterrent to plaintiffs. See, e.g., PETER W. HUBER, LIABILITY 153-61 (1988) (arguing that the tort system slows the pace of innovation and thereby sets back safety rather than advancing it).
200 For example, Charles Fried defines privacy as "control we have over information about ourselves." CHARLES FRIED, AN ANATOMY OF VALUES 140 (1970). Allen Westin defines privacy as "the claim of individual, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." ALLEN WESTIN, PRIVACY AND FREEDOM 7 (1967).
201 See supra notes 61-75 and accompanying text (arguing that scientific findings should
ies are indisputably real, and scientific developments may reach a point where it is necessary to test or examine non-parties or to obtain their personal records to determine if the plaintiff has been harmed by the defendant's actions. This point, however, has not been reached in the lead exposure context.

Various epidemiological studies of the effects of relatively low levels of lead exposure on children take into account parents' education, socioeconomic status, and mother's IQ as "confounding variables." A confounding variable "is an extraneous factor that independently associates with a higher or lower disease rate, but which is differentially present in the exposed [group]." For example, if long-haired children have a higher percentage of learning disabilities than short-haired children, regardless of prior lead exposure, a study must consider this. Multiple regression analysis would isolate the role of lead, thereby eliminating the supposed effect of having long hair on learning disabilities. If the study does not weed out the effect of the long-haired factor, and focuses primarily on long-haired children, the long-haired variable would mistakenly magnify lead's effects.

Although the mother's IQ is often used as a confounding variable in studies determining the effect of lead on children, not all studies utilize it.
Moreover, it is inappropriate to test mothers’ and siblings’ IQs in lead exposure litigation. First, the argument for testing the IQs of the mother and siblings of a lead-poisoned child rests partly on the idea that there is a measurable genetic correlation between IQs of family members.206 Many factors, however, can contribute to the low IQ of a lead-exposed child or her mother, such that testing the mother’s IQ would not shed light on the cause of a child’s low IQ.207 For example, a mother might have had the potential for a very high IQ, but might have received a head injury that resulted in a low IQ. In such a situation, a genetic argument that her child’s IQ was low because hers was low would obviously be false.208

Second, the studies that control for mothers’ IQs continue to find harmful effects from lead.209 Third, the degree to which IQ is heritable is highly debatable, and heritability itself is a concept that applies to group, not individual, IQ.210 Thus, any general statistical correlation between mothers’ IQs and children’s IQs does not imply anything about either the individual mother’s or individual child’s IQ. Fourth, the claimed harm from lead is not always IQ damage, but includes harms such as learning disabilities and attention disorders.211 Fifth, none of the epidemiological lead studies considers the siblings’ IQs,212 thus presenting no basis for testing siblings.

In addition, existing correlations between birth order and IQ indicate that firstborn children generally have higher IQs than other children; thus, some researchers have considered this when drawing conclusions about lead’s effect on IQ. See id. at 54 (noting a study that considered birth order as potential confounding variable).

206 See supra notes 84-87, 170 and accompanying text (discussing defendants’ arguments that IQ is inherited).
207 See supra notes 165-67 and accompanying text (discussing various possible causes of a learning disability and low IQ). In addition, as with many toxic tort claims, it is difficult to isolate harms as attributable solely to lead, because various other sources can also potentially cause such harms. Of course, a plaintiff in a negligence case need not show that lead exposure is the only cause of the harm claimed, but need only show that it was a substantial factor in bringing about the harm. See RESTATEMENT (SECOND) OF TORTS § 431 (1979).
208 Such an argument also would put the mother’s entire medical history and records at issue, expanding the scope of the litigation even further. See supra notes 162-68 and accompanying text (arguing that expanding the scope of litigation is against current trends toward streamlining discovery procedures).
209 See MEASURING LEAD EXPOSURE, supra note 27, at 52-58 (noting studies, which controlled for maternal IQ, that found higher lead levels correlated to lower intelligence test scores).
210 See supra notes 112-14 and accompanying text (discussing the limitations of the concept of heritability as applied to individuals).
211 See supra notes 32-33 and accompanying text (discussing other neurological effects of lead exposure).
212 See MEASURING LEAD EXPOSURE, supra note 27, at 52-54 (describing the confounding variables considered in various studies, none of which included sibling IQ).
Finally, the purported basis for testing siblings' IQs, as opposed to testing the father's IQ, is unclear. The siblings do not contribute genetically to the child, while arguably the father contributes half of the child's genetic material. If parental IQ contributes genetically to the child's IQ, then one would assume that a father's IQ would be equally as important as the mother's. Yet, the studies do not generally consider this. Thus, even if epidemiological studies include mother's IQ as a confounding variable, this does not imply that an individual mother's or sibling's IQ would be of probative value in an individual case.

4. Rule 35 and Judges' Power to Compel Non-Parties in Civil Cases to Submit to Examination and Testing

The most intrusive efforts departing from plaintiff-centered discovery are those aimed at performing tests on persons other than the lead-exposed child. Such efforts necessarily implicate Federal Rule of Civil Procedure 35 ("Rule 35") or one of its state law correlates, because these are the only civil rules allowing physical or mental examinations. Under Rule 35, a party can be compelled to submit to mental and physical examination if a party's condition is at issue and in controversy and the requisite good cause is shown. In 1970, Rule 35 was amended to provide that an examination can be ordered of anyone who is in custody or under the legal control of a party, if that person's condition is in controversy and good cause is shown. The 1970 amendment was made in order to clarify that if a parent or guardian was suing for injuries to a minor, the parent or guardian could be ordered to produce the minor for examination. This Part briefly reviews pertinent authority concerning Rule 35, and then reviews the legal foundations of the decisions regarding IQ and psychological testing of persons other than the lead-exposed child.

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213 See id. at 52 (noting that only the Needleman study considered "parental IQ" as a confounding variable). The actual Needleman study refers to "parental IQ," but specifies that most of the parents whose IQs were tested were mothers. See Needleman et al., supra note 34, at 690 (noting that usually the mothers were brought to the testing location). Thus, the study did not test and average both parents' IQ.

214 See Fed. R. Civ. P. 35(a) (describing the requirements and limitations for physical and mental examinations); see also Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2231 n.16 (1994) (commenting that Rule 35 has correlates in almost every state).

215 See Fed. R. Civ. P. 35(a) (stating that upon a showing of good cause, an examination can be ordered of the parties or those in custody or control of the parties); see also Wright & Miller, supra note 214, § 2231 (same).

216 See Fed. R. Civ. P. 35 advisory committee's note (pronouncing that an order to produce a person in the custody or control of a party imposes a good faith effort to produce the person).

217 See id.
a. Past Challenges to Rule 35

Although Rule 35 is now taken for granted as an element of civil practice, the idea of forcing parties to submit to mental or physical tests did not gain immediate acceptance with the passage of the Rule.218 In fact, at common law such examinations were not allowed in federal court.219 In Sibbach v. Wilson,220 in which a court-ordered examination of the plaintiff was challenged, the Supreme Court considered the validity of Rule 35.221 The Court concluded that Rule 35 did not modify the substantive rights of litigants, and therefore it was within the authority granted by the Rules Enabling Act.222 Justices Frankfurter, Douglas, Murphy, and Black dissented, emphasizing the common law tradition of personal privacy.223 Justice Frankfurter wrote that the Rule authorized "invasion[s] of the person" and "intrusion[s] into an historic immunity of the privacy of the person," which were so significant, that authority to invade those interests should not be inferred from the general language of the Rules Enabling Act.224 Moreover, in Union Pacific Railway Co. v. Botsford,225 the Supreme Court held that a federal court did not have power to order a personal injury plaintiff to submit to a physical examination.226 In Schlagenhauf v. Holder,227 the Supreme Court considered whether Rule 35 permitted mental and physical examinations of a defendant driver who had not put his own condition at issue.228 In holding that such examinations were allowable in certain situations, the Court emphasized that the driver

218 See, e.g., Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 17-18 (1941) (5-4 decision) (Frankfurter, J., dissenting) (arguing that "inviolability of a person" should only be curtailed if the law is clear and unquestionable, and that Rule 35, in ordering physical examinations, could not withstand such a standard).
219 See Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251-53 (1891) (holding that the court may not order the plaintiff to submit to physical examination to determine the extent of injuries, and remarking that "no order to respect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history").
220 312 U.S. 1 (1941).
221 See id. at 6.
222 See id. at 14-16.
223 See id. at 17 (Frankfurter, J., dissenting) (arguing that privacy has historic roots in Anglo-American law).
224 Id. at 18 (Frankfurter, J., dissenting).
225 141 U.S. 250 (1891).
226 See id. at 252 (asserting that "the inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow" and that to "compel any one, and especially a woman, to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass").
228 See id. at 114-15.
was subject to the examination requirement because he was a party.\footnote{229 See id. at 115.} The Court stated that, "it is clear that the person sought to be examined must be a party to the case[,]... not that he be an opposing party vis-à-vis the movant."\footnote{230 Id. (emphasis added).} In dissent, Justice Douglas argued that it is fair that the plaintiff must "choose between his privacy and his purse," but that a defendant has no such choice and thus should not be required to "surrender his right to keep his person inviolate" by the mere fact that someone has sued him.\footnote{231 Id. at 126 (Douglas, J., dissenting) (noting that Sibbach rests on the idea that the plaintiff waives privacy interests by bringing a lawsuit). The Schlagenauf majority viewed the case as resting on an interpretation of the language of the rules, and not as resting on a waiver theory. See id. at 114 (noting that there might be constitutional problems with a waiver theory). The reading by the Schlagenauf majority seems more consistent with the language of the opinion in Sibbach than does Justice Douglas’s interpretation.\footnote{232 See id. at 122 (5-4 decision); Sibbach, 312 U.S. at 16 (5-4 decision).\footnote{233 Indeed, considering that these were 5-4 decisions for ordering parties to submit to examinations, it seems very unlikely that the Court would have ordered non-parties to submit to such examinations. Cf. Schlagenauf, 379 U.S. at 114-15 (considering whether Rule 35 permits examination of defendant who had not put own condition at issue); Sibbach, 312 U.S. at 6 (considering whether Rule 35 is valid and would allow examination of parties).\footnote{234 The limitations of Rule 35 are that it only applies to parties or those in custody or control of parties, that a showing of good cause is necessary before an examination can be ordered, and that it is necessary that the condition of a party be in controversy before an examination can be ordered. See Fed. R. Civ. P. 35(a). Courts have repeatedly held that Rule 35 does not allow mental examinations of plaintiffs bringing emotional distress claims. See, e.g., Turner v. Imperial Stores, 161 F.R.D. 89, 97-98 (S.D. Cal. 1995) (holding that emotional distress claim did not put plaintiff’s condition in controversy for purposes of Rule 35); O’Quinn v. New York Univ. Med. Ctr., 163 F.R.D. 226, 228 (S.D.N.Y. 1995) (holding that defendant not entitled to mental examination of sex discrimination plaintiff because plaintiff did not bring tort claim for emotional distress); Smith v. J.I. Case Corp., 163 F.R.D. 229, 230 (E.D. Pa. 1995) (holding that products liability plaintiff's claim for mental damages based on embarrassment does not put condition in controversy, so defendant not entitled to mental examination or counseling records); Curtis v. Express, Inc., 868 F. Supp. 467, 469 (N.D.N.Y. 1994) (holding that mental examination of plaintiff in race discrimination case not allowed); Cody v. Marriott Corp., 103 F.R.D. 421, 422 (D. Mass. 1984) (holding that plaintiff in employment discrimination case making emotional distress claim does not put her mental condition “in controversy” to justify requiring her to submit to psychiatric examination under Rule 35).}}

In both Sibbach and Schlagenauf, the idea of ordering parties to submit to mental or physical examinations was highly contested.\footnote{232 These decisions considered the privacy interests of the parties, and there was no suggestion that a court would have authority to order examinations of non-parties.\footnote{233 The limitations of Rule 35\footnote{234 recognize and endorse individual privacy and...}}
the separateness of individuals.

b. **Testing of Persons other than the Lead-Exposed Child Despite Rule 35**

In the lead litigation context, courts have taken varying positions concerning examinations of persons other than the lead-exposed child. In *Little v. McIntyre*, the New Jersey Appellate Division held that such tests were not allowed because they were beyond the scope of Rule 35. Massachusetts's courts have taken the same position. Courts in three states, on the other hand, have allowed such tests. In *Stewart v. Nassau*, a Louisiana court held that the mental state of the plaintiff's sister was relevant, and therefore tests would be allowed. In *Atkins v. New York City Housing*
Authority\textsuperscript{241} and Salkey v. Mott,\textsuperscript{242} the courts ordered the minor plaintiff’s mother to submit to an IQ test. In Campbell v. Bonner, a District of Columbia court acknowledged that it did not have power under Rule 35 to order non-parties to submit to IQ and psychological testing, but ordered the tests anyway under its “inherent powers.”\textsuperscript{243}

The Campbell opinion, written by Judge Graae, merits further discussion because it is the only decision that articulates a basis for the court’s power to order non-party testing.\textsuperscript{244} Judge Graae concluded that he was “not precluded from ordering such tests,”\textsuperscript{245} and that “[s]ome courts have resorted to their ‘inherent powers’ to order examinations of non-parties where they could not compel such examinations pursuant to Rule 35.”\textsuperscript{246} He further stated that “due process requires that there be an opportunity to present every available defense”\textsuperscript{247} and that “[b]ased upon this principle, courts have increasingly been willing to find circumstances in which an individual’s right of privacy must yield to a defendant’s right to discover evidence bearing upon his liability.”\textsuperscript{248} Judge Graae’s reasoning concerning the authority to order tests and examinations of non-parties is based on two main aspects—inherent powers and due process.\textsuperscript{249} As discussed below, neither of these aspects grants to the court the authority to order these tests.

i. The Inherent Powers Argument

In Campbell, Judge Graae claimed that courts have inherent power to or-

\textsuperscript{241} No. 12460195 (N.Y. Sup. Ct. Oct. 29, 1996) (order granting defendant’s motion to compel IQ testing of minor plaintiff’s mother and ordering release of academic records of mother and siblings of plaintiff).

\textsuperscript{242} 656 N.Y.S.2d 886 (App. Div. 1997) (order affirming lower court’s decision ordering mother of lead-exposed child to submit to IQ test as within trial court’s discretion).

\textsuperscript{243} See Campbell v. Bonner, No. 92-7771, at 3-4 (D.C. Super. Ct. Jan. 7, 1994) (order granting defendant’s motions for leave to conduct clinical interview and intelligence testing on mother and sibling of lead-exposed child). The mother and sister were not represented; the lawyer for the lead-poisoned children presented arguments against the testing and asked that the court appoint a guardian ad litem for them, which the court declined to do. See Plaintiffs’ Opposition to Defendant Bonner’s Motion for Leave to Conduct Clinical Interview and Intelligence Testing at 1-2, Campbell (No. 92-7771).

\textsuperscript{244} In Salkey v. Mott, the appellate court simply noted that discovery decisions were within the trial court’s discretion and that IQ tests were not privileged medical information. See Salkey, 656 N.Y.S.2d at 886.

\textsuperscript{245} Campbell, No. 92-7771, at 2.

\textsuperscript{246} Id. at 3.

\textsuperscript{247} Id. at 2 (citing Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

\textsuperscript{248} Id. at 2-3 (citing Department of Soc. Servs. v. Stein, 612 A.2d 880, 891 (Md. 1992) (allowing defendants in a lead poisoning case to examine social services records of the minor plaintiff’s family)).

\textsuperscript{249} See id.
der these tests\textsuperscript{250} in the face of a clear rule that denies this power. As Professors Wright and Miller have noted regarding federal law, "[c]laims of inherent power in the face of a rule with specific limitations are always dubious and especially when it is clear that the federal courts had no power, inherent or otherwise, to order a physical or mental examination prior to the adoption of the rule."\textsuperscript{251} To support its assertion of inherent powers, the court cited only a 1972 Arizona Supreme Court case that is clearly inapposite.\textsuperscript{252}

In \textit{Chambers v. Nasco, Inc.},\textsuperscript{253} the most recent Supreme Court decision that discussed in detail inherent powers in civil litigation, inherent power was limited to the authority of the federal court to maintain order and sanction conduct that undermines the integrity of the judicial process.\textsuperscript{254} The Supreme Court gave a broad interpretation to the inherent power of federal trial

\begin{itemize}
\item \textsuperscript{250} See id. at 3 (noting that some courts have resorted to their inherent powers to order such tests).
\item \textsuperscript{251} WRIGHT & MILLER, supra note 214, § 2233 n.8. The limits on the inherent power of federal courts would not necessarily be the same as for state courts. See Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1024-25 (1961) (noting that the "general rule in the states is that courts do possess the inherent authority to order a physical examination of a party" and that "a state court might well extend its inherent power to order medical examinations to include third persons as well as parties").
\item \textsuperscript{252} See Campbell, No. 92-7771, at 3 (citing Lewin v. Jackson, 492 P.2d 406 (Ariz. 1972)). In Lewin v. Jackson, a mental and physical examination of a non-party elderly man was ordered over his guardian daughter’s objection, solely in order to determine whether he was competent to testify at a deposition. See Lewin, 492 P.2d at 409. The lawsuit at issue was a slander case brought by the guardian/daughter in which she claimed that the defendants, by defaming her, had induced her wealthy father to disinherit her. See id. at 407. The defendants wanted to take her father’s deposition, and she claimed that he was not fit to be deposed. See id. The Arizona Supreme Court noted that the examination was not for discovery purposes and that Rule 35 did not apply to the examination, but that the court had inherent power to "take all steps necessary to assure itself not only that a witness’ testimony will be accurate but also that the act of testifying will not endanger the health of the proposed witness." Id. at 409. The court further argued that under the circumstances, because its purpose was to make sure the father was competent to be deposed, the examination was acceptable. See id. at 408-09. The court analogized the situation to the "well-established power of a trial judge to personally examine a child witness in order to determine the child’s mental capacity." Id. at 410. In T.H. v. Department of Health & Rehabilitation Service, the court held that it lacked the authority to order the mother of a cocaine dependent child to undergo bimonthly drug testing to prevent the birth of any more drug-exposed children. See 661 So. 2d 403, 404 (Fla. Dist. Ct. App. 1995). But see Dinsell v. Pennsylvania R.R. Co., 144 F. Supp. 880, 882 (W.D. Pa. 1956) (holding that the court has the power to appoint a specialist to conduct eye exams of non-party co-worker of plaintiff who threw stones that hit the plaintiff, where the plaintiff claimed that the employer was negligent in allowing the employee to work near him).
\item \textsuperscript{253} 501 U.S. 32 (1991).
\item \textsuperscript{254} See id. at 43-46.
\end{itemize}
courts to sanction fraudulent and oppressive litigation related behavior. In *Chambers*, the defendant had engaged in sustained and extraordinary bad faith litigation tactics, and after a trial and frivolous appeal, the district court, under its inherent power, ordered the defendant to pay the plaintiff's entire attorney fees, though under the circumstances the judge did not have specific statutory or rule based authority to do so.

The Supreme Court noted that the inherent power includes the power to maintain silence in court, to punish for contempt, to vacate its judgment when a fraud is committed, and to “fashion an appropriate sanction for conduct which abuses the judicial process,” including awarding attorney fees when outrageous bad faith conduct has occurred in litigation. Despite the lack of specificity in the majority opinion as to the precise scope of inherent power to sanction, there is no basis in that opinion for the suggestion that a court can create new rules in situations other than where a party has engaged in extraordinarily egregious conduct. *Chambers* presents no authority for applying the idea of “inherent power” to the completely different context of non-party discovery.

Some state courts have held that they had inherent power under common law to order an examination of a party in discovery, while others have held that they lack such power. The inherent power to order an examination of a non-party is wholly different, because the common law power to order examinations, where it existed, was limited to parties. Discovery is regulated by carefully constructed rules that allow for a great deal of judicial

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255 See id.
256 See id. at 40 (noting that the district court had ordered the defendant to pay attorney fees for improper conduct).
257 See id. at 43.
258 See id. at 44.
259 See id.
260 Id. at 44-45.
261 See id. at 45-46.
262 See, e.g., Greenhow v. Whitehead's, Inc., 175 P.2d 1007, 1015 (Idaho 1946) (holding that the court has inherent power to order physical examination of plaintiff in personal injury litigation); People ex rel Noren v. Dempsey, 139 N.E.2d 780, 784 (Ill. 1957) (same); Drake v. Bowles, 92 A.2d 161, 163 (N.H. 1952) (same); SS. Kresge Co. v. Trester, 175 N.E. 611, 613 (Ohio 1931) (same); Cohen v. Philadelphia Rapid Transit Co., 95 A. 315, 316 (Pa. 1915) (same).
264 See, e.g., Greenhow, 175 P.2d at 1015 (ordering physical examination of plaintiff in personal injury litigation based on waiver argument); Noren, 139 N.E.2d at 784 (same); Drake, 92 A.2d at 163 (same); SS. Kresge Co., 175 N.E. at 613 (same); Cohen, 95 A. at 316 (same).
discretion, but not unlimited discretion.\textsuperscript{265} Rule 35 and the various state analogues are unique in their degree of intrusiveness on individuals.\textsuperscript{266} Inherent authority to order non-parties to submit to unwanted IQ and psychological testing and interviews is therefore lacking.\textsuperscript{267}

ii. The Due Process Argument

Judge Graae’s citation of the language from the Supreme Court’s decision in \textit{Lindsey v. Normet},\textsuperscript{268} that “due process requires that there be an opportunity to present every available defense,”\textsuperscript{269} does not establish a firm foundation for compelling the mental or physical examinations of non-parties, even if good cause is shown. \textit{Lindsey} upheld, against a facial due process challenge, state eviction statutes that limited tenants’ rights.\textsuperscript{270} The Supreme Court held that no due process violation had occurred because the tenant could challenge the landlord’s action in another proceeding.\textsuperscript{271} Similarly, discovery orders not allowing IQ tests or clinical examinations of non-parties in lead paint claims do not deprive defendants of the opportunity to challenge causation or damages; rather, they may merely force defendants to alter their strategy.

In addition, due process does not grant parties in civil matters the right to obtain or introduce every conceivable piece of evidence.\textsuperscript{272} Numerous tech-

\textsuperscript{265} See, e.g., Schlagenhauf v. Holder, 379 U.S. 104, 112-13 (1964) (reiterating the provisions of Rule 35); Sibbach v. Wilson, 312 U.S. 1, 8-9 (1941) (describing the limitations of Rule 35); see also WRIGHT & MILLER, supra note 214, § 2233 n.8 (explaining the questionable use of the inherent powers doctrine).

\textsuperscript{266} See supra notes 218-34 (discussing the resistance to Rule 35 given its intrusiveness and the requirements imposed upon those trying to seek examinations under it).

\textsuperscript{267} See supra notes 143-46 and accompanying text (noting the focus in litigation on discovery pertaining to parties); cf. \textit{Ex parte} Anniston Personal Loans, 96 So. 2d 627, 630 (Ala. 1957) (holding that court lacked inherent power to order non-party to produce, without notice, books and documents in advance of trial for inspection by a party). The Missouri Supreme Court has held that in a loss of consortium case involving the damages a husband suffered as a result of his wife’s injuries in a car accident, it had inherent power to direct the wife to be examined by a doctor chosen by the court. See Missouri v. McMullen, 297 S.W.2d 431, 437 (Mo. 1956). In \textit{McMullen}, the wife’s injuries were at issue; the existence of the husband’s claim turned on them. See id. at 433-34. By contrast, in the lead context, the plaintiff’s case does not turn on the extent of injury to a non-party.

\textsuperscript{268} 405 U.S. 56 (1972).


\textsuperscript{270} See \textit{Lindsey}, 405 U.S. at 69 (holding that the eviction statute at issue was valid under the Due Process Clause).

\textsuperscript{271} See id. at 66 (noting that there are other available procedures for litigation claims against landlords).

nical limitations, such as Federal Rule of Evidence 403,\textsuperscript{273} therapist-patient privilege,\textsuperscript{274} Federal Rule of Civil Procedure 26(b)(4),\textsuperscript{275} physician-patient privilege,\textsuperscript{276} husband-wife privilege,\textsuperscript{277} and statutes of limitation,\textsuperscript{278} restrict parties’ “rights” to present defenses or claims. Such technical matters may also obstruct the trial’s purpose to “search for truth.”\textsuperscript{279} However, there are compelling reasons for each of these “technical” barriers.\textsuperscript{280} In sum, there is no due process right for civil parties to compel non-parties to submit to request to compel voice exemplar tests of the plaintiff’s female children). The defendants, including the city police chief, were accused of civil rights violations in connection with arresting plaintiffs for allegedly making obscene telephone calls. See id. at 544. The defendants sought to compel voice exemplar tests of the plaintiffs' female children under twelve, so that they could show that obscene phone calls had been made from plaintiffs' phone and thereby establish defendants' good faith. See id. at 546 (noting that “[t]here is no provision in the rules requiring non-parties to produce evidence of the type requested”). The decision to deny voice exemplar tests might have limited the options of the defendants and forced them to change strategy, but that is different from violating their due process rights. This is not to say that no due process considerations arise in civil litigation. For example, punitive damage awards may violate defendants’ due process rights. See, e.g., BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1595 (1996) (holding that “grossly excessive” punitive awards violate defendant’s due process rights).

\textsuperscript{273} See FED. R. EVID. 403 (excluding evidence, although relevant, that would be outweighed by chances of unfair prejudice).


\textsuperscript{275} See FED. R. CIV. P. 26(b)(4) (providing limitations upon expert discovery).

\textsuperscript{276} See, e.g., 6 CAL. EVID. CODE §§ 990-1007 (West 1995) (physician-patient privilege); see also 42 PA. CONS. STAT. ANN. § 5929 (West 1982 & Supp. 1996) (noting that patient’s consent is necessary before physician may disclose any information except in civil matters brought by the patient in claims for damages for personal injury).

\textsuperscript{277} See, e.g., 5 CAL. EVID. CODE §§ 980-987 (marital communications privilege).

\textsuperscript{278} See, e.g., Choroszy v. Tso, 647 A.2d 803, 807 (Me. 1994) (holding that a three year statute of limitations for medical malpractice is constitutional); St. Paul Fire & Marine Ins. Co. v. Getty Oil, 782 P.2d 915, 923 (Okla. 1989) (finding that builders and architects statute of repose limiting a cause of action to a ten year period is constitutional).


\textsuperscript{280} Numerous mechanisms, in addition to those mentioned in the accompanying text, reflect considerations other than “truth,” such as the importance of legitimacy and consensus. But, truth is a highly contested concept on many levels. For example, eyewitness testimony is often unreliable, and there is debate about whether expert testimony about the reliability of eyewitness testimony should be allowed. See, e.g., Watkins v. Sowers, 449 U.S. 341, 350 (1981) (Brennan, J., dissenting) (arguing the unreliable nature of eyewitness testimony and its powerful impact on juries); U.S. v. Wade, 388 U.S. 218, 228-29 (1967) (holding that eyewitness testimony is unreliable because of prosecutor’s power of suggestion); Faigman, supra note 69, at 967 (arguing that expert testimony on factors associated with inaccurate identification eyewitness testimony should be admissible).
mental or physical examinations.

c. A Thought Experiment

To clarify this argument further, an analogy may be drawn between lead poisoning and an allegedly poisonous chemical. This hypothetical situation presents the case of a middle level manager who is the son of a corporate executive. He suffers a mental disability that he ascribes to the long term exposure to a chemical that is universally recognized as poisonous that was present in the workplace. Consequently, he makes a workers' compensation claim against his employer for the mental disability, accompanied by a claimed loss of IQ. Studies have found that lowered IQ was associated with the chemical to which he was exposed, but these studies also recognized a genetic or environmental component.

The workers' compensation carrier concedes that the workplace exposed the manager to the poisonous chemical, and further, that the manager has a mental disability as well as a low IQ. The carrier, however, claims that the manager inherited such traits from his family and not from exposure to the chemical. The carrier supports its contention with epidemiological studies of the chemical and IQ that find that many people exposed to the chemical have mental disabilities and lowered IQ, but not finding a one-to-one correspondence. The studies take into account many factors, such as socioeconomic status, the presence of other major stresses, and father's IQ. The studies find a very strong pattern that the chemical causes lowered IQ. There is a correlation, not fully understood, between exposure to this chemical, low IQ, and high socioeconomic status.

Although the manager's siblings are a prominent law professor and a surgeon, they both possess embarrassing employment and medical histories. Under such circumstances, it is unlikely that a court would order the manager's family to submit to IQ or psychological tests or release records, although this information could help the carrier's defense. Releasing such information would greatly intrude on this family's right to privacy. It is also difficult to imagine the well-heeled relatives of the manager, who would surely be represented in court, tolerating the coercion involved.

V. Future Directions

A. Introduction and the Happiness Set Point

Increased pressure from current scientific research and its broader cultural implications encourages both expansion of non-party testing and disclosure of information previously considered privileged, irrelevant, or otherwise undiscoverable. Defendants argue that such information may reveal that environment, genetic condition, or genetic disposition caused the plaintiff's condition or made plaintiff's damages less. Plaintiffs may provide similar arguments that such measures would help prove their cases as well. Courts should resist these arguments for several reasons. First, such discovery ex-
plorations involve extreme intrusion into the lives of non-parties. 281 Second, these techniques greatly expand both the scope and expense of litigation. 282 Third, they may simply reflect the undue power of genetic and maternal determinism narratives. 283

A 1996 story in *The New York Times* concerning a genetically determined set point for happiness illustrates the aforementioned problems in expanding the discovery process. 284 Relying on studies of identical twins reared apart who nevertheless possess similar happiness levels, psychologists found that genes determined a significant part of happiness. 285 One researcher claimed that, "about half of your sense of well-being is determined by your set point, which is from the genetic lottery, and the other half from the sorrows and pleasures of the last hours, days or weeks." 286 Under this happiness set point theory, a person injured in an accident who suffers residual pain may claim damages for pain and suffering as well as for mental distress. 287 Additionally, in some states she may assert a right to hedonic damages. 288 Based on this happiness research, a defendant could try to obtain evidence about the general happiness level of the plaintiff’s family members, given their life circumstances. The defendant may use this information to argue that the plaintiff’s unhappiness and pain were due to whatever unhappiness runs in the family, rather than the pain and distress that followed from the

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281 See supra Part IV.B.2 (discussing the intrusiveness of various discovery techniques).
282 See supra Part IV.B.1 (discussing negative implications of broadening the scope of litigation and increasing its costs).
283 See supra notes 40-91 and accompanying text (critiquing genetic and maternal determinism).
285 See id.
286 Id. at C9 (quoting Dr. David T. Lykken, a behavioral geneticist at the University of Minnesota who published results from a study of 1500 pairs of twins in the May issue of *Psychological Science*). This research seems to fail to take into account data about depression levels among African-Americans compared with whites. Cf. C.W. Henderson, *Social Issues Study: High Levels of Depressive Distress Among Gay Blacks*, AIDS WKLY., June 13, 1994, at 1, available in 1994 WL 2564409 (finding that homosexually active African-American men and women suffer significantly higher levels of depression and stress than other individuals).
287 See RESTATEMENT (SECOND) OF TORTS § 90S (1977) (“Compensatory damages that may be awarded without proof of pecuniary loss include compensation (a) for bodily harm, and (b) for emotional distress.”).
288 See Gretchen L. Valentine, Comment, *Hedonic Damages: Emerging Issue in Personal Injury and Wrongful Death Claims*, 10 N. ILL. U. L. REV. 543, 546 (1990) (suggesting that hedonic damages may be awarded in personal injury cases to compensate for loss of enjoyment, pleasure, and value of life, but noting that no clear consensus has emerged for their use as a tort remedy).
accident. Defendants could request that the plaintiff and her family submit to various happiness tests and allow defendants to examine the medical, educational, and employment records of family members, so that experts could fully evaluate the plaintiff and her family's genetically determined set point. The current happiness research appears so vague that courts would likely regard such inquiries as beyond the scope of discovery.

Nevertheless, beyond the current preliminary nature of the science, there are additional reasons to be reluctant to depart on the path outlined above. First, the family members possess powerful privacy interests, and society as a whole also has an interest in protecting individuals' confidentiality interests. Second, administering the tests, obtaining the records, and having experts review them would add to the expense of litigation. Third, such inquiries would broaden the scope of litigation with no necessary or logical stopping point. The plaintiff may want to bring up some constantly exuberant distant relative and highlight the happiness of an adoptive sibling to undercut the defendant's argument. These types of arguments shift the focus from the defendant's actions and the plaintiff's injury, to the family and beyond, undercutting the broad societal interest in resolving disputes. Fourth, this type of genetic inheritance argument may lead to particularly racist and damaging connotations and consequences.

B. The Current Discovery Framework's Protection of Individuals

Under the current discovery framework, parties may discover any non-privileged material that is relevant or reasonably calculated to lead to the discovery of admissible evidence. Unfortunately, this system fails to ade-

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289 The article cited various ways of studying happiness, such as accepting people's accounts of how happy they were, observing how exuberant they were, and seeing whether their left prefrontal brain has greater electrical activity when a person states that she agrees with certain statements like, "[w]hen good things happen to me, it strongly affects me." Goleman, supra note 284, at C9. All of these or other methods might be proposed.

290 See, e.g., FRIED, supra note 200, at 140 (emphasizing American society's desire to protect its privacy, a fundamental value, in the face of surveillance technology); WESTIN, supra note 200, at 7 ("[P]rivacy is not just one possible means among others to insure some other value, but . . . it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship, and trust. . . . [W]ithout privacy they are simply inconceivable."); Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890) (advocating the individual's right "to be let alone" from unauthorized invasions by newspapers).

291 See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993) (asserting that unlike scientific conclusions, which are subject to perpetual revision, the law prefers quick and final dispute resolutions).

292 See supra notes 94-111 and accompanying text (discussing the racist backdrop of genetic inheritance arguments and intelligence research).

293 See FED. R. CIV. P. 26(b).
quately address the concerns outlined above. See Rothstein, supra note 37, at 902 (highlighting additional important ways in which the current discovery framework may not be adequate to protect individuals, such as delay, expense, and insufficient protection of litigants' privacy interests).

Communications to doctors are generally privileged, although the exact scope varies from state to state. See, e.g., Jaffee v. Redmond, 116 S. Ct. 1923, 1928-32 (1996) (holding that the therapist-patient privilege was not subject to a balancing test on a case-by-case basis, but that as a society, the privilege had to be recognized as absolute). In Jaffee, the privilege protected the therapist from an order to testify and produce her records. See id. at 1932 (holding that conversations and notes taken during counseling session were protected).

Protecting the confidentiality of communications to physicians has ancient roots. See Rothstein, supra note 37, at 896 ("Ever since the Oath of Hippocrates in the fifth century B.C., confidentiality has been one of the cardinal obligations of physicians."). Today, the confidentiality of medical records is under attack with the impact of technology and insurance. In response, various states have passed statutes protecting confidentiality of records held by Health Maintenance Organizations. See, e.g., Me. Rev. Stat. Ann. tit. 24-A, § 4224 (West 1990) (protecting medical records obtained by any health organization from discovery); see also Lawrence O. Gostin et al., Privacy and Security of Personal Information in a New Health Care System, 270 JAMA 2487, 2488-91 (1993) (attempting to balance a proposed electronic health care plan with society's interest in privacy).

dentiality protections exist in some states. 298

Tensions exist between the concepts of privilege and privacy, and these concepts are likely to become increasingly inconsistent. Legal recognitions of privacy have not kept pace with intrusions into privacy made possible by science and technology. 299 The continuing shift away from plaintiff-centered discovery will permit litigants to discover employment, educational, and medical records about individuals other than the injured party and subject these individuals to unwanted tests. 300 Existing privilege law may be too narrow to satisfy the concerns raised here.

The question of when a privilege is waived can be critical in this context. As noted above, a person claiming physical injury waives privileges in pertinent medical records. 301 Many cases are brought by parents as next friends or guardians of their children because it is a necessary prerequisite. 302 However, a next friend is not equivalent to a party. 303 Therefore, being next


299 See, e.g., WESTIN, supra note 200, at 3 (noting “that American society [has] developed a deep concern over the preservation of privacy under the new pressures from surveillance technology”); Nancy Levit, Ethereal Torts, 61 GEO. WASH. L. REV. 136, 159 (1992) (noting that technology permits increasingly greater intrusions into people’s private domains); Warren & Brandeis, supra note 290, at 195 (recognizing that technological developments necessitate developments in the law to protect privacy); G. Bruce Knecht, A New Casualty in Legal Battles: Your Privacy, WALL ST. J., Apr. 11, 1995, at B1 (lamenting that legal protections do not cover the increased availability of consumer information).

300 See supra notes 165-68 and accompanying text (discussing the implications of broadening discovery to include non-parties).

301 See Rothstein, supra note 37, at 887-89 (noting that discovery requests for plaintiff’s records are rarely challenged and usually granted).

302 See, e.g., FED. R. CIV. P. 17(e) (requiring that an infant sue through a representative, next friend, or guardian ad litem).

303 See, e.g., Hall v. Haque, 34 F.R.D. 449, 449 (D. Md. 1964) (holding that next friend, the parent of child, is not party to suit brought on child’s behalf); see also Crawford v. Loving, 84 F.R.D. 80, 81 (E.D. Va. 1979) (holding that next friend of incompetent person is only nominal party and that person under disability is real party).
friend should not waive any privileges. In addition, it is established that simply being next friend or guardian ad litem of a child does not waive privileges and does not constitute being a party for Rule 35 purposes.

A related issue is whether a parent who asserts emotional distress or loss of consortium claims in connection with a child’s injuries waives privileges for the parent’s own educational or medical records. There is limited discussion of this issue in the case law. In one case, in which parents claimed emotional distress based on their child’s exposure to lead, the court held that defendants could obtain medical records of the minor plaintiff’s parents, but only for the time period beginning when the parents learned of their son’s lead exposure. In another case, however, defendants argued unsuccessfully that a mother had waived her privacy interests in her educational records by asserting emotional distress and loss of consortium claims. On appeal of the denial of the defendant’s motion to compel, the Massachusetts Appeals Court did not discuss or decide the issue, but seemed to imply such a waiver, stating that “[i]nitiation of litigation inevitably compromises the privacy of the parties and it is particularly reasonable that this be so regarding the party who instigates the litigation.” The appeals court remanded the issue to the trial court for reconsideration, and on remand, the trial court

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304 Indeed, no decision I have found allowing discovery of records or testing rests on the idea that being next friend or guardian ad litem waives any privileges.

305 See, e.g., Scharf v. U.S. Attorney General, 597 F.2d 1240, 1243 (9th Cir. 1979) (holding in an action by Mexican child for citizenship that the court lacked power to order parents to submit to blood group testing); Fong Sik Leung v. Dulles, 226 F.2d 74, 81-82 (9th Cir. 1956) (holding in a suit brought by minor through parent or guardian as next friend, the parent or guardian is not a party because her physical and mental condition is not directly in controversy); Chin Nee Deu v. Dulles, 18 F.R.D. 350, 351 (S.D.N.Y. 1955) (“Regardless of the gratuitous inclusion . . . of the father . . . as ‘next friend’ . . . neither he nor the mother . . . is a party within the meaning of F. R. Civ. P. 35(a).”). But cf. Paula M. Becker, Court-Ordered Mental and Physical Examinations: A Survey of Federal Rule 35 and Illinois Rule 215, 11 Loy. U. L.J. 725, 728 (1980) (proposing that state and federal rules be broadened to include defendants’ employees and witnesses’ capacity); Note, Physical Examination of Non-Parties Under the Federal Rules of Civil Procedure, 43 Iowa L. Rev. 375, 375 (1958) (arguing that examinations should be authorized for three categories of persons: children in paternity suits for maintenance brought by their mother; agents of defendants when such agents are actively involved in the controversy; and parents and siblings of claimants in derivative citizenship cases).


308 Id.
found that the defendant had not shown that the records were relevant.\textsuperscript{309}

Rather than applying a blanket rule, the courts should determine the issue of whether the parents' claims of loss of consortium or emotional distress waive their privileges based on the nature of the claims, the accompanying requirements of proof for such claims, and the opposing party's claimed reason for needing the records. For example, if a parent claims emotional distress arising from her child's injuries, and that such has affected her academic performance, she places her academic history at issue, thereby waiving any privilege in pertinent academic records. Conversely, if her emotional distress claims are unrelated to academic performance, her privilege remains intact. Additionally, if a parent has an emotional distress claim, and the defendants want access to her school and medical records so that their experts can use this material to challenge the child's injuries\textsuperscript{310} rather than to evaluate the emotional distress claim, this kind of discovery is being used as a smokescreen for departing from plaintiff-centered discovery and should not be allowed. To avoid arbitrary and unjust results, courts should require a substantive nexus between the nature of the claim at issue and the waiver involved.

Leaving aside the issues of privilege, the rule allowing discovery of all material that is relevant or reasonably calculated to lead to the discovery of admissible evidence should be examined in light of recent and anticipated developments. Under existing Federal Rule of Civil Procedure 26(c) and its state parallels, the courts may consider the privacy interests of non-parties, although this is not specified in the Rule.\textsuperscript{311} Rule 26(c) authorizes courts to limit discovery to protect any person "from annoyance, embarrassment, op-

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\textsuperscript{309} See Vasquez v. Hezekiah, No. 91-CV-0057, at 1 (Mass. Housing Ct. Apr. 18, 1995) (order denying defendants' motion to discover the educational records of plaintiff).

\textsuperscript{310} In fact, defendants generally seek records and information about parents specifically in order to challenge causation and/or damages of the child's injuries. See, e.g., Affidavit of Lawrence Charnas at 2, Campbell v. Bonner, No. 92-7771 (D.C. Super. Ct. Jan. 7, 1994) (stating that parents' educational and other records are necessary to determine a child's intelligence without the injury, to determine whether lead is the cause or if genetic factors are responsible); Affidavit of Claire B. Emhart at 4-5, Campbell (No. 92-7771) (stating that information about a child's parents is necessary to determine whether lead exposure is the cause of plaintiff's claimed harm).

\textsuperscript{311} See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 30-31 (1984) (holding that trial court has duty and discretion to consider privacy interests of the litigants and third parties). The Court stated:

\begin{quote}
The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.
\end{quote}

\textit{Id. at 30; see also} Rothstein, \textit{supra} note 37, at 902 (noting that discovery may involve litigant's and third party's privacy interests).
pression or undue burden or expense." Although some might argue that this provides sufficient protection for non-parties, discovery in the lead exposure cases demonstrates the existing framework's insufficient protection of non-parties because it presents the possibility of virtually limitless expansion of litigation and discovery of peripheral records. Further, it leaves litigants the option of constructing wholly deterministic arguments about human behavior.

C. A Preliminary Proposal

Given the inadequacy of the current framework in dealing with the anticipated changes in civil discovery efforts, this Article proposes various steps. First, legislatures should systematically review statutory and common law privileges protecting individuals' records to determine if existing law provides sufficient protection for those not directly involved in litigation. If existing laws fail to provide the requisite protection, lawmakers should pass appropriate legislation. Second, lawmakers should closely examine principles of waiver and make decisions concerning which claims should waive what privileges.

Third, because the Rule 26(c) standard may eventually have effectively no limits, a more specific rule for the types of situations discussed and contemplated here should be considered. A rule should be formulated so that in personal injury cases, discovery of records and materials pertaining to the individual parties would be subject to the usual Rule 26 test, but that discovery of records pertaining to others generally would not be allowed. This presumption that non-party's personal—but non-privileged—records are non-discoverable could be outweighed by a showing of compelling need and established scientific foundation. This technique would better protect privacy interests generally, and non-party records and materials from discovery in personal injury cases in particular.

Fourth, Rule 35 should be left intact, prohibiting examinations of persons other than parties or persons in custody of parties, and allowing them only in certain circumstances. This Rule has worked well for over fifty years, and strikes a practical balance between privacy and discovery of information pertinent to litigation. As genetic and other research progresses, however, science may eventually create compelling situations when examining non-parties proves truly pertinent in strengthening or challenging a claimant's case. Such a time has not yet arrived, and it is entirely possible that such a time will never arrive in view of the complexities of genetic issues. 313

312 FED. R. CIV. P. 26(c). The Rule provides that, "upon motion by a party or by the person from whom discovery is sought ... and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Id.

313 See HUBBARD & WALD, supra note 38, at 36-37 (noting that genetic conditions involve "a largely unpredictable interplay of many factors and processes," thus there may
Accordingly, revisions of Rule 35 should be considered only if that time occurs. A possible revised framework might require the condition of the person whose examination is sought to be “in controversy.” This approach would force the claim or defense to turn on the non-party’s condition for the court to consider even the possibility of a non-party examination. Also, the litigant seeking the examination must make a showing of “compelling need.” In addition, the court would then consider the persuasiveness of the following additional factors: (1) the degree of intrusiveness of the test or examination; (2) the potential mental or physical harm to the test subject; and (3) the strength of the science.\textsuperscript{314}

The courts generally should deny the testing of non-parties when they consider the test intrusive, potentially harmful, or where the science is weak or disputed. Conversely, courts should allow non-intrusive testing supported by strong, undisputed scientific bases, with no potential for harm to the subject, such as the DNA testing of relatives that definitively establishes an alternate cause of disease.\textsuperscript{315} Additionally, courts should prohibit testing if the science is strong, but the intrusion great and potentially harmful to the subject. On the other hand, if the science is strong and the intrusion great but not harmful, then there could be situations where courts might permit such test.\textsuperscript{316}

\textsuperscript{314} Of course, scientific testimony is rarely unanimous, and judgment inevitably enters into decisions whether to admit such testimony. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-98 (1993) (proposing flexible standard for admitting scientific testimony and evidence). Given the social nature of science and the unfortunate uses to which it has been put in our history, however, judges should be vigilant in making determinations about admission of scientific testimony particularly in the context of science relating directly or indirectly to race. See Delgado et al., supra note 94, at 131-39 (discussing the history of attributing group differences in intellect to innate factors); cf. Chamallas, supra note 11, at 78 (advocating that the courts should stop the practice of using race and gender based data in determining damages).

\textsuperscript{315} An example of nonintrusive testing is the practice in Maine, where tests of saliva, rather than blood, are now commonly used for paternity testing. Interview with Jessica Maurer, Assistant Attorney General, Maine Department of Human Services, Child Support Enforcement Div. (Feb. 10, 1997); see Gina Kolata, Parents Take Charge, Putting Gene Hunt on Fast Track, N.Y. TIMES, July 16, 1996, C1, at C7 (reporting that in research regarding genes for dysautonomia, hair from a deceased child’s hairbrush was used).

\textsuperscript{316} Such a change in Rule 35 would likely lead to challenges making arguments similar to those made in Sibbach—that it was beyond the scope of the Rules Enabling Act. See Sibbach v. Wilson, 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting) (arguing that Rule 35, authorizing a physical examination of plaintiff, was beyond the scope of the Rules Enabling Act because it modified the substantive right of the litigant). There would likely also be challenges under state laws and constitutional privacy principles. See, e.g., MASS. GEN. LAWS ch. 214, § 113 (1996) (forbidding unreasonable invasions of privacy).
CONCLUSION

Recent increased emphasis on genetic and maternal explanations for individuals' characteristics has renewed emphasis on the genetic determinism of intelligence. Acceptance of these ideas has fostered a shift from plaintiff-centered discovery in lead exposure litigation toward a focus on the relatives of the lead-exposed children. This trend manifested itself in efforts by litigants to examine persons other than the party claiming injury from lead and to obtain personal records about persons other than the lead-exposed child. Not surprisingly, in view of the race, gender, and class characteristics of many plaintiffs and their families, lead exposure litigation constitutes the first area in which litigants systematically seek this type of discovery.

Yet, every reason exists to believe that this type of discovery will expand far beyond this context to many other types of litigation.\(^{317}\) For reasons set forth in this Article, courts should be extremely dubious of arguments that litigants need tests or personal records of persons other than the party claiming injury. As human knowledge about genetics expands, the law may need to change and concern itself less with human autonomy. Significantly affecting society as a whole, we should adopt such changes only after full debate and evaluation of all the issues involved, a task only just begun.

\(^{317}\) As Prosser and Keeton have noted, "[p]erhaps more than any other branch of the law, the law of torts is a battleground for social theory." CHARLES PROSSER & W. PAGE KEETON, THE LAW OF TORTS 15 (5th ed. 1984).
RAPE, RACISM, AND THE LAW

JENNIFER WRIGGINS*

INTRODUCTION

The history of rape in this country has focused on the rape of white women by Black men. From a feminist perspective, two of the most damaging consequences of this selective blindness are the denials that Black women are raped and that all women are subject to pervasive and harmful sexual coercion of all kinds.

This Note examines the historical legacy of the racist social meaning of rape and its consequences. Part I describes the history of the legal and societal focus on punishing Black men when the rape of white women is claimed. Part II discusses the denial of the rape of Black women. Part III argues that the narrow focus on one racial combination of rape obscures the significance of the sexual coercion.

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The word "Black" is capitalized in this Note when used to denote someone's race. The reason for this has been well stated by Catharine MacKinnon:

Black is conventionally (I am told) regarded as a color rather than a racial or national designation, hence is not usually capitalized. I do not regard Black as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions. It is as much socially created as, and at least in the American context no less specifically meaningful or definitive than, any linguistic, tribal, or religious ethnicity, all of which are conventionally recognized by capitalization.

MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 Signs 515, 516 (1982). While a parallel argument could support the capitalization of "white," such a usage would resonate with a long tradition of dominance by whites and is hence rejected.
all women face. Part IV argues that feminists must go beyond traditional rape reform measures to stop sexual coercion.

PART I: THE NARROW FOCUS ON BLACK OFFENDER/WHITE VICTIM RAPE

There are many different kinds of rape. Its victims are of all races, and its perpetrators are of all races. Yet the kind of rape

1 By "rape" this Note refers not to the legal definition of rape or sexual assault, but rather to "any attempted or completed sexual act that is forced on an individual against his or her will." Bowker, Rape and Other Sexual Assaults, Women and Crime in America 180, 180 (L. Bowker ed. 1981). The term thus includes a wide range of situations, from a stranger assaulting a woman in a dark alley to a husband forcing sex on his wife, regardless of whether penetration is involved or the act is illegal. The term "illegal rape" refers to situations where the imposition of sex is prohibited by law.

This Note addresses only the rape of women by men. Besides being the most prevalent and widely-studied kind of rape, it is also an important manifestation of, and means of perpetuating, male dominance. This Note argues that the treatment of this kind of rape by the legal system also serves as a weapon of white dominance.

2 Rape statistics are notoriously unreliable. An initial problem with them is that they report only activity which the law defines as rape. Illegal rape is not necessarily the only or most harmful sex forced on victims. See MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence 8 Signs (forthcoming 1983); Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Cal. L. Rev. 919, 941 (1973).

A second major problem with rape statistics is that underreporting even of illegal rape renders them inaccurate. It is likely that Black women underreport more than white women, especially if the woman's assailant is white. See infra note 122. A recent estimate is that only one in two illegal rapes is reported. Bowker, Women as Victims: An Examination of the Results of L.E.A.A.'s National Crime Survey Program, in Women and Crime in America, supra note 1, at 158-64.

A third problem is that police often decide not to pursue rape complaints which may be valid, especially if the complainant is Black, so these complaints may not appear in police "reported rape" figures. Chappell, Geis, Schafer & Siegel, A Comparative Study of Forcible Rape Offenses Known to the Police in Boston and Los Angeles, in Forcible Rape 227, 235 (D. Chappell, R. Geis & G. Geis eds. 1977).

More accurate figures may be derived from victim surveys which involve interviewing a random sample of citizens in a particular area concerning their victimization. It is from such surveys that the estimated ratios of actual to reported rapes are derived. However, this method has in some circumstances been found to underestimate the crime committed against Blacks. Hood & Sparks, Citizens Attitudes and Police Practice in Reporting Offenses, in Victimology 167 (I. Drapkin & E. Viano eds. 1974).

3 This Note focuses on rape between white and Black people in this country. It does not deal with rape involving other people of color for several reasons. First, most of what has been written about race and rape focuses exclusively on Black/white issues. (Exceptions include J. Williams & K. Holmes, The Second Assault (1981) [hereinafter cited as The Second Assault]; Aegis, March-Apr. 1979 (special issue entitled Violence Against Women and Race); Chu & Torres, Rape: It Can't Happen to Me, Bridge: An Asian American Perspective, Spring 1979.) Second, critics of feminist rape literature have primarily addressed its failure to combat the myth of the Black rapist and to recognize the differences between the vulnerability of white and Black women as rape victims. See infra note 183. This Note attempts to begin to correct these failures. A remaining failure is commentators' neglect of rape as it affects other people of color.

4 See infra text accompanying notes 121-232.
that has been treated most seriously throughout this nation's history has been the illegal forcible rape of a white woman by a Black man. The selective acknowledgement of Black accused/white victim rape was especially pronounced during slavery and through the first half of the twentieth century. Today a powerful legacy remains that permeates thought about rape and race.

Slavery

During the slavery period, statutes in many jurisdictions provided the death penalty or castration for rape when the convicted man was Black or mulatto and the victim white. These extremely harsh penalties were frequently imposed. In addition, mobs occasionally broke into jails and courtrooms and lynched slaves alleged to have raped white women, prefiguring Reconstruction mob behavior.

In contrast to the harsh penalties imposed on Black offenders, courts occasionally released a defendant accused of raping a white woman when the evidence was inconclusive as to whether he was...

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5 See Mann & Selva, The Sexualization of Racism: The Black as Rapist and White Justice, 3 W. J. BLACK STUDIES 168 (1979); see also infra text accompanying notes 8-80.
6 See infra text accompanying notes 8-63.
7 See infra text accompanying notes 64-80.
8 See, e.g., Alabama Code of 1852 (death penalty for rape of a white woman by a slave or free Black); Mississippi 1857 Statute (death penalty for attempted carnal connection with or rape of a white female under fourteen by a slave); Tennessee 1858 Law (death by hanging for rape of a free white woman by a slave or free Black); Missouri 1825 Statute (castration for rape or attempted rape by a Black or mulatto); Arkansas Code of 1838 (death penalty for assault with intent to commit rape by a Black or mulatto). Bienen, Rape III—National Developments in Rape Reform Legislation, 6 WOMEN'S RIGHTS L. REP. 170, 173 n.14 (1980). Although the last two states appear to provide strong sanctions for the rape of a Black woman by a Black man, the case law demonstrates that the claims of Black women were ignored. See infra text accompanying notes 93-96. Although concentrated in the South, statutes distinguishing between the races for sexual crimes were enacted in other states as well. See, e.g., Pennsylvania Code of 1700 (death penalty for rape of a white woman by a Black man); Kansas Compilation of 1855 (castration at his own expense for rape or attempted rape of a white woman by a Black or mulatto). Bienen, supra, at 173 n.14; see also Burns, Race Discrimination—Law and Race in America, in The Politics of Law 89 (D. Kairys ed. 1982).
10 K. STAMPP, supra note 9, at 190-91.
11 See infra text accompanying notes 26-40.
Black or mulatto. The rape of Black women by white or Black men, on the other hand, was legal; indictments were sometimes dismissed for failing to allege that the victim was white. In those states where it was illegal for white men to rape white women, statutes provided less severe penalties for the convicted white rapist than for the convicted Black one. In addition, common-law rules both defined rape narrowly and made it a difficult crime to prove.

During slavery, then, the legal system treated seriously only one racial combination of rape—rape involving a Black offender and a white victim. This selective recognition continued long after slavery ended.

The Post-Civil War Period

After the Civil War, state legislatures made their rape statutes race-neutral, but the legal system treated rape in much the same way

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12 Thurman v. State, 18 Ala. 276 (1850); Dick, a slave, v. State, 30 Miss. 631 (1856).
14 State v. Charles, a slave, 1 Fla. 298 (1847); Commonwealth v. Jerry Mann, 4 Va. (Va. Cas.) 210 (1820); George, a slave, v. State, 37 Miss. 316 (1859); see infra text accompanying notes 93–96.
15 See, e.g., Virginia Code of 1819 and 1823 Law (death penalty for rape or attempted rape of a white woman by a slave, Black, or mulatto and term of 10–21 years for rape by a white man); Kentucky 1802 Code (death penalty for rape of a white woman by a slave and term of years for rape by a white man). Bienen, supra note 8, at 173 n.14; Georgia Penal Code of 1816 (death penalty for rape or attempted rape of a free white woman by a slave or free person of color and term of not more than 20 years for rape or attempted rape by a white man) No. 380 §§ 33-34; No. 508 and 509, § 2; Georgia Acts of 1816 § 1, Compilation of the Laws of Georgia 804 (Lamar ed. 1821), cited in Amicus Brief of Women’s Legal Defense Fund and Equal Rights Advocates at 17, Coker v. Georgia, 433 U.S. 584 (1977).
16 For example, rape by one’s husband and rape not involving penetration by the penis were not defined as “rape.” See H. Field & L. Bienen, Jurors and Rape 154, 163 (1980) [hereinafter cited as Jurors]; MacKinnon, Violence Against Women: A Perspective, Aegis, Jan. 1982 51, 53; MacKinnon, supra note 2; Comment, supra note 2, at 925-26.
17 The two most important rules were those allowing admission of evidence of the sexual history of the victim and requiring extensive corroborating evidence of the rape. Berger, Man’s Trial, Woman’s Tribulation, 77 Colum. L. Rev. 1, 15-20 (1977); Note, The Victim in a Forcible Rape Case: A Feminist View, 11 Am. Crim. L. Rev. 335, 336 (1973); Comment, supra note 2, at 919; see infra text accompanying notes 140–163. Such rules were relaxed when the defendant was Black. See infra text accompanying notes 145–151.
18 A compilation of all post-Civil War state legislation enacted prior to 1917 that mentioned race contained no rape statutes. F. Johnson, The Development of State Legislation Concerning the Free Negro (1918). Such race-specific legislation included many anti-
as it had before the war. Black women raped by white or Black men had no hope of recourse through the legal system.\textsuperscript{19} White women raped by white men faced traditional common-law barriers that protected most rapists from prosecution.\textsuperscript{20}

Allegations of rape involving Black offenders and white victims were treated with heightened virulence. This was manifested in two ways. The first response was lynching, which peaked near the end of the nineteenth century.\textsuperscript{21} The second, from the early twentieth century on, was the use of the legal system as a functional equivalent of lynching, as illustrated by mob coercion of judicial proceedings,\textsuperscript{22} special doctrinal rules,\textsuperscript{23} the language of opinions,\textsuperscript{24} and the markedly disparate numbers of executions for rape between white and Black defendants.\textsuperscript{25}

\textit{Lynching}

Between 1882 and 1946 at least 4715 persons were lynched, about three-quarters of whom were Black.\textsuperscript{26} Although lynching tapered off after the early 1950s, occasional lynch-like killings persist to this day.\textsuperscript{27} The influence of lynching extended far beyond the numbers
of Black people murdered because accounts of massive white crowds torturing, burning alive, and dismembering their victims created a widespread sense of terror in the Black community.

The most common justification for lynching was the claim that a Black man had raped a white woman. The thought of this particular crime aroused in many white people an extremely high level of mania and panic. One white woman, the wife of an ex-Congressman, stated in 1898, “If it needs lynching to protect woman’s dearest possession from human beasts, then I say lynch a thousand times a week if necessary.”

The quote resonates with common stereotypes that Black male sexuality is wanton and bestial, and that Black men are wild, criminal rapists of white women.

11 Black women were not spared the violence of lynchings. The NAACP study, discussed in White, supra note 26, found that of the 4951 people lynched, 76 were Black women. Vivid first-person accounts of the lynchings of Black women document that no gentleness was accorded them on account of their sex.

See G. Lerner, Black Women in White America 161-63 (1972); Katz, The Negro Woman and the Law, in 2 Freedomsways 289 (1962); Documentary History, supra note 26, at 610.


A. Rose, supra note 26, at 185; C. Woodward, supra note 21, at 43; Hall, supra note 30; Reynolds, The Remedy for Lynch Law, 7 Yale L.J. 20, 20 (1897-98) (quoting an article that refers to the lynching of a Black man for the alleged rape of a white woman as “the usual crime”).

33 The association of Black men with criminality extends back at least to the nineteenth century. A. Rose, supra note 26, at 303. White criminals often capitalized on and perpetuated this stereotype by dying their faces black before committing crimes. Id. at 304; Johnson, The Negro and Crime, in The Sociology of Crime and Delinquency 419, 422 (M. Wolfgang, L. Santz & N. Johnston eds. 2d ed. 1970). The alleged propensity of Black men to rape white women can be seen partly as a manifestation of the criminality stereotype. In 1933, Arthur Raper made this link in trying to explain lynching: “[A]ccording to the popular estimate, all Negroes are essentially alike and are inclined to commit certain crimes, chief of which is the rape of white women.” A. Raper, supra note 21, at 50; see A. Rose, supra note 26, at 305.

Note that “all Negroes” refers only to Black men; Black women are left out of this formulation.

35 In the United States the myth of Black male sexuality includes the characterization of the Black male as rapist of white women. See, e.g., E. Genovese, Roll Jordan Roll: The
Many whites accepted lynching as an appropriate punishment for a Black man accused of raping a white woman. The following argument made to the jury by defense counsel in a 1907 Louisiana case illustrates this acceptance:

Gentlemen of the jury, this man, a nigger, is charged with breaking into the house of a white man in the nighttime and assaulting his wife, with the intent to rape her. Now, don't you know that, if this nigger had committed such a crime, he never would have been brought here and tried; that he would have been lynched, and if I were there I would help pull on the rope. 36

**The Legal System's Treatment: "Legal Lynching"**

It is doubtful whether the legal system better protected the rights of a Black man accused of raping a white woman than did the mob. 37 Contemporary legal literature used the term "legal lynching"
to describe the legal system’s treatment of Black men. Well past the first third of the twentieth century, courts were often coerced by violent mobs, which threatened to execute the defendant themselves unless the court convicted him. Such mobs often did lynch the defendant if the judicial proceedings were not acceptable to them. A contemporary authority on lynching commented in 1934 that “the local sentiment which would make a lynching possible would insure a conviction in the courts.” Even if the mob was not overtly pressuring for execution, a Black defendant accused of raping a white woman faced a hostile, racist legal system. State court submission to mob pressure is well illustrated by the most famous series of cases about interracial rape, the Scottsboro cases of the 1930s. Eight young Black men were convicted of what the Alabama Supreme Court called “a most foul and revolting crime,” which was the rape of “two defenseless white girls.” The defendants were summarily sentenced to death based on minimal and dubious evidence, having been denied effective assistance of counsel. The Alabama Supreme Court upheld the convictions in opinions demonstrating relentless determination to hold the defendants guilty regardless of strong evidence that mob pressure had influenced the verdicts and the weak evidence presented against the defendants. In one decision, that court affirmed the trial court’s denial of a change of venue on the grounds that the mobs’ threats of harm were not imminent enough although the National Guard had been called out to protect the defendants from mob executions. The U.S. Supreme Court later recognized

38 Chadbourn, infra note 39, at 332.
39 A. RAPER, supra note 21, at 143; Chadbourn, Plan for Survey of Lynching and the Judicial Process, 9 N.C. L. Rev. 330, 332–33 (1931); see Thompson v. State, 117 Ala. 67, 23 So. 676 (1898) (change of venue granted for Black defendant accused of rape because threats of mob violence threatened defendant’s imminent death or would pressure jury into convictions); see also R. WILKINS, RAPE: A CASE HISTORY OF MURDER, TERROR AND INJUSTICE VISITED UPON A NEGRO COMMUNITY (1949).
40 Chadbourn, supra note 39, at 331.
43 Patterson v. State, 224 Ala. 531, 141 So. 195 (1932); Powell v. State, 224 Ala. 540, 141 So. 201 (1932); Weems v. State, 224 Ala. 524, 141 So. 215 (1932).
44 Powell v. State, 224 Ala. 540, 544, 141 So. 201, 204 (1932).
45 Id. at 548, 141 So. at 207.
47 Patterson v. State, 224 Ala. 531, 534, 141 So. 195, 196 (1932); Powell v. State, 224 Ala. 540, 545–46, 141 So. 201, 205–06 (1932).
that the proceedings had in fact taken place in an atmosphere of "tense, hostile, and excited public sentiment." After a lengthy appellate process, including three favorable Supreme Court rulings, all of the Scottsboro defendants were released, having spent a total of 104 years in prison.

In addition, courts applied special doctrinal rules to Black defendants accused of the rape or attempted rape of white women. One such rule allowed juries to consider the race of the defendant and victim in drawing factual conclusions as to the defendant's intent in attempted rape cases. If the accused was Black and the victim white, the jury was entitled to draw the inference, based on race alone, that he intended to rape her. One court wrote, "In determining the question of intention, the jury may consider social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man." The "social conditions and customs founded upon racial differences" which the jury was to consider included the assumption that Black men always and only want to rape white women, and that a white woman would never consent to sex with a Black man.

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49 Norris v. Alabama, 294 U.S. 587 (1935) (systematic and arbitrary exclusion of Blacks from jury lists resulting in exclusion of Blacks from juries constitutes denial of Fourteenth Amendment due process rights); Patterson v. Alabama, 294 U.S. 600 (1935) (state Supreme Court must consider defendants' claim of systematic exclusion of Blacks from juries despite defendants' failure to file timely bill of exceptions in light of Supreme Court's decision on identical facts in Norris v. Alabama that such claims have merit); Powell v. Alabama, 287 U.S. 45 (1932) (defendant accused of capital crime has due process right to counsel that includes right to consult with counsel and prepare a defense).
51 Chastity evidence, for example, was treated differently for Black and white defendants, see infra text accompanying notes 145-155.
52 McQuirter v. State, 36 Ala. App. 707, 709, 63 So. 2d 388, 390 (1953) (citations omitted). In this case, the defendant, a Black man who had never before been arrested, was found guilty of an "attempt to commit an assault with intent to rape." Id. at 708, 63 So. 2d at 388. He was accused of uttering something unintelligible and walking within six feet of Mrs. Ted Allen, a white woman. Id. at 708, 63 So. 2d at 389. See Pumphrey v. State, 156 Ala. 103, 107-08, 47 So. 156, 158 (1908); Kelley v. State, 1 Ala. App. 133, 135, 56 So. 15, 15-16 (1911).
53 See supra notes 33-35. Many opinions graphically illustrate this assumption, for example: "The accused, a negro, under the excitement of lust and with the intention of gratifying it by force, entered the bedroom of Mrs. Crimm, a white woman.... There was nothing in the evidence to indicate that Mrs. Crimm was not virtuous...." Pumphrey v. State, 156 Ala. 103, 107, 47 So. 156, 158 (1908). Note the significance to the court, even in this situation, that "Mrs. Crimm" is "virtuous." See Barnett v. State, 83 Ala. 40, 3 So. 612 (1878); Kelley v. State, 1 Ala. App. 133, 56 So. 15 (1911); Dorsey v. State, 108 Ga. 477, 34 S.E. 135 (1899). See infra text accompanying notes 140-155.
54 See, e.g., Story v. State, 178 Ala. 98, 5 So. 480 (1912), discussed infra text accompanying notes 149-150.
The Georgia Supreme Court of 1899 was even more explicit about the significance of race in the context of attempted rape, and particularly about the motivations of Black men. It held that race may properly be considered “to rebut any presumption that might otherwise arise in favor of the accused that his intention was to obtain the consent of the female, upon failure of which he would abandon his purpose to have sexual intercourse with her.” Such a rebuttal denied to Black defendants procedural protection that was accorded white defendants.

Judicial attitudes toward the rape of white women by Black men are also manifested in the factual descriptions of the crime in opinions. Courts sometimes created pornographic images of the events of the rape. One court, for example, wrote, “[The victim,] while clad only in her pajamas was forced to a remote spot some two blocks from her home, where battered, bruised, bleeding and exhausted she was overpowered….” The sense of disgusted fascination that such opinions convey is not paralleled in cases where offender and victim are both white.

The outcome of this disparate treatment of Black men by the legal system was often the same as lynching—death. Between 1930 and 1967, thirty-six percent of the Black men who were convicted of raping a white woman were executed. In stark contrast, only two percent

\[\text{\footnotesize 55 Dorsey v. State, 108 Ga. 477, 480, 34 S.E. 135, 136-37 (1899). This rule was not used where both parties were Black. See Washington v. State, 138 Ga. 370, 75 S.E. 253 (1912); see infra text accompanying notes 106-108.}\]

\[\text{\footnotesize 56 That the descriptions were pornographic was pointed out to the author by Karen Getman.}\]


\[\text{\footnotesize 58 For example, in Rice v. State, 35 Fla. 236, 17 So. 286 (1895), the court dryly notes “the plaintiff in error was convicted of the crime of rape upon one Helen Smith, his stepdaughter.”}\]

\[\text{\footnotesize 59 In 1965, 18 American jurisdictions allowed the death penalty for rape. Wolfgang \& Reidel, \textit{Race, Judicial Discretion and the Death Penalty} 407 ANNALS 120 (1973). Hugo Bedau has written that most criminologists think capital punishment for rape was “introduced in order to \textit{Keep the Nigras in line}” and “had nothing to do with its deterrent effect.” Bailey, \textit{Rape and the Death Penalty: A Neglected Area of Deterrence Research}, in \textit{Capital Punishment in the United States} 336 (H. Bedau \& C. Pierce eds. 1975) (citing unpublished letter) (emphasis in the original).}\]

\[\text{\footnotesize 60 Wolfgang, \textit{Racial Discrimination in the Death Sentence for Rape}, in \textit{Executions in America}, supra note 13, at 116. A systematic analysis of 1238 convictions for rape between 1945 and 1965 examined many variables in addition to race, such as presence of a weapon and prior record of the defendant, to attempt to account for the disparate numbers of executions. The study concluded that race was the only factor that accounted for the disparities. \textit{Id.} at 114–20. The Wolfgang study is unique in its methodology and conclusiveness. It supports a larger body of prior research summarized in \textit{id.} at 110–11.}\]
of all defendants convicted of rape involving other racial combinations were executed. As a result of such disparate treatment, eighty-nine percent of the men executed for rape in this country were Black. While execution rates for all crimes were much higher for Black men than for white men, the differential was most dramatic when the crime was the rape of a white woman.

The Legacy Today

The patterns that began in slavery and continued long afterwards have left a powerful legacy that manifests itself today in several ways. Although the death penalty for rape has been declared unconstitutional, the severe statutory penalties for rape continue to be applied in a discriminatory manner. A recent study concluded that Black men convicted of raping white women receive more serious sanctions than all other sexual assault defendants. A recent attitudinal study found that white potential jurors treated Black and white defendants similarly when the victim was Black. However,

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61 Id. at 110–13; see Mann & Selva, supra note 5.
62 Wolfgang & Reidel, supra note 59.
63 Wolfgang, supra note 60, at 110–13. The NAACP-LDEF challenged the constitutionality of the death penalty partly on the grounds that the execution rate disparities for rape constituted racial discrimination. M. MELTSNER, CRUEL AND UNUSUAL 73–105 (1973). This argument was not accepted by the Supreme Court in its decision limiting the circumstances in which the death penalty could constitutionally be imposed. See Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972). A striking example of opposition to this type of argument is the response of the Supreme Court of Arkansas in 1962 to evidence that over a recent 47 year period, 95% of the executions for rape had been of Black men (19 out of 20) and 72.9% of the executions for murder had been of Black men or women (108 out of 148). See Maxwell v. State, 236 Ark. 694, 370 S.W.2d 113 (1963). The court rejected the idea that such statistics proved discrimination, concluding:

Certainly there was no evidence offered even remotely suggesting that the ratio of violent crimes by Negroes and Whites was different from the ratio of the executions. There was no testimony suggesting that the State's attorneys in the various judicial districts had not been asking for the death penalty in their prosecutions for rape, whether the accused be black or white.

65 In almost half the states today, the maximum punishment for rape is life imprisonment. JURORS, supra note 16, at 207–458.
Black defendants received more severe punishment than white defendants when the victim was white. 67

The rape of white women by Black men is also used to justify harsh rape penalties. One of the few law review articles written before 1970 that takes a firm position in favor of strong rape laws to secure convictions begins with a long quote from a newspaper article describing rapes by three Black men, who at 3 a.m. on Palm Sunday “broke into a West Philadelphia home occupied by an eighty-year-old widow, her forty-four-year-old daughter and fourteen-year-old granddaughter,” brutally beat and raped the white women, and left the grandmother unconscious “lying in a pool of blood.” 68 This introduction presents rape as a crime committed by violent Black men against helpless white women. It is an image of a highly atypical rape—the defendants are Black and the victims white, the defendants and victims are strangers to each other, extreme violence is used, and it is a group rape. Contemporaneous statistical data on forcible rapes reported to the Philadelphia police department reveals that this rape case was virtually unique. 69 Use of this highly unrepresentative image of rape to justify strict rape laws 70 is consistent with recent research showing that it is a prevalent, although false, belief about rape that the most common racial combination is Black offender and white victim. 71

67 Jurors, supra note 16, at 117-18. This difference is not solely attributable to the type of crime at issue, since many studies show that Black defendants usually receive stricter sentences than white defendants for crimes committed against whites other than rape, id. at 117, and that white jurors are generally lenient on Black defendants who commit crimes against Blacks. Note, The Case for Black Jurors, 79 YALE L.J. 531, 534 (1970). But the degree of misinformation and sensationalism associated with the accusation of rape is unique. See infra note 71.

68 Schwartz, The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape, 59 J. CRIM. L., CRIMINOLOGY, & POLICE BEHAVIOR 509 (1968). The author concludes that the increased penalties for rape did not reduce the incidence of rape.

69 M. Amr, infra note 116. Out of 343 rapes reported to the Philadelphia police, 3.3% involved Black defendants accused of raping white women, id. at 44; 42% involved complaints of stranger rape, id. at 250; 20.5% involved brutal beatings, id. at 155-56; 43% involved group rapes, id. at 200.

70 In October 1969, The Thunderbolt, the newspaper of the National States Rights Party, carried a strikingly similar image. At the bottom of the page was a drawing of the FBI's crime time clock, with a caption proclaiming: “Every thirty minutes, a woman is RAPEd somewhere in the U.S.A.” Dominating the top of the page was the phrase “THE BLACK PLAGUE,” next to a drawing of a large unkempt Black man with a knife, running toward the reader and away from a tangled pile of grass. On close examination, what appeared initially as grass was revealed as the virtually subliminal image of a partly disrobed, prone blonde white woman. This image is reproduced in L. CURTIS, CRIMINAL VIOLENCE 22 (1974).

71 In answer to the question, “Among which racial combination do most rapes occur?” 48% of respondents stated Black males and white females, 3% stated white males and Black females, 16% stated Black males and Black females, 33% stated white males and white females. Jurors,
Charges of rapes committed by Black men against white women are still surrounded by sensationalism and public pressure for prosecution. Black men seem to face a special threat of being unjustly prosecuted or convicted. One example is Willie Sanders. Sanders is a Black Boston man who was arrested and charged with the rapes of four young white women after a sensational media campaign and intense pressure on the police to apprehend the rapist. Although the rapes continued after Sanders was incarcerated, and the evidence against him was extremely weak, the state subjected him to a vigorous twenty-month prosecution. After a lengthy and expensive trial, and an active public defense, he was eventually acquitted. Although Sanders was clearly innocent, he could have been convicted; he and his family suffered incalculable damage despite his acquittal.

Another recent example is the Alabama case of Thomas Lee Hines. Hines is a young mentally retarded Black man who was accused of raping several white women. The trial judge granted a change of venue, noting, "the facts of the race of the defendant and victims have so overpowered the case as to make it appear to the community as a racial incident." Hines' trial was transferred to a nearby county, where he was convicted by an all-white jury in proceedings marked by frequent outbursts from spectators, sensationalist press coverage, and public pressure for prosecution.

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**supra note 16, at 80.** Recent victim survey data contradicts this prevalent belief; more than four-fifths of illegal rapes reported to researchers were between members of the same race, and white/Black rapes roughly equaled Black/white rapes. Bowker, * supra* note 2, at 172. In that text, there is a misprint so that the sentence reads: "nearly four-fifths of all rapes were interracial." *Id.* While the context makes clear that "intraracial" is intended, it is fascinating that this particular typographical error slipped past all proofreaders. For a discussion of rape statistics, see *supra* note 2.

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*Suffolk Superior Court Indictment No. 025027-36, 025077* (1980).


*Hines v. State*, 384 So. 1171 (Ala. Crim. App. 1980). This case was brought to the attention of the author by Stephanie Y. Moore.

*Id.* at 1183.
and extensive security to protect the courtroom participants. The appellate court granted a new trial because police behavior coupled with the degree of Hines’ retardation called into question the voluntariness of his statements to the police, and stated that the court found that the racially charged trial conditions justified a second change of venue. Hines was eventually declared incompetent for trial and committed to a state institution.

**Conclusion**

From slavery to the present day, the legal system has consistently treated the rape of white women by Black men with more harshness than any other kind of rape. The punishment for Black offender/white victim rape has ranged historically from castration, to death by torture and lynching, to executions. Today Black men convicted of raping white women receive longer prison sentences than other rape defendants. Innocent Black men also face the threat of racially motivated prosecutions.

This selective focus is significant in several ways. First, since tolerance of coerced sex has been the rule rather than the exception, it is clear that the rape of white women by Black men has been treated seriously not because it is coerced sex and thus damaging to women, but because it is threatening to white men’s power over both “their” women and Black men. Second, in treating Black offender/white

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78 Id. at 1183.
79 Id. at 1181, 1183.
81 Part of the reason for this social meaning of rape is that laws against rape originate in the conception of women as property. See S. Brownmiller, supra note 13, at 7-10, 201; L. Clark & D. Lewis, Rape: The Price of Coercive Sexuality 115-32 (1977); The Second Assault, supra note 3, at 24; Comment, supra note 2, at 924-25.

In nineteenth century cases and literature, this notion sometimes took the form of discussing women as “goods.” For example, in one rape case where a slave was accused of raping a white woman, force was an element of the crime, but since there was no evidence of force, the Alabama Supreme Court wrote:

There was, in this case, at least some evidence tending to show that the act of the prisoner was an attempt to accomplish his object by fraudulent personation of the husband.... [W]e depart from our usual course, for the purpose of inviting the attention of the legislature to this subject. Under our penal laws, one who obtains the goods of another under false and fraudulent pretenses, is held guilty...as if he had feloniously stolen them. He who contaminates female purity under like fraudulent pretenses, goes un-whipped of justice.
victim illegal rape much more harshly than all coerced sex experienced by Black women and most coerced sex experienced by white women, the legal system has implicitly condoned the latter forms of rape. Third, this treatment has contributed to a paradigmatic but false concept of rape as being primarily a violent crime between strangers where the perpetrator is Black and the victim white. Finally, this pattern is perverse and discriminatory because rape is painful and degrading to both Black and white victims regardless of the attacker's race.

PART II: THE DENIAL OF THE RAPE OF BLACK WOMEN

Who knows what the black woman thinks of rape? Who has asked her? Who cares? —ALICE WALKER

The selective acknowledgement of the existence and seriousness of the rape of white women by Black men has been accompanied by a denial of the rape of Black women that began in slavery and continues today. Because of racism and sexism, very little has been written about this denial. Mainstream American history has ignored the role of Black people to a large extent; systematic research into Black history has been published only recently. The experiences of Black women have yet to be fully recognized in those histories, although this is beginning to change. Indeed, very little has been written about rape from the perspective of the victim, Black or white,
until quite recently. 88 Research about Black women rape victims encounters all these obstacles.

**Slavery**

The rape of Black women by white men during slavery was commonplace and was used as a crucial weapon of white supremacy. 89 White men had what one commentator called "institutionalized access" to Black women. 90 The rape of Black women by white men cannot be attributed to unique Southern pathology, however, for numerous accounts exist of northern armies raping Black women while they were "liberating" the South. 91

The legal system rendered the rape of Black women by any man, white or Black, invisible. The rape of a Black woman was not a crime. 92 In 1859 the Mississippi Supreme Court dismissed the indictment of a male slave for the rape of a female slave less than 10 years old, saying:

[T]his indictment can not be sustained, either at common law or under our statutes. It charges no offense known to either system. [Slavery] was unknown to the common law...and hence its provisions are inapplicable... There is no act (of our legislature on this subject) which embraces either the attempted or actual commission of a rape by a slave on a female slave.... Masters and slaves can not be governed by the same system or laws; so different are their positions, rights and duties. 93
This decision is illuminating in several respects. First, Black men are held to lesser standards of sexual restraint with Black women than are white men with white women. Second, white men are held to lesser standards of restraint with Black women than are Black men with white women. Neither white nor Black men were expected to show sexual restraint with Black women.

The Post-Civil War Period

After the Civil War, the widespread rape of Black women by white men persisted. Black women were vulnerable to rape in several ways that white women were not. First, the rape of Black women was used as a weapon of group terror by white mobs and by the Ku Klux Klan during Reconstruction. Second, because Black women worked outside the home, they were exposed to employers' sexual aggression as white women who worked inside the home were not.

The legal system's denial that Black women experienced sexual abuse by both white and Black men also persisted, although

94 "Whites, perhaps originally to perpetuate breeding, encouraged the identity of Black males in terms of uninhibited sexuality... It seems clear that the Black male was given sexual license by the White patriarchy in exchange for his economic and political autonomy." The Second Assault, supra note 3, at 30-31; see B. Hooks, supra note 89, at 35; G. Lerner, supra note 28, at 194. The "sexual license" of course did not extend to white women. Id. at 31-33.

The comparison between masters and slaves in George v. State, 37 Miss. 306 (1859), implies that real standards of sexual restraint were applied to white men's behavior toward white women, an assumption questioned in Part III of this Note, infra text accompanying notes 138-180.

95 See supra text accompanying notes 5-17.
96 R. Staples, The Black Woman in America 40 (1973); B. Hooks, supra note 89, at 32-34.
97 See H. Gutman, supra note 91, at 390; B. Hooks, supra note 89, at 52, 56-59; G. Lerner, supra note 28, at 173-93.
98 See G. Lerner, supra note 28, at 172-81.
99 See B. Hooks, supra note 89, at 22, 71-72; G. Lerner, supra note 28, at 122; Noble, supra note 89, at 46; Beckett, Working Women: A Historical Review of Racial Differences, 9 The Black Sociologist 5 (1982). Analyses of women's situations which assume the "traditional women's role" to be that of housewife, and treat "women's" introduction into the workforce as a relatively recent phenomena, effectively deny the existence of Black women. While this denial has been pointed out in many publications, recent examples of it exist. See, e.g., Taub & Schneider, Perspectives on Women's Subordination and the Role of Law, in The Politics of Law, supra note 8, at 125-26.
100 See B. Hooks, supra note 89, at 56-59. The myths concerning Black women's promiscuity probably contributed to the sexual abuse of Black women by white employers.
101 Bell Hooks discusses newspaper articles urging the public to take action in opposition to the rape of Black women, B. Hooks, supra note 89, at 56-59. The author of this Note has been unable to find any legal literature on the rape of Black women either during or after slavery.
statutes had been made race-neutral.\textsuperscript{102} Even if a Black victim's case went to trial—in itself highly unlikely\textsuperscript{103}—procedural barriers and prejudice against Black women protected any man accused of rape or attempted rape.\textsuperscript{104} The racist rule which facilitated prosecutions of Black offender/white victim attempted rapes by allowing the jury to consider the defendant's race as evidence of his intent,\textsuperscript{105} for instance, was not applied where both persons were "of color and there was no evidence of their social standing."\textsuperscript{106} That is, the fact that a defendant was Black was considered relevant only to prove intent to rape a white woman; it was not relevant to prove intent to rape a Black woman. By using disparate procedures, the court implicitly makes two assertions. First, Black men do not want to rape Black women with the same intensity or regularity that Black men want to rape white women.\textsuperscript{107} Second, Black women do not experience coerced sex in the sense that white women experience it.\textsuperscript{108}

These attitudes reflect a set of myths about Black women's supposed promiscuity which were used to excuse white men's sexual abuse

\textsuperscript{102} See supra note 18.
\textsuperscript{103} The process that white rape victims must go through in pursuing a rape complaint has been shown to be arduous and taxing. See L. Holmstrom & A. Burgess, The Victim of Rape: Institutional Reactions 30-62 (1978) [hereinafter cited as The Victim of Rape]; Note, supra note 17, at 347-51; Comment, supra note 2, at 937-38; Comment, The Rape Victim: A Victim of Society and the Law, 11 Willamette L.J. 36, 43-49 (1974) [hereinafter cited as Comment, The Rape Victim]. The treatment by the legal system of a Black rape victim in the first half of this century was incalculably worse. See S. Griffin, Rape: The Power of Consciousness 14 (1979) (description of the treatment Billie Holiday received after having been raped at age 10).
\textsuperscript{104} Traditional common-law rules which made rape generally a difficult crime to prove protected the defendant. See infra note 159. In addition, Black women's claims were not taken seriously regardless of the offender's race. In a 1971 study on judges' attitudes towards rape victims, a judge was quoted as saying: "with the Negro community, you really have to redefine rape. You never know about them." Bohmer, Judicial Attitudes Towards Rape Victims, 57 Judicature 303 (1974). A vivid example of the judicial system's response to Black women's claims of sexual harassment is the account by a nurse published in 1912:

I remember well the first and last work place from which I was dismissed. I lost my place because I refused to let the madam's husband kiss me... I didn't know then what has been a burden to my mind and heart ever since; that a colored woman's virtue in this part of the country has no protection. When my husband went to the man who had insulted me, the man... had him arrested! I... testified on oath to the insult offered me. The white man, of course, denied the charge. The old judge looked up and said: 'This court will never take the word of a nigger against the word of a white man.'

\textsuperscript{105} See supra text accompanying notes 52-55.
\textsuperscript{106} Washington v. State, 38 Ga. 370, 75 S.E. 253 (1912).
\textsuperscript{107} See supra note 35.
\textsuperscript{108} See B. Hooks, supra note 89, at 52.
of Black women. An example of early twentieth century assumptions about Black women's purported promiscuity was provided by the Florida Supreme Court in 1918. In discussing whether the prior chastity of the victim in a statutory rape case should be presumed subject to defendant's rebuttal or should be an element of the crime which the state must prove, the court explained that:

What has been said by some of our courts about an unchaste female being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race, but we would blind ourselves to actual conditions if we adopted this rule where another race that is largely immoral constitutes an appreciable part of the population.

Cloaking itself in the mantle of legal reasoning, the court states that most young white women are virgins, that most young Black women are not, and that unchaste women are immoral. The traditional law of statutory rape at issue in the above-quoted case provides that women who are not "chaste" cannot be raped. Because of the way the legal system considered chastity, the association of Black women with unchastity meant not only that Black women could not be victims of statutory rape, but also that they would not be recognized as victims of forcible rape.

The Legacy Today

The criminal justice system continues to take the rape of Black women less seriously than the rape of white women. Studies show that judges generally impose harsher sentences for rape when the victim is white than when the victim is Black. The behavior of white

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109 Id. at 54-85; G. Lerner, supra note 28, at 163-71; J. Noble, supra note 89, at 47.
111 Jurors, supra note 16, at 167; Bienen, supra note 8, at 192.
112 The operation of traditional laws and conceptions of rape that depend on victims' prior chastity is discussed in greater detail at infra text accompanying notes 140-155.
113 LaFree, supra note 66, at 847-48. A 1968 study of rape sentencing in Maryland revealed that in all 55 cases where the death penalty was imposed the victim had been white, and that between 1960 and 1967, 47% of all Black men convicted of criminal assaults on Black women were immediately released on probation. The average sentence received by Black men, exclusive of cases involving life imprisonment or death, was 4.2 years if the victim was Black, 16.4 years if the victim was white. Howard, Racial Discrimination in Sentencing, 59 Judicature 121, 123 (1975).
jurors shows a similar bias. A recent study found that sample white jurors imposed significantly lighter sentences on defendants whose victims were Black than on defendants whose victims were white.\textsuperscript{114} Black jurors exhibited no such bias.\textsuperscript{115}

Evidence concerning police behavior also documents the fact that the claims of Black rape victims are taken less seriously than those of whites.\textsuperscript{116} A 1968 study of Philadelphia police processing decisions concluded that the differential in police decisions to charge for rape "resulted primarily from a lack of confidence in the veracity of Black complainants and a belief in the myth of Black promiscuity."\textsuperscript{117}

The thorough denial of Black women's experiences of rape by the legal system is especially shocking in light of the fact that Black women are much more likely to be victims of rape than are white women.\textsuperscript{118} Based on data from national surveys of rape victims,\textsuperscript{119} "the profile of the most frequent rape victim is a young woman, divorced or separated, Black and poverty stricken."\textsuperscript{120}

Recent victim survey data shows that of the roughly one-fifth of illegal rapes that are interracial, Black men were as likely to rape white women as white men were to rape Black women.\textsuperscript{121} The statistics concerning Black women's rape by white men, however, may be too low. Black women apparently underreport illegal rape to the police—especially rape by white men\textsuperscript{122}—and may do the same with

\textsuperscript{114} \textit{Jurors}, \textit{supra} note 16, at 106.
\textsuperscript{115} \textit{Id}. at 119.
\textsuperscript{116} See M. Amir, Patterns in Forcible Rape 11 (1971); Peters, \textit{The Philadelphia Rape Survey}, in Victimology: A New Focus, Vol. III, Crimes, Victims and Justice 186 (I. Drapkin \& E. Viano eds. 1975) [hereinafter cited as Victimology III]; Note, \textit{supra} note 17, at 343. The relatively high credibility accorded white women's accusations of rape against Black men was mitigated if the woman was known to socialize with Blacks.
\textsuperscript{118} Recent data from random citizen interviews suggest that Black women are much more likely to be victims of illegal rape than are white women. Bowker, \textit{supra} note 2, at 164; see Karmen, \textit{Women Victims of Crime: Introduction} 185, 188, in \textit{The Criminal Justice System and Women: Offenders, Victims, Workers} (B. Price \& N. Sokoloff eds. 1982).
\textsuperscript{119} See \textit{supra} note 2.
\textsuperscript{120} Karmen, \textit{supra} note 118, at 188.
\textsuperscript{121} Bowker, \textit{supra} note 2, at 172.
\textsuperscript{122} There is conflicting commentary as to whether Black women are more or less likely than white women to report rape to the police. Lee Bowker explains that the National L.E.A.A. Survey published in 1976 found that, "[w]hite rape victims were much more likely to report the crime to the police (59%) than were Black rape victims (36%)." Bowker, \textit{supra} note 2, at 173. Allen Johnson, however, claims, "the available evidence suggests that nonwhites are more likely than whites to report their assaults." Johnson, \textit{On the Prevalence of Rape in the
victim survey interviewers. Even if the victim survey data were accurate, the type of forced sex it studies is only a small fraction of the various kinds of sexual subordination to which women are subjected, some of which are available disproportionately to white men.

**Conclusion**

From slavery to the present time, the rape of Black women has been denied by the legal system. During slavery, the rape of Black women by Black men was legal. The rape of Black women by white men was frequent, legal, and a crucial weapon of white supremacy. After the Civil War, the legal system’s continued denial of the rape of Black women was manifested in discriminatory doctrinal rules and judicial language. Today Black women continue to suffer rape in disproportionate numbers, while the criminal justice system still takes the claims of Black rape victims less seriously than the claims of white victims.

**PART III: THE DENIAL OF THE SIGNIFICANCE OF SEXUAL COERCION**

The legal system and American society have acknowledged the existence and seriousness of one racial combination of rape—that

*United States, 6 STNS 136, 145 (1980). See infra notes 116 and 117, suggesting that police behavior may be an especial deterrent to Black women’s reporting. When the race of the assailant is taken into account, there is agreement that Black women tend not to report rapes by white men. In a 1971 study of rape in Oakland, California, few Black women reported being raped by white men. One respondent told the questioners: “No Black woman would report being raped by a white man to the police in Oakland. They might report it to the Panthers, but never the police.” Agopian, Chappell & Geis, Black Offender and White Victim: A Study of Forcible Rape in Oakland, California, in VICTIMOLOGY III, supra note 116, at 101 [hereinafter cited as Black Offender]. See L. CURTIS, supra note 70; see also THE RACIST USE OF RAPE AND THE RAPE CHARGE, supra note 73, at 5-6 (discussion of the rape of Black women by Alabama police during the Civil Rights movement); A. DAVIS, supra note 73, at 173 (the rape of Black women by Chicago police in 1974).

123 See infra text accompanying notes 171-178.

124 The opportunity for sexual harassment of women employees by their employers or supervisors is disproportionately available to white men, who disproportionately hold such positions of power. See A. DAVIS, supra note 73, at 197–200. To acknowledge this is not to claim that Black men do not sexually harass women; both Black and white women have complained of sexual harassment by Black men. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 30–31 (1979).
of white women by Black men. Courts and commentators justified this focus by exaggerating the trauma white women face when raped by Black men. This characterization allowed the crime of rape to be narrowly defined and treated in a way that denied to all women an effective legal shield against rape. Moreover, the myth that rape is only a crime committed by Black men against white women has obscured and deflected attention from the varied nature, pervasiveness, and influence of the sexual subordination to which all women are subjected.

**Characterizing White Women's Experiences**

Part of the justification given by white men for treating Black offender/white victim rape with special severity was that rape by a Black man felt worse, was worse, than rape by a white man. An 1889 law review note on lynching bid its readers to “consider how profoundly humiliated any woman must feel who has been the victim of an outrage of this character, and how, under existing social conditions, this humiliation must be greatly intensified by the wrong having been committed by a negro.”

White men also told white women that death was preferable to rape by a Black man. In one of the Scottsboro opinions the Alabama Supreme Court wrote, “some things may happen to one worse than death by an assassin. One of those things happened to this defenseless woman.” Thirty years later, in 1964, the Georgia

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125 See *infra* text accompanying notes 129–132.
126 See *infra* text accompanying notes 140–175.
127 While there has been virtually no recognition that Black women experience any kind of sexual coercion, the illegal rape of white women has been recognized to some extent, albeit within the limits discussed in this Part.
128 Reynolds, *supra* note 31, at 21. Note that, although the author refers to the humiliation of “any woman,” he means only white women. The notion that a Black woman could have been humiliated by a rape would have been virtually inconceivable. See notes 92–112 and accompanying text. To the extent that the definition “woman” was limited by the helpless white woman image, Black women were excluded. The stereotype of the delicate, helpless white woman has never applied and has never been applied to Black women. Part of the reason for this is that Black women have been workers outside their households from slavery to the present. See *supra* note 99. But even with the recent recognition of the introduction of women into the workforce, the notion that Black women are not feminine persists, see B. Hooxs, *supra* note 89, at 83.
130 See *supra* text accompanying notes 43–50.
131 Powell v. State, 224 Ala. 540, 551, 141 So. 201, 211 (1932).
Supreme Court described the rape of a white woman by a Black man as "a crime more horrible than death[,]... the forcible sexual invasion of her body, the temple of her soul," which "soil[ed] for life her purity, the most precious attribute of all mankind."132 In fostering racism, these characterizations presented a rationalization for the brutal murder of Black men.133 Yet they also created fear in white women and thus helped maintain their powerlessness134—both by encouraging white women’s physical dependence on white men, and by robbing women of the power to define their own sexual experiences.135

The unstated converse of these characterizations is that for white women, rape by white men is better than death and not nearly as bad as rape by Black men. Indeed, the criminal justice system in practice has virtually denied the seriousness of the rape of white women other than in the rare circumstances where the offender is a violent Black man who is a stranger to the “virtuous” victim.

**The Legal System’s Denial of Rape**

The 1897 law review article on lynching demonstrates great sympathy for the rape complainant136 and does not explicitly doubt her

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133 See Part I supra text accompanying notes 1–83.
134 It is important to acknowledge that to say that something furthers racism is not to deny that it can also be sexist. Likewise, to say that something contributes to sexism is not to deny that it can also be racist. Racism and sexism are complementary, not contradictory. For further discussion, see Part IV, infra text accompanying notes 181–233.
135 These characterizations embody two types of disempowerment. First is the disempowerment involved simply in having one’s own experience defined by someone else. Second is the disempowering content of the definitions imposed. Here, the treatment of the rape victim after the rape is that of a stigmatized, ruined woman. An early description of the purported effect of rape on a virgin is Camp v. State, 3 Ga. 417, 422 (1847), which stated that after the loss of her virginity, “all is gone: her love of justice, sense of character, and regard for truth.” This extreme stigmatization is perhaps decreasing, Sagarin, *Forcible Rape and the Problem of the Rights of the Accused, Forcible Rape*, supra note 2, at 142, but it nonetheless persists in powerful forms. The stigma is often internalized, which is also disempowering. See J. BARKAS, VICTIMS 126 (1978); Peters, *supra* note 116, at 197.
136 See *supra* note 129 and accompanying text. Reynolds argues that society’s desire to spare the white woman the extreme humiliation she suffers from public cross-examination is the force behind lynching. Reynolds, *supra* note 31, at 21. This characterization of the causes of lynching is obviously incorrect. It uses false stereotypes of white women’s extreme delicacy and the false idea that society sincerely aimed to protect white women from rape (this idea is refuted in Part III, *supra* text accompanying notes 125–180) to make lynching seem understandable and even noble.
veracity. These “feminist” attitudes are anomalous in the pre-1970s legal literature. Except for the lynching article, the legal literature on rape shows concern solely for the defendant and invariably implicitly or explicitly favors acquittal.

Until recently various rules and attitudes made rape an extremely difficult crime to prosecute. The issue of chastity, or virginity, was one such barrier. Chastity was legally relevant in rape cases for three reasons. First, in many jurisdictions it was an element of the crime of statutory rape that the victim be chaste. Second, in most jurisdictions the chastity of the rape complainant was considered probative on the issue of consent, the assumption being that a sexually experienced woman was likely to have consented to this particular act of intercourse regardless of her words or actions to the contrary. Third, evidence as to a rape complainant’s chastity was thought to bear on the woman’s general character, and, hence, on her credibility. A woman’s propensity for falsehood was assumed to increase proportionately to her sexual experience.

The concept of chastity was not race-neutral. According to governing stereotypes, chastity could not be possessed by Black women. Thus, Black women’s rape charges were automatically
discounted, and the issue of chastity was contested only in cases where the rape complainant was a white woman.

For white women, evidence of unchastity was given less weight when the defendant was Black.\(^{145}\) A blatant example of the courts' willingness to ignore victims' lack of chastity appeared in the Scottsboro opinions. The Alabama Supreme Court demonstrated its determination to affirm the defendants' convictions by its vigorous protection of the reputation and credibility of the white woman who claimed she was raped. It ruled that evidence pertaining to her marital status,\(^{146}\) her previous chastity,\(^{147}\) and her general reputation\(^{148}\) had been properly excluded as irrelevant.

A less famous but equally vivid case also illustrates this dynamic. In *Story v. State*,\(^{149}\) where a Black man was charged with the rape of a white prostitute, the Court found that her unchastity with white men was not relevant to her unchastity with Black men, commenting that: "The consensus of public opinion, unrestricted to either race, is that a white woman prostitute is yet, though lost of virtue, above the even greater sacrifice of the voluntary submission of her person to the embraces of the other race."\(^{150}\)

These rulings shielding the victim's reputation were contrary to the weight of authority at that time.\(^{151}\) Indeed, the debate in the legal literature prior to the 1970s concerned not whether evidence of the complainant's sexual history should be admissible, but rather the type of evidence that should be admissible—specific sexual acts or only the victim's general reputation.\(^{152}\)

Many feminists favor excluding evidence of the rape complainant's sexual history because the admission of such evidence reflects and

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\(^{145}\) In the 19th century, evidence of a white woman's lack of chastity sometimes convinced courts to treat Black defendants with relative leniency. *See*, e.g., Cato, a slave, v. State, 9 Fla. 163 (1860) (rape conviction of slave based on partly contradicted testimony of white prostitute set aside and new trial granted). *But see* Barnett v. State, 83 Ala. 40, 3 So. 612 (1888) (rape conviction of Black defendant on uncorroborated testimony of white prostitute upheld).

\(^{146}\) *Weems v. State*, 224 Ala. 524, 527, 141 So. 215, 217 (1932).

\(^{147}\) *Patterson v. State*, 224 Ala. 531, 536, 141 So. 195, 197 (1932).


\(^{149}\) *178 Ala. 98, 59 So. 480 (1912).*

\(^{150}\) *Id. at 104, 59 So. at 482.*

\(^{151}\) *1 Wigmore, Evidence § 200 (2d ed. 1923).*

\(^{152}\) *See Recent cases—Evidence—Admissibility of Prior Acts of Unchastity Upon Issue of Consent of Prosecutrix in a Rape Prosecution, 9 Tex. L. Rev. 98 (1930).* The author argued that the better practice was to admit evidence of prior acts rather than general reputation "in view of the gross injustice which might result from placing an innocent man at the mercy of a lewd and unscrupulous woman." *See* *Cross-examination of Prosecutrix in Rape Prosecution, 19 Ga. B.J. 95 (1956); 14 Ga. B.J., *supra* note 141.
reinforces misogynistic views of women153 and allows defendants to
discredit easily the victim's testimony.154 Yet, in the Scottsboro con-
text, other considerations are also important. The complainant was
allowed to testify without being cross-examined as to her sexual
history only because the defendants were Black. Had they been white,
such evidence would have been admitted, the reputation of the witness
discredited, and the defendants probably freed.155

Another barrier to successful rape prosecutions has been the
statutory requirements that the testimony of a rape complainant be
corroborated by other evidence.156 The corroboration requirement
was introduced "for the purpose of protecting against false
accusations."157 To justify the stricter standards of proof required
in rape cases than for other crimes, commentators claimed women

153 These include stereotypes that women are especially likely to lie and to be deluded, see supra note 142; that sexually experienced women are likely to have actually consented to sex with the man they now are accusing, see Note, supra note 17, at 41; Comment, supra note 2, at 932; Comment, The Rape Victim, supra note 103, at 41; that sexually experienced women are apt to lie, see Berger, supra note 17, at 16; Note, supra note 17, at 345; and that sexually experienced women cannot be raped, Comment, supra note 103, at 44.
155 Susan Brownmiller notes sexist attitudes manifested in the case, since the white women were threatened with vagrancy and prostitution charges, S. BROWNMIller, supra note 13, at 257-58, and since defense counsel tried to destroy the complainant's credibility by claiming she was a prostitute, id. at 254. Brownmiller's discussion of the cases is misleading and disturbing because of its singleminded focus on sexism with its attendant sympathy for the white women, its belittlement of racism, and its lack of sympathy for the Black defendants sentenced to death. Her distortions are well discussed in A. EDWARDS, RAPE, RACISM AND THE WHITE WOMEN'S MOVEMENT: AN ANSWER TO SUSAN BROWNMIller, 8-15 (2d printing 1979) and A. DAVIS, supra note 73, at 198-99. Although Brownmiller is correct that white women were under pressure to cry rape because they were often stigmatized or ostracized if they were discovered in a voluntary relationship with a Black man, A. Rose, supra note 26, at 305, these hardships on women do not justify false rape charges. Susan Griffin claims, without citation, that if a white woman discovered with a Black man did not cry rape, "she herself would be subject to lynching." S. GRIFFIN, supra note 103, at 18. This is refuted by the NAACP study cited supra at note 28, that found that only 16 out of the 4951 people lynched between 1882 and 1927 were white women. (The reasons for thelynchings were not given.) The number is so small that it is highly unlikely that lynching could have posed a meaningful threat to white women who refused to claim that sexual contact with Black men was rape.
156 See, e.g., Comment, Corroborating Charges of Rape, 67 Colum. L. Rev. 1137 (1967); Comment, Nebraska's Corroboration Rule, 54 Neb. L. Rev. 93 (1975); Comment, The Corroboration Rule and Crimes Accompanying a Rape, 118 U. Pa. L. Rev. 458 (1970); Criminal Law—Attempted Rape—Merger and Corroboration, 14 Brooklyn L. Rev. 122 (1948); Recent Criminal Cases—Rape—Corroboration of Prosecutrix, 26 J. Crim. L. & Criminology 463 (1935-36); Recent cases, 18 Ohio L. Rev. 264 (1939).
157 26 J. Crim. L. & Criminology, supra note 156, at 463. It was incorrectly thought that the number of reported rapes exceeded the number of actual rapes due to false accusations brought by deluded or malicious women. See Comment, supra note 2, 919, 931; infra note 158. It is now well known that rape is underreported, see supra note 2. The justifications for the corroboration requirement became more complex, far-fetched, and misogynist in the late 1960s, apparently through the influence of Freudian psychology, see S. BROWNMIller, supra
frequently made malicious rape charges and easily duped juries into awarding convictions.\textsuperscript{158}

One result of the chastity and corroboration rules was that rape was often a very difficult crime to prove.\textsuperscript{159} Rapes where the woman made her report too soon or not soon enough,\textsuperscript{160} rapes where the woman knew her assailant,\textsuperscript{161} rapes where the woman did not resist enough,\textsuperscript{162} rapes where the woman was sexually experienced,\textsuperscript{163} were all difficult to prosecute successfully.

The attitudes manifested in the rape laws and expressed in the legal literature extend to other areas of the criminal justice system. Police have often been extremely insensitive to rape victims.\textsuperscript{164} Rape com-
plainants have been disbelieved by police more frequently than complainants of other crimes.\textsuperscript{165}

\textit{Women's Actual Experiences}

While denial of any experience is a significant indication of powerlessness, the widespread denial of women's experiences of coerced sex is the denial of a phenomenon which deeply affects every woman's life.

The crime of illegal rape is a terrifying, traumatic experience which often has long-term damaging effects on its victims.\textsuperscript{166} Illegal rape is much more widespread than is reported to police. A recent study concluded that twenty to thirty percent of girls currently aged twelve will suffer a sexual attack during their lifetimes.\textsuperscript{167} A recent random survey of San Francisco households revealed that forty-four to forty-six percent of women in that city had been victims of rape or attempted rape.\textsuperscript{168}

Additionally, the fear and threat of rape influences many women who are never actually raped.\textsuperscript{169} It restricts movement and forces

\textsuperscript{82} (1980). The accounts of negative treatment experienced by many women become notorious and thus have a disproportionately large impact on victims' reluctance to report and on the image of the police, \textit{The Victim of Rape}, supra note 103, at 53-55. These studies do not indicate whether police sensitivity towards women of color has increased; see supra note 122.

\textsuperscript{165} In one study, the "unfounding" determination by the police for forcible rape was 18%, while for larceny it was only two percent. G. NEttLER, \textit{EXPLAINING CRIME} 45 (1974), cited in Robin, \textit{Forcible Rape: Institutionalized Sexism in the Criminal Justice System} in \textit{The Criminal Justice System and Women}, supra note 118, at 246.

\textsuperscript{166} See J. Barkas, supra note 135, 107-29; S. Brownmiller, supra note 13, 404-07; E. HiLlERMAN, \textit{The Rape Victim} 17-19, 33-40 (1976); T. McCAHll.L, L. MEYER & A. Fischman, \textit{The Aftermath of Rape} (1979); \textit{The Victim of Rape}, supra note 103; Burgess & Holmstrom, \textit{Rape Trauma Syndrome}, in \textit{Forcible Rape}, supra note 2 at 315 [hereinafter cited as \textit{Rape Trauma}]; Note, supra note 17.

\textsuperscript{167} Johnson, supra note 122, at 145.

\textsuperscript{168} Russell & Howell, \textit{Revisions/Reports: The Prevalence of Rape in the United States Revisited}, 8 Signs (forthcoming Summer 1983). The researchers concluded that there is a 26% probability that a woman will be a victim of a completed rape at some point in her lifetime, and that there is a 46% probability that a woman will be a victim of a completed or attempted rape at some point in her life, see Russell, \textit{Sexual Assault: The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females}, 7 VictimoLOGY (forthcoming 1983).

\textsuperscript{169} "I have never been free of the fear of rape. From a very early age I, like most women, have thought of rape as part of my natural environment—something to be feared and prayed against like fire or lightning." S. Griffin, supra note 103, at 3; see S. Brownmiller, supra note 13, at 449; Riger, Gordon & LeBailly, \textit{Women's Fear of Crime: From Blaming to Restricting the Victim}, 3 VictimoLOGY 274, 278-80 (1978) [hereinafter cited as \textit{Women's Fear of Crime}].
women to maintain a special wariness about the situations in which they place themselves.\footnote{A recent study found that women feared crime more than men, and that their greater fear was rooted in a fear of rape. 93\% of women expressed fear of the thought of rape. The major practical effect on women of the fear of rape is a restriction of freedom of action. \textit{Women's Fear of Crime}, supra note 169, at 282–83. The researchers concluded: "The effect of women's greater fear of crime is to produce social constraints upon them; women not heeding those constraints may be punished not only by direct victimization, but also by being blamed for their own victimization. The irony of course, is that these restrictions do not guarantee that safety." \textit{Id.} at 282–83; see Reynolds, \textit{Rape as Social Control}, 8 \textit{Catalyst} 62 (Winter 1974).}

Illegal rape is neither the only nor necessarily the most harmful kind of coerced sex for women.\footnote{An essential element of the traditional common-law definition of rape is sexual intercourse including penetration by the penis, see S. Brownmiller, \textit{supra} note 13, at 424–25; L. Clark \& D. Lewis, \textit{supra} note 81, at 130–32, 160; Bienen, \textit{supra} note 8, at 174–75; MacKinnon, \textit{supra} note 2, at 15–16; Comment, \textit{supra} note 2, at 83. Ignored by such a definition are forced oral sex, fondling, and penetration with an object, for example.} Although the definition of rape has been expanded in many statutes,\footnote{\textit{E.g.}, acts other than sexual intercourse, N.J. \textit{Stat. Ann.} § 2C:14-1 (West Supp. 1982); sexual assaults with an object, S.D. \textit{Codified Laws Ann.} § 22-22-2 (Supp. 1982).} the requirement of penetration remains in some states.\footnote{\textit{E.g.}, \textit{Idaho Code} 18-6101, 6103 (1979); \textit{Missouri Rev. Stat.} § 566.040 (1979).} Spousal rape is legal in most states,\footnote{The spousal rape exemption has been abolished in only three states (New Jersey, Nebraska, Oregon). \textit{Jurors, supra} note 16, at 196. All other states retain some version of it, based on a notion that the decision to marry implies continual consent to sexual intercourse. \textit{Id.} at 165. The exemption originated in a conception of the wife as the sexual property of the husband. Lord Hale explained, "[The] husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind into her husband, which she cannot retract." Bienen, \textit{supra} note 8, at 184, quoting M. Hale, \textit{The History of the Pleas of the Crown} 629 (S. Emlyn ed. 1778).} and its incidence is widespread.\footnote{The incidence of spousal rape is difficult to estimate, partly because it is legal in most states. \textit{Jurors, supra} note 16, at 163–66; \textit{see note} 174. However, estimates of wife-battering run as high as 50\% of marriages, R. Langley \& R. Levy, \textit{Wife Beating} 4 (1977); and most battered wives are apparently also victims of rape by their husbands, S. Schecter, \textit{Women and Male Violence: The Visions and Struggles of the Battered Women's Movement} 17, 223 (1982); L. Walker, \textit{The Battered Woman} 108 (1979).} Other forms of sexual coercion are also pervasive. The incidence of incest is difficult to calculate, but it is certainly widespread; whatever the exact incidence, there is unanimity among researchers that the victims are overwhelmingly female, the perpetrators male.\footnote{One estimate is that at least 200,000 girls a year are sexually molested, overwhelmingly by men. L. Sanford, \textit{The Silent Children: A Parent's Guide to the Prevention of Child Abuse} 83 (1980). Another source estimates the number of incest victims at one million a year. F. Rush, \textit{The Best Kept Secret: The Sexual Abuse of Children}, 2, 4–5 (1980). An estimate by the Children's Division of the American Humane Association is that a minimum of 80,000 to 100,000 children are sexually molested each year. The pattern appears to be 97\% male offenders, 92\% female victims. In the majority of the cases the molester is well-known to the child; in one quarter, the molester is a relative. The Humane Association's figures were...
women are sexually harassed on the job. Very little is done about these forms of sexual abuse, and what has been done has largely been done by women themselves, in the last decade. Widespread societal ignorance and general denial of sexual coercion by the legal system persist.

Conclusion

The legal system's treatment of rape is not designed to protect women from sexual coercion. Through discriminatory punishment, the language of opinions, scholarly writing, and the manipulation of doctrine, the legal system has implicitly defined rape so as to limit it to the rape of white women by Black men. The social meaning of rape is thus limited to a Black offender and white victim. In addition, because of the legal system's traditionally narrow definition of rape, coupled with the widespread acceptance of other forms of sexual coercion, the legal system has also implied that illegal rape is the only form of sexual abuse. In fact, both of these implications are false. The great majority of rapes of white women are committed by white men; and women are subjected to a range of sexual coercion in addition to illegal rape.

Because of the specific social meaning of rape, sole responsibility for the coerced sex of white women has been placed on the shoulders of Black men, and Black women have been ignored as rape victims.
Those who work against rape and other forms of sexual coercion must be vigilant not to support this racist social meaning. Activists must realize that the false image of rape sustained by the legal system fosters fear and resentment between white women and Black people. It is not true that efforts to fight racist abuses of rape charges necessarily deny the reality of women's experiences of sexual coercion. Nor is it correct that efforts to fight sexist denials of women's experiences of sexual coercion necessarily deny the reality of racist abuses of rape charges.

PART IV: RECASTING THE FORM OF THE DEBATE—BEYOND LEGAL REFORM

The pervasiveness of racism and its historical connection to rape raise complex issues for those who oppose sexual coercion. As leaders of the movement against rape, feminists are responsible for examining closely the implications of their actions and proposals.

The foregoing analysis raises considerations often neglected in feminist writing and thus leads to some conclusions about strategies to fight sexual coercion that differ in emphasis from other feminist work.


Various commentators have noted that white feminists often demonstrate ignorance of the racist uses of the rape charge, and have pointed out the limitations of anti-rape theories and strategies that fail to deal with issues of racism. See, e.g., A. Davis, supra note 73, at 178–82, 196–99; A. Edwards, supra note 155; The Racist Use of Rape and the Rape Charge, supra note 73; Braden, supra note 73; Does the Women's Movement Compromise the Struggle of Minorities? 4 Women's Rts. L. Rep. 27, 31 (1977); Friedman, Rape, Racism and Reality, Aegis, Summer 1981, at 14; Hare, Revolution Without A Revolution: The Psychology of Sex and Race 13, The Black Scholar, Summer 1982, at 14; Sagarin, supra note 135, at 146; Sands, supra note 75.

A fairly common analogy in feminist literature is between lynching and rape. S. Brownmiller, supra note 13, at 281 (“Rape is to women what lynching was to blacks: the ultimate physical threat by which all men keep all women in a state of psychological intimidation.”); D. Russell, The Politics of Rape 231 (1974) (“Just as lynching may be seen as the supreme political act of whites against blacks, so rape may be seen as the supreme political act of men against women.”); Karmen, supra note 118, at 196 (“Rapes serve, as other crimes against women, to remind them of their 'appropriate' place in society—beneath men, just as the lynchings of blacks by whites in the south carried the message—accept your lot in life—
The legal system has historically ignored or denied the claims of women who have been victims of rape. At the same time, women have been traumatized by the criminal justice system, few men have been convicted of rape, and women continue to be victimized by rape in appalling numbers.  

Feminist strategies to combat rape have included encouraging self-defense and protection, improving the treatment rape victims receive after their attack, and reforming rape laws so as to increase the conviction rate.  

**Improving the Treatment of Rape Victims**  

One of the most degrading aspects of rape for victims has been the treatment they receive from the criminal justice system. One  

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of the critical contributions of feminist anti-rape work has been to increase public awareness of this unsympathetic treatment. One proposal to improve the treatment rape victims receive has been to increase the representation of women who deal with rape victims within the criminal justice system.\textsuperscript{193} A second proposal has been to exclude evidence of a complainant's prior sexual experiences at trial.\textsuperscript{194}

The first proposal is a positive one as far as it goes, but placing more women in law enforcement is not in itself adequate to improve the treatment victims receive. If the women participants are all white, or have little understanding of racism, many of the problems pointed out in this Note will remain.\textsuperscript{195} Black women's rape claims will continue to lack credibility because white women share with white men notions of Black people's promiscuity and untrustworthiness.\textsuperscript{196} The special harshness reserved for Black men who are accused of raping white women will also continue.\textsuperscript{197}

\textsuperscript{193} See S. Brownmiller, supra note 13, at 434–37; Note, supra note 17, at 352.

\textsuperscript{194} See Rape and the Limits of Law Reform, supra note 191, at 22–23; The Victim of Rape, supra note 103, at 279; Rose, supra note 182, at 80; Note, supra note 17, at 353.

\textsuperscript{195} Howard, Battered and Raped: The Physical/Sexual Abuse of Women, in Fight Back!, supra note 176, at 80–81.

\textsuperscript{196} See This Bridge Called My Back, supra note 181 (especially pp. 61–101 including And When You Leave, Take Your Pictures With You). See generally Top Ranking (J. Gibbs & S. Bennett eds. 1980) (especially Cornwall, Notes From a Third World Woman 61; Gwendolyn, Righteous Anger in Three Parts: Racism in the Lesbian Community—One Black Lesbian's Perspective 70; Calderone & Charoula, The Personal is Political Revisited: An Exploration of Racism in the Lesbian Community 79); Bethel, What chou mean we, white girl? 86 CONDITIONS: FIVE, Autumn 1979 (The Black Women's Issue); Smith, supra note 87.

\textsuperscript{197} Both men and women were included in the studies of beliefs about rape, supra note 71, which showed that most people incorrectly believed the most common racial combination in rape cases was Black offender/white victim. Similarly, the study of white jurors which showed that the heaviest sentences were given to Black men accused of raping white women, supra note 67, was based on a sample of both female and male jurors. Many white feminists have been reluctant or have refused to support Black men falsely accused of raping white women. See Braden, supra note 73; Sands, supra note 75. Angela Davis eloquently exposes the contributions of several white feminists' work to the perpetuation of racism with respect to rape. A. Davis, supra note 73, 178–82, 198–99. Even more recent writings which have ideological roots in feminism contain inaccurate statements which perpetuate racism. A most striking example appears in Women and Crime in America, supra note 1. This book, published in 1981, is intended to fill the need for a text on women in the criminal justice system, id. at v.

When an interracial rape occurs today, it is most likely to be a black rapist and a white victim, which is a reversal of the historical situation that existed in the United States during the days of slavery and the decades that followed its termination. During this period, it was black women who were constantly in danger of being sexually assaulted by white men.
If increasing the number of women involved in the legal and criminal justice systems is to create a system more sympathetic to all women, it is imperative that substantial numbers of these women be Black and that all individuals working with rape victims are keenly aware of, and strongly opposed to, racism.\(^{198}\)

Another proposal for improving the legal system's treatment of rape victims has been the reform of rape statutes to exclude evidence of rape victims' sexual history from trial.\(^{199}\) Cross-examination on the details of one's sexual history, a common defense technique, is one of the victim's most traumatic contacts with the legal system.\(^{200}\) Another rationale for this proposal is that the introduction of the rape victim's sexual history as evidence reflects and reinforces misogynistic attitudes about women and sexuality.\(^{201}\)

In Michigan, where the law has forbidden the introduction of evidence of past sexual behavior since 1975,\(^{202}\) the overall experiences of victims, as reported by rape crisis center workers and criminal justice participants, seem to have improved markedly.\(^{203}\) It does not appear from the Michigan study, however, that attitudes about the right of women to be free from sexual coercion have changed as a result of the statutory change.\(^{204}\)

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198 In one recent study only about three percent of the rape victims commented specifically on the sex of the police officers who investigated their cases, although all were male; most of the victims' responses about the police were positive, although 10% had serious complaints about their treatment by police. \textit{The Victim of Rape}, supra note 103, at 51, 53-54.

199 \textit{See supra} note 194.

200 \textit{The Victim of Rape}, supra note 103, at 179-83; Note, \textit{supra} note 17, at 350-51; Comment, \textit{The Rape Victim}, supra note 103, at 45-46.

201 \textit{See} note 153.

202 Michigan's sexual assault statute, which took effect in 1975, is widely considered one of the nation's most innovative and comprehensive rape laws and has served as the model for many states. Bienen, \textit{supra} note 8, at 172. The most detailed published research on the impact of rape laws deals with Michigan. \textit{See Rape and the Limits of Law Reform}, \textit{supra} note 191. For these reasons, the discussion on reforming rape laws is limited to Michigan.

203 \textit{Rape and the Limits of Law Reform}, \textit{supra} note 191, at 68-71.

204 \textit{Id.} at 106-107.
Increasing the Conviction Rate

Another major goal of feminists has been to increase rape convictions. Law reform proposals offered to accomplish this have included limiting the admissibility of evidence of a victim's sexual history, reducing the penalties allowed for rape, and introducing degrees of rape.

In Michigan, the conviction rate for sexual assaults has increased markedly since the passage of its law making sexual history inadmissible as evidence and introducing degrees of rape. Apparently the increase is largely due to the provision limiting admissibility of prior sexual activities.

It is understandable that many white feminists initially perceive an increased rape conviction rate as a victory. Rape has been denied so consistently by the criminal justice system until so recently that any type of recognition of it by the legal system seems positive. Also, upperclass white women until recently have been fairly isolated in a private sphere in which their subordination to men has been furthered by the law's absence, so that the prospect of the law's presence in an area, seemingly acting on behalf of women, is attractive.

However, the subordination of other groups has been furthered by the law's presence, and rape laws in particular have functioned

\[205\] See note 191.
\[206\] RAPE AND THE LIMITS OF LAW REFORM, supra note 191, at 23.
\[207\] Many reformers favor reducing penalties for rape because they think the severity of traditional penalties deters juries from convicting. Bienen, supra note 8, at 173.
\[208\] S. BROWNMILLER, supra note 13, at 425; Note, supra note 17, at 355.
\[209\] RAPE AND THE LIMITS OF LAW REFORM, supra note 191, at 29-33, 62.
\[210\] Id. at 57-62.
\[211\] See supra text accompanying notes 138-165.
\[213\] The anti-rape movement began scarcely more than a decade ago, see Rose, supra note 182, at 76. Susan Griffin's essay Rape: The All-American Crime in RAMPARTS, September 1971, was one of the first major pieces published. The essay is reprinted in FORCIBLE RAPE, supra note 2, at 47. The first law review pieces that had roots in the movement against rape also appeared in the early 1970s, e.g., Note, supra note 17; Comment, supra note 2.
\[214\] See Taub & Schneider, supra note 99, at 117, 121-24. Examples cited by the authors include tort law's family immunity provisions, the marital rape exemption, and contract law's failure to deal with financial commitments relating to marriage, id. at 121-22. “For example, when the police do not respond to a battered woman's call for assistance or when a civil court refuses to evict her husband, the woman is relegated to self-help, while the man who beats her receives the law's tacit encouragement.... By declining to punish a man for inflicting injuries on his wife, for example, the law implies she is his property and he is free to control her as he sees fit.” Id. at 122.
\[216\] The criminal justice system allows women to be victimized in their homes and actively victimizes people of color. A recent survey of seven geographically diverse U.S. cities found
to further white supremacy.\^{215} In light of the racist history surrounding the legal system's treatment of rape, the goal of increasing the rape conviction rate must be examined in more detail.

Working to increase the conviction rate for rape is not necessarily a constructive tactic in the struggle against sexual coercion for several reasons. First, most pragmatically, raising the conviction rate has not been shown to have any impact on the incidence of rape, although long-term data are not yet available.\^{216} Second, given the existing disparities in punishments between whites and Blacks, an across-the-board increase would simply reproduce these disparities.\^{217} Third, the increasingly racist political climate,\^{218} and the Supreme Court's destruction of various constitutional procedures to protect defendants,\^{219} suggest that the punishment disparities are likely to increase. Fourth, to the extent these disparities implicitly indicate that men are being punished on racial grounds and not because they committed rape, the credibility of the underlying claim of sexual abuse is undermined.\^{220} Fifth, to press for convictions under rape laws suggests that women accept the narrow definitions and limited conceptions of sexual abuse that underlie those laws. Finally, to say that rape should be treated like other crimes is problematic in that it implicitly validates the way other crimes have been and are treated. The criminal justice system has radical shortcomings—the treatment,\^{221}


\^{215} See Parts I and II, supra text accompanying notes 1-124.

\^{216} F. E AND THE LIMITS oF Li.w REfoRM, supra note 191, at 27.

\^{217} See supra note 67.

\^{218} See supra note 67.

\^{219} See generally D. Bell, supra note 18; A. L. Higginbotham, supra note 13; Burns, supra note 8.

\^{216} See Rudovsky, The Criminal Justice System and the Role of the Police, The Politics of Law, supra note 8, at 242-52. For example, the shooting of civilians by police officers,
definition,\textsuperscript{222} and punishment\textsuperscript{223} of many other crimes should be deplored rather than endorsed. It has refused to protect and indeed has consistently worked against the interests of Black men, Black women, and white women.\textsuperscript{224}

The Sanders and Hines cases discussed earlier\textsuperscript{225} illustrate the risks of pressuring the criminal justice system to "do something" about specific rapes, especially rapes committed by Black men against white women. Rather than leading to apprehension of the actual rapist,\textsuperscript{226} such pressure can lead police to scapegoat an innocent Black man. This is not to argue that Black men never rape white women; but rather that, where such a rape claim is being prosecuted, white feminists must not overlook the circumstances surrounding the event in order to be certain that the prosecution is not a racial act against the wrong man in an attempt to defuse community pressures.\textsuperscript{227} Such prosecutions not only hurt Black people,\textsuperscript{228} they also divide women along color lines, and do nothing to halt rape.

Conclusion

Attempting to reform rape laws to increase convictions thus has numerous shortcomings as a feminist strategy. Improving the criminal

\textit{see supra} note 214, almost invariably goes unpunished—out of 1500 killings of civilians by police from 1960–1970, only three resulted in criminal punishment, according to a study by A. Kobler, \textit{Police Homicide in a Democracy}, 31 J. of Soc. Issues, Winter 1975, at 163–64.\textsuperscript{222}


Strong evidence suggests that Black defendants generally receive longer sentences than do white defendants for most crimes. \textit{See Jurors, supra} note 16, at 117; Owens, \textit{Looking Back Black in Blacks and Criminal Justice}, \textit{supra} note 13, 7 at 11.\textsuperscript{224}

\textit{Supra} Rudovsky, \textit{supra} note 221, at 244; Taub & Schneider, \textit{supra} note 99, at 117. Janet Howard notes that "given the history and nature of the 'justice' system, [using the legal system] can only bring small concessions to women's safety, and is more likely to strengthen the repressive, racist power of the police, the courts, and the prisons." Howard, \textit{supra} note 195, at 82.\textsuperscript{225}

\textit{See supra} text accompanying notes 74–80.\textsuperscript{226}

\textit{See Sands, supra} note 75.\textsuperscript{227}

\textit{Sagarin, supra} note 135, at 148.\textsuperscript{228}

The targeting of Black men for punishment also affects Black women. Alice Walker writes, "Whenever interracial rape is mentioned, a black woman's first thought is to protect the lives of her brothers, her father, her sons, her lover. A history of lynching has bred this in her." A. Walker, \textit{supra} note 84, at 93; \textit{see A. Davis, supra} note 73, at 173–74.
justice system’s treatment of the victim is a positive goal but does not change the fact of women’s victimization. A problem with both approaches is that they only address the problems of women who are known victims of illegal rape. This focus is insufficient. First, even if the activity forbidden by rape laws stopped, other powerful forms of women’s sexual subordination would persist. Second, given the racist content of the social meaning of rape, struggles limited to illegal rape are likely to have the racist repercussion of targeting Black men.

A response must be devised which goes beyond the formulation of rape as an extraordinary crime to which only some unlucky women fall victim, to a conception that the sexual coercion of women is pervasive, multivariate, and wholly unacceptable in every form. If women go beyond the formulation given by the legal system they may be able to escape some of the traps of racism, and claim their own lives and sexuality.

This means linking rape issues with other issues of sexual coercion such as incest, spousal abuse, and sexual harassment. It also means recognizing that rape will be treated by the criminal justice system in a racist way as long as this society is racist.

CONCLUSION

. . . Eyes that only see the bruises inflicted by men miss seeing other bruises and deep scars. — JANET HOWARD

The legal system’s treatment of rape both has furthered racism and has denied the reality of women’s sexual subordination. It has disproportionately targeted Black men for punishment and made Black women both particularly vulnerable and particularly without

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229 See supra notes 171–178 and accompanying text.
230 See Part I, supra text accompanying notes 1–83.
231 See supra notes 171–178 and accompanying text; see also Hoagland, Violence, Victimization, Violation, 15 SINISTER WISDOM, Fall 1980, at 70.
232 Susan Brownmiller observes that “If protection of the bodily integrity of all children is to be genuinely reflected in the law, and not simply the protection of patriarchal interests, then the current division of offenses (statutory rape for outsiders; incest for a member’s family) must be erased.” S. BROWNMILLER, supra note 13, at 429.
233 Howard, supra note 195, at 80.
redress. It has denied the reality of women’s sexual subordination by creating a social meaning of rape which implies that the only type of sexual abuse is illegal rape and the only form of illegal rape is Black offender/white victim. Because of the interconnectedness of rape and racism, successful work against rape and other sexual coercion must deal with racism. Struggles against rape must acknowledge the differences among women and the different ways that groups other than women are disempowered. In addition, work against rape must go beyond the focus on illegal rape to include all forms of coerced sex, in order to avoid the racist historical legacy surrounding rape and to combat effectively the subordination of women.