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Exámenes
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Índice

	<i>Página</i>
<i>“The Jury as a Democratic Check: The discrepancy between theory and practice”</i>	3
<i>“Ninth Circuit Court Upholds Collection of DNA from Parolees”</i>	7
<i>“The Rise of The Firm”</i>	12
<i>“Regulating Eugenics”</i>	17
<i>“In the Face of a CNN Lawsuit, FEMA Agrees To Allow Media Coverage of Katrina's Dead: If the Case Had Proceeded, Who Would Have Won, and Why?”</i>	22
<i>“Vote fraud in the eye of the beholder: the role of public opinion in the challenge to voter identification requirements”</i>	33
<i>“Did The Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations”</i>	38

The Jury as a Democratic Check: The discrepancy between theory and practice

As the Supreme Court has acknowledged, “the purpose of a jury is to guard against the exercise of arbitrary power- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge”. In fulfilling this
5 democratic checking function, the jury is presumed “to reflect the collective sentiments and conscience of the community”.

By convicting, the jury acknowledges that an individual’s prosecution comports with the community’s conception of justice. By nullifying or acquitting against the weight of the evidence, the jury not only protects a defendant from punishment, but also communicates to
10 the prosecutor that community values and preferences do not support prosecution of the conduct at issue. In this way, juries have the potential to legitimate criminal justice outcomes in ways that “experts, no matter how intelligent and skillful they may be” cannot.

The benefits of enhanced legitimacy can be broken down into two related considerations: the extent to which the criminal process is perceived as being fair and just and the extent to
15 which the criminal process is actually fair and just. Although all juries have the potential to affect both the perceived and actual fairness of the criminal process, whether a given jury actually realizes this potential depends largely on the extent to which its membership “is representative of the community”. Whether it convicts or nullifies, an unrepresentative jury implements only the conception of justice held by the segments of the community that it
20 represents.

Unrepresentative jury verdicts thus say nothing about the combined preferences of the community; instead, they lead prosecutors to act on information that appears to reflect the community’s desires but is in fact skewed. In addition, jury representativeness is integral to the resolution of those factual inquiries that require jurors to draw on their individual
25 perspectives and experiences; these inquiries include “whether a defendant reasonably feared for his life” and “whether a suspect was acting suspiciously” among others. Finally, unlike monoracial juries, cross-representative juries “silence expressions of group prejudice”, forcing jurors to “abandon arguments that depend on the particular prejudices or perspectives of their own kind” and to rely on those that “resonate across group lines”
30 instead. Although the Supreme Court has not explicitly commented on the deliberative benefits of representative juries, it has acknowledged the importance of representativeness, stating that the jury fails to serve its intended purposes if the pool from which it is drawn includes “only special segments of the populace or if large, distinctive groups are excluded from the pool”. Thus, more than having merely symbolic or expressive value, juries composed
35 of individuals from various racial backgrounds minimize the chances that deliberations will be racially biased and that the public will view a defendant’s conviction or acquittal as being based on race rather than on the merits of the case.

The Supreme Court declared de jure exclusion of blacks from the jury box unconstitutional as early as 1880, but its attempts during the ensuing century to root out racial discrimination,
40 except in the most blatant instances, were few and far between. In the 1986 decision of *Batson v. Kentucky* the Court fundamentally changed course when it articulated the test that currently governs challenges to the discriminatory use of peremptory challenges. Although the *Batson* Court emphasized that the Constitution does not entitle a defendant to a “petit

jury composed in whole or in part of persons of his own race”, it held that a defendant does
45 have a right to a jury selected by non-discriminatory means. Accordingly, the Court declared
that a defendant could make out a prima facie case of discrimination by showing that he was
a member of a racial group capable of being singled out and that the prosecutor had used
peremptory challenges to strike potential jurors of the defendant’s race. Once the defendant
made a prima facie showing of discrimination, the state would then be required to advance
50 race-neutral explanations for the strikes, though the Court made clear that “the prosecutor’s
explanations need not rise to the level justifying exercise of a challenge for cause”. Finally,
the court would weigh all the evidence to determine whether the defendant had proven
purposeful racial discrimination.

In light of *Batson’s* broad application but weak enforcement, it is not surprising that the
55 doctrine has had little success in protecting racial minorities from race-based strikes.

**A. Responder las siguientes preguntas siempre ateniéndose a lo expresado en el texto. Indicar
asimismo los renglones de referencia.**

1. ¿Según el texto, ¿cuál es la función del jurado y el fundamento de su existencia?

Renglón/renglones de referencia:

2. ¿Cómo se interpreta la declaración de culpabilidad por parte del jurado?

Renglón/renglones de referencia:

3. ¿Cuál es el mensaje que el jurado transmite cuando absuelve?

Renglón/renglones de referencia:

4. ¿Por qué es importante que un jurado sea representativo?

Renglón/renglones de referencia:

5. ¿Qué refleja el veredicto dictado por un jurado no representativo?

Renglón/renglones de referencia:

6. ¿Qué resolvió la CSJ en 1880?

Renglón/renglones de referencia:

7. ¿Qué se decidió en el caso *Batson v. Kentucky* sobre la selección de los miembros del jurado?

Renglón/renglones de referencia:

B. Resuma en castellano el contenido de los siguientes textos.

Thus, more than having merely symbolic or expressive value, juries composed of individuals from various racial backgrounds minimize the chances that deliberations will be racially biased and that the public will view a defendant's conviction or acquittal as being based on race rather than on the merits of the case.

Although all juries have the potential to affect both the perceived and actual fairness of the criminal process, whether a given jury actually realizes this potential, depends largely on the extent to which its membership "is representative of the community".

Ninth Circuit Court Upholds Collection of DNA from Parolees

Fuente: *United States vs Kincade (2004)*, *Harvard Law Review*

The expansion of DNA strands is an unraveling and rewrapping of helixes that biologists study with amazement and rigor. The expansion of DNA crime-lab databases, while just as steady, is generally treated with neither adequate amazement nor doctrinal rigor. Over the past decade, DNA databases have skyrocketed, covering hundreds of thousands of people who
5 have committed no crime at all.

The most obvious database expansion is the growth in the population tested, which has been justified by an increasingly expansive judicial rationale- one that allows for testing in a growing list of circumstances and for a growing list of uses. Recently in *United States v. Kincade*, the Ninth Circuit held that collecting DNA from individuals on parole is
10 constitutional. The court's greatest error was not what it decided but how it decided: by using a broad reasonableness test instead of a narrower special-needs test, the court created an unprecedented precedent for suspicionless searches conducted for pure law enforcement purposes. Kincade opened a window for an intrusion upon Fourth Amendment (*) rights not just for convicted felons but for other swaths of society as well.

15 The CODIS (Combined DNA Index System) began in 1990 as a pilot project to collect DNA samples from crime scenes in fourteen states. Congress first formally authorized the FBI to use the database for law enforcement purposes four years later and expanded the scope dramatically after 2000. The most recent significant authorization, the DNA Analysis Backlog Elimination Act of 2000 allows the FBI to collect DNA from all individuals who are convicted
20 of any of a broad list of federal crimes and sentenced to prison, parole, probation or supervised release.

In 1993, Thomas Kincade robbed a bank with a firearm, which is a federal crime. He pled guilty, served seven years in prison and then began a three-year term of supervised release. In 2002, during his supervised release, his probation officer ordered him to provide a DNA
25 sample as mandated by the DNA Act. Kincade refused to comply and challenged the constitutionality of the Act in federal district court. The district court found the Act constitutional and sentenced Kincade to four months' imprisonment and two years' supervised release for violating the terms of his earlier probation

The three-judge panel of the Ninth Circuit reversed. Judge Reinhardt authored an opinion holding the DNA Act unconstitutional under the Fourth Amendment as applied to individuals on parole and Judge O'Scannlain dissented. The Ninth Circuit reheard the case *en banc* (including Judge Reinhardt and Judge O'Scannlain) This time Judge O'Scannlain's opinion controlled. He began by analyzing the case within Fourth Amendment doctrine's traditional special needs framework, which provides a justification for "searches conducted for
35 important non-law enforcement purposes in contexts where adherence to the warrant-and-probable cause requirement would be impracticable". But instead of grounding its holding in this analysis, the Ninth Circuit opted for a broader totality-of the circumstances test. The court relied on *United States v. Knights*, in which the Supreme Court authorized the search of a probationer's home under a general reasonableness test. Judge O'Scannlain reasoned that,
40 for parolees, *Knights* left open the possibility of a broader totality-of-the-circumstances test, which can be satisfied solely by reference to law enforcement purposes.

In applying this reasonableness test, the plurality first observed that parolees have a severely diminished entitlement to privacy and are already subject to invasive procedures that would be unconstitutional if applied to society at large. It noted that blood tests are not particularly intrusive and that the collected DNA is “junk” that merely established a record of the individual’s identity. On the other side of the ledger, the government’s interests in solving and deterring crime are undeniably compelling. Judge O’Scannlain wrote: “We believe that severe and fundamental disruption in the relationship between the offender and society, along with the government’s concomitantly greater interest in closely monitoring and supervising conditional releases, is in turn sufficient to sustain suspicionless searches of this person and property even in the absence of some non-law enforcement “special need”-where such searches meet the Fourth Amendment touchstone of reasonableness...”

Judge Reinhardt’s dissent began by explaining that the list of qualifying crimes was so broad and eclectic that it is difficult to name any discernible categories of criminal activities that remain beyond the reach of the DNA Act. He noted that various state statutes have already expanded DNA collection to include all arrestees. He also expressed concern that the “junk” DNA collected will later prove to have predictive or identifying power. Judge Reinhardt objected to the plurality’s use of the totality the circumstances test. He sustained that if such test could be used to justify suspicionless law enforcement searches, the 4th Amendment would be little more than an afterthought as the government seeks to conduct more and more invasive general programs in the name of law enforcement.

With Kincade, the Ninth Circuit became the sixth federal court of appeals to approve some form of DNA collection from convicted felons. But Kincade expanded on those earlier cases in two significant ways: it broadened the population subjected to DNA testing, and it increased the uses to which DNA testing may be put. DNA collection had not been authorized for parolees. And although other courts had upheld suspicionless searches in limited circumstances, they had never done so for pure law enforcement purposes. The two types of expansion feed on each other, so that a broader testable population can be used to justify a broader rationale and- more importantly-vice versa.

() “Amendment IV: The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”*

A. Responder en detalle. Indicar renglón de referencia.

1. ¿Qué se plantea en el primer párrafo?

2. ¿Qué opina el autor sobre la sentencia dictada en *U.S. vs. Kincade*?

3. ¿Cómo evolucionaron los bancos de datos de ADN en los Estados Unidos de América?

4. ¿Cómo fueron los hechos en el caso *Kincade*? ¿Qué se resolvió en primera instancia?

5. ¿Qué sucedió en segunda instancia?

6. Mencionar los fundamentos que justifican la opinión de:

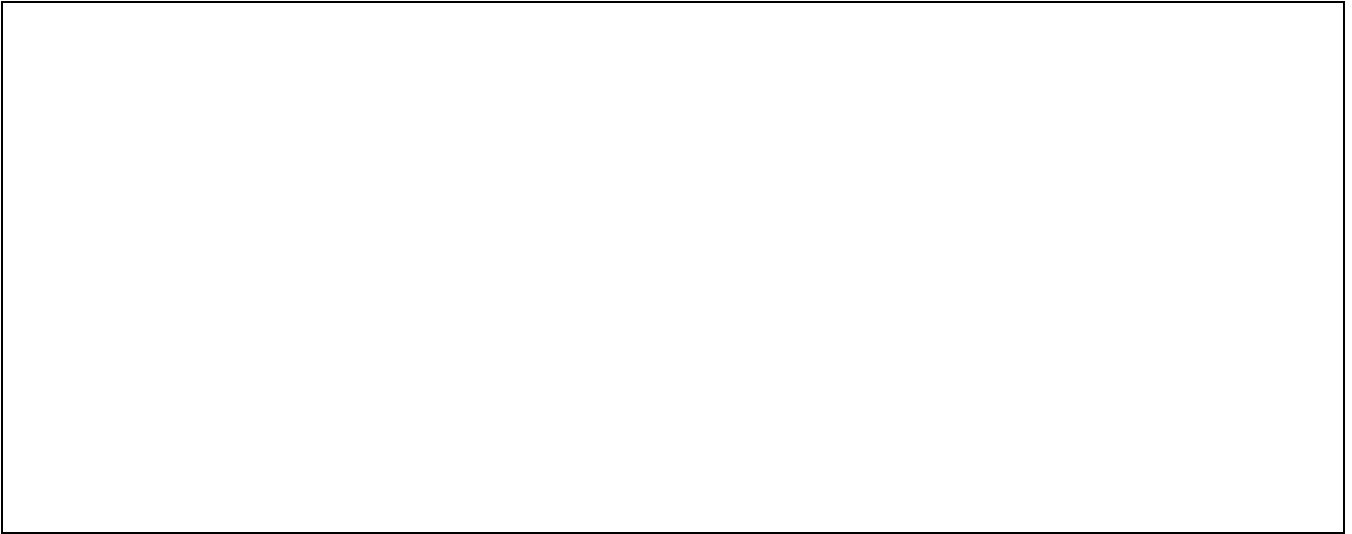
Juez Reinhardt	Juez O'Scannlain

7. ¿Cuál es el tema central del artículo?

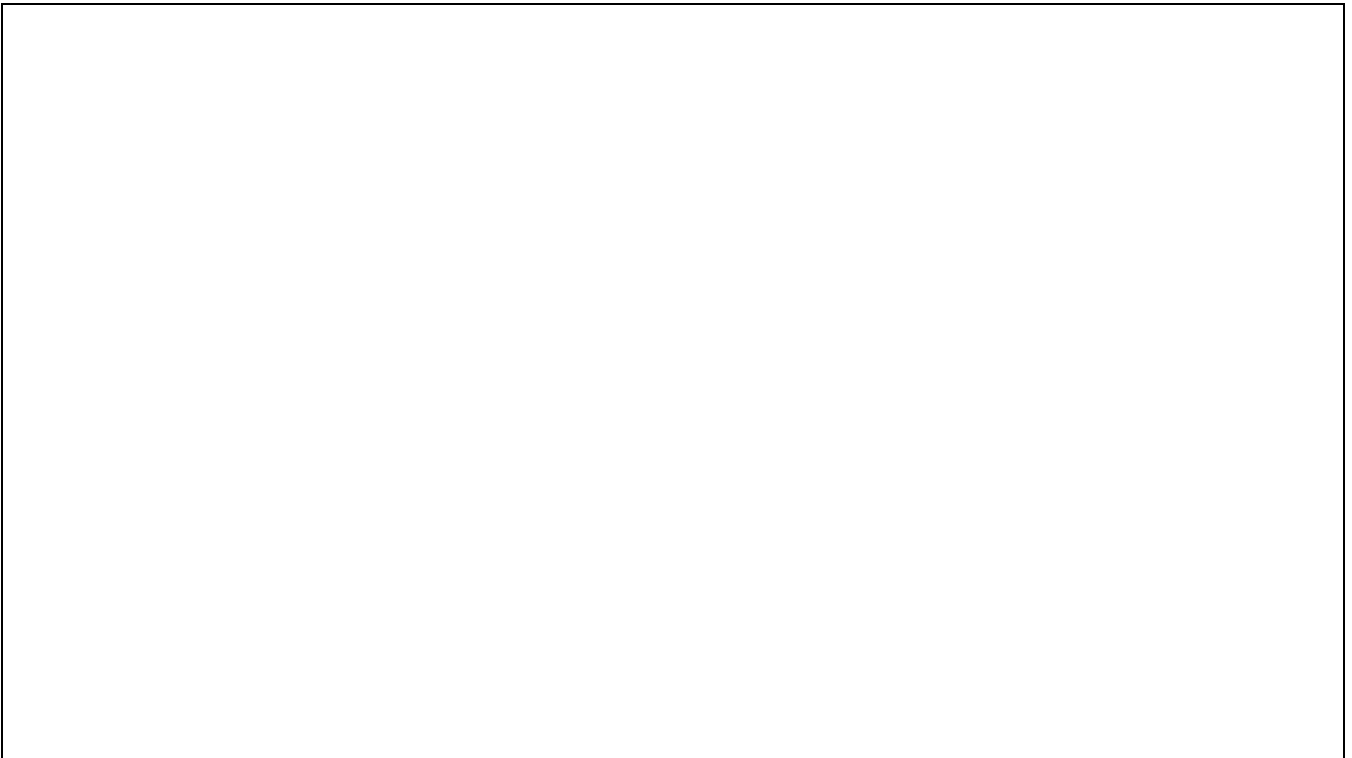
B. Elaborar en castellano una versión de las siguientes oraciones:

1. "In applying this reasonableness test, the plurality first observed that parolees have a severely diminished entitlement to privacy and are already subject to invasive procedures that would be unconstitutional if applied to society at large." (renglones 42-44).

2. “But Kincade expanded on those earlier cases in two significant ways: it broadened the population subjected to DNA testing, and it increased the uses to which DNA testing may be put.” (renglones 64-66).



3. “And although other courts had upheld suspicionless searches in limited circumstances, they had never done so for pure law enforcement purposes. The two types of expansion feed on each other, so that a broader testable population can be used to justify a broader rationale and- more importantly-vice versa.” (renglones 67-70.)



The Rise of The Firm

HLR March 2006

Introduction

Economic activity in modern societies is dominated not by individuals, but by firms that own assets, enter contracts and incur liabilities that are legally separate from those of their owners and managers. A universal characteristic of these modern business firms is that they
5 enjoy the legal power to commit assets that bond their agreements with their creditors and correlatively to shield those assets from the claims of their owners' personal creditors. This legal characteristic which we previously termed *affirmative asset partitioning* and which we here call *entity shielding* - has deep but largely unexamined roots in the history of Western commercial law. In this Article we analyze, in economic terms, the evolution of
10 commercial entity shielding. Our object is not only to understand the past but also to shed light on the foundations of modern business entities and on their likely course of future development.

Previous work on the legal history of firms has focused on limited liability- a form of *owner shielding* that, by protecting personal assets of firm owners from the claims of firm
15 creditors, is the functional inverse of entity shielding. Although the matter is complex, we believe that this emphasis is misplaced. While limited liability has evident and important functional complementarities to entity shielding, it is neither necessary nor sufficient for the creation of business firms as separate and distinct economic actors. Firms can prosper without limited liability, but significant enterprises lacking entity shielding are largely
20 unknown in modern times.

...

We begin by describing entity shielding and outlining its economic benefits and costs. We then conduct our historical survey. We conclude by describing the relationship between the economics of entity shielding and the policy challenges that will shape the future evolution
25 of the commercial firm.

II. Asset Partitioning and Entity Shielding.

A variety of sanctions have been used across history to enforce contracts, including debtor's prison and enslavement. The principal sanction employed by modern legal systems, however is permitting an unpaid creditor to seize assets owned by the defaulting promisor.
30 When an individual enters into a contract, modern law in effect inserts a default term by which the individual pledges all his personal property to bond his performance. A similar legal rule applies to business corporations: unless the contract states otherwise, all assets owned by the corporation bond its obligations. Individuals (or rather, their personal estates) and corporations are thus both examples of *legal entities*, a term we use to refer to legally

35 distinct pools of assets that provide security to a fluctuating group of creditors and thus can be used to bond an individual's or business firm's contract.

Special legal rules, which we term rules of *asset partitioning*, are required to determine which entities bond which contracts, and which assets belong to which entities. Often, the asset partitioning between entities is complete: the creditors of one entity may not levy on
40 assets held by another. But asset partitioning can also be partial, as in the modern general partnership: personal creditors of partners may levy on firm assets, but only if the partnership creditors have first been paid in full. As this example suggests, the separation between the assets of a commercial firm and those of its owners comes in two forms, depending on which set of assets is being shielded from which group of creditors. We label
45 the two forms *entity shielding* and *owner shielding*.

A. *Entity Shielding as the Foundation of Legal Entities.*

The term *entity shielding* refers to rules that protect a firm's assets from the personal creditors of its owners. In modern legal entities, entity shielding takes three forms:

Weak entity shielding grants firm creditors priority over personal creditors in the division of
50 firm assets, meaning that the personal creditors of owners may levy on firm assets, but only if the firm creditors have first been paid in full. This rule characterizes the modern general partnership.

Strong entity shielding adds a rule of *liquidation protection* to the protections of weak entity shielding. Liquidation protection restricts the ability of both firm owners and their
55 personal creditors to force the payout of an owner's share of the firm's net assets. The restriction on firm owners is conceptually distinct from the restriction on personal creditors, but, for reasons we will explore, these traits usually come paired. The modern business corporation provides a familiar example of strong entity shielding: not only do corporate creditors enjoy a prior claim to the corporation's assets, but they are also
60 protected from attempts by a shareholder or his personal creditors to liquidate those assets.

Complete entity shielding denies non-firm creditors- including creditors of the firm's (beneficial) owners, if any- *any* claim to firm assets. Common contemporary examples of entities with this trait include nonprofit corporations and charitable trusts. The personal
65 creditors of the managers and beneficiaries of such an organization do not enjoy any claim to its assets, which only bond contractual commitments made in the name of the organization itself.

All entity forms used by modern commercial firms exhibit entity shielding. And entity shielding, unlike owner shielding can be achieved only through the special property rules of
70 entity law. For this reason, we believe that entity shielding is the sine qua non of the legal entity, and we divide legal entities into *weak entities*, *strong entities* and *complete entities* based on the degree of entity shielding they provide.

A. Responder.

1. ¿Qué se afirma en la primera oración?

2. ¿Cuál es la característica universal a que se refiere la segunda oración? ¿Cómo se la denomina?

3. ¿Cuál es el concepto inverso de *entity shielding*? ¿Qué relación puede establecerse entre estos dos conceptos? (Indicar renglones de referencia).

Renglones de referencia:

4. En la parte II, ¿qué sanciones se mencionan a causa del incumplimiento contractual? (Indicar renglones de referencia).

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Renglones de referencia:

5. ¿Cuál es la regla del derecho moderno que se aplica tanto a las personas físicas como a las sociedades anónimas en materia contractual? (Indicar renglones de referencia).

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Renglones de referencia:

6. ¿Cómo se entiende el término '*asset partitioning*' en el contexto dado? ¿Cuántos tipos hay? (Indicar renglones de referencia).

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Renglones de referencia:

7. ¿A qué se refiere el término '*entity shielding*'? ¿Cómo se clasifica? Explicar cada uno de los tipos. (Indicar renglones de referencia).

Renglones de referencia:

B. Expresar en castellano las oraciones subrayadas en el texto.

1. "Our object is not only to understand the past but also to shed light on the foundations of modern business entities and on their likely course of future development." (Renglones 10 - 11).

2. "As this example suggests, the separation between the assets of a commercial firm and those of its owners comes in two forms, depending on which set of assets is being shielded from which group of creditors. We label the two forms *entity shielding* and *owner shielding*." (Renglones 41 - 44).

Regulating Eugenics

Harvard Law Review April 2008

Commentators have recognized that the constitutional law pertaining to modern reproductive techniques is underdeveloped and undertheorized. In many instances, the law lags well behind technological realities and possibilities. Although we might expect and perhaps desire the *law* to be behind the state of the art, it is troubling that *legal thinking* has not offered
5 thorough analysis of existing and near-future reproductive technology, particularly because such technologies have received considerable attention in political philosophy departments.

For example, respected liberal moral philosophers have recently argued in favour of “liberal eugenics”. This term is somewhat of a misnomer because liberal eugenics has almost nothing to do with the eugenics of the twentieth century. Liberal eugenicists reject coercive measures
10 like state-sponsored sterilization. Instead, they typically assert that it is permissible (and perhaps praiseworthy) for individuals to voluntarily determine their children’s genetic endowment.

The ethical debate surrounding liberal eugenics tends to eclipse the legal debate over the constitutionality of regulating the voluntary use of new reproductive technologies, including
15 genetic engineering. This focus is short-sighted because even if society determines that liberal eugenics is pragmatically bad or morally wrong, constitutional law could easily frustrate attempts to regulate it. The focus is also unexpected because eugenics and reproductive freedom are not new ideas in the United States. Congress, the states and the Supreme Court have dealt with eugenics and reproductive technologies before.

20 This Note explores the limits of the state’s power to regulate eugenics. There are two relevant and largely mutually exclusive legal doctrines: one emphasizing substantive due process concerns and the other emphasizing the use of the police power to protect public welfare. Analysis under the substantive due process doctrine would sharply limit the state’s power to regulate eugenics, while a similar analysis under the police power doctrine would
25 allow eugenics regulating largely as the state sees fit. Because the two doctrines offer conflicting conceptions of state involvement in eugenics, because constitutional precedent offers little or no guidance to decide which doctrine is more relevant, and because both doctrines are amorphous and heavily informed by moral reasoning (if not decided on moral instinct), this Note turns to political philosophy and ethics to help decide what the
30 constitutional limits on state regulation of eugenics should be.

. . .

The Liberal Eugenics Movement

The twenty-first century has produced a form of eugenics markedly different from twentieth-century eugenics. The movement is called ‘liberal eugenics’ because it advocates for genetic
35 modification of humans on liberal political grounds. Genetic modification includes everything from screening for genes that cause serious disabilities, like Tay-Sachs disease to genetically engineering smarter children. Liberal eugenics, proponents argue, is founded on traditional liberal values of pluralism, respect for personal autonomy and egalitarianism.

40 Although different philosophers take “liberal eugenics” to mean somewhat different things, it is possible to offer a largely coherent picture of liberal eugenics. First, liberal eugenics is based solely on voluntary choices by parents. Second, it countenances the use of genetic techniques to treat or remove disability or enhance ability in one’s unborn children. Third, such interventions must be reasonably calculated to add to the possible set of life choices that the child will have or augment the child’s ability to pursue her preferred life path. For
45 example, genetically engineering a child to be stupid but strong does not fall within liberal eugenics, but inserting a gene that will only improve strength does.

Professor Rawls, the founder of modern liberal political philosophy, endorses liberal eugenics in *A Theory of Justice*. Professor Rawls’s argument is simple: a rational actor wants to ensure that her descendants have the capabilities to pursue their preferred plans of life. And because
50 enhancing one’s children’s natural talents neither infringes on others’ liberty nor makes anyone worse off, “society is to take steps at least to preserve the general level of natural abilities and to prevent the diffusion of serious defects.”

Professor Dworkin expands on Professor Rawl’s point, creating an ethical individualist account of morality. First, “it is objectively important that any human life, once begun,
55 succeed rather than fail”. Second every person has the right to “define, for him, what a successful life would be”. Given these two precepts, society should have no qualms about enhancing the capabilities of its children so that they may have a greater choice of life paths and better odds at succeeding at whatever they choose to do. Indeed, morality requires that society do so.

60 Professors Allen Buchanan, Dan W. Brock, Norman Daniels and Daniel Wikler offer a more thorough and nuanced position in the Rawlsian vein: genetic enhancements are morally permissible and laudable, while genetic interventions to prevent disabilities are morally obligatory. They begin by discerning that arguments against liberal eugenics often are misinformed by notions of genetic determinism. Noting that genes do not define destiny, but
65 rather that an individual is made up of the interaction between genes and environment, they argue that providing a child with superior genes is no different than providing a child with a superior education. They realize that what makes for the “best” life is a matter left for personal decision, but insist that some “enhancements of capacities and abilities... are ... plausibly a benefit from nearly any evaluative perspective” and corresponding losses of
70 capacities and abilities are unquestionably harms. Parents should be allowed to use eugenic methods to secure those enhancements and avoid those harms, they argue. Furthermore, they claim, justice requires genetic treatments for disabilities to ensure equal opportunity for all - it is not fair that some people have more life choices or easier lives simply because they won the genetic lottery.

75 The three major scenarios in which liberal eugenics should not be permitted, according to Professors Buchanan, Brock, Daniels and Wikler are when liberal eugenics will “be collectively self-defeating and thus harmful or wasteful for everyone,” when it will be available only to the rich, and when it risks will outweigh its benefits. Additionally, the authors acknowledge serious concerns about the possibility that liberal eugenics might exclude disabled citizens
80 from society and propose hortatory requirements to ensure that eugenics policies avoid this result. Liberal eugenics, in the authors’ view, devalues disability, not the disabled.

...

A. Responder.

1. Según el primer párrafo, ¿cómo ha evolucionado el Derecho Constitucional respecto de las técnicas reproductivas? ¿Qué problema se plantea?

2. Según el segundo párrafo, ¿qué sostiene y qué rechaza la ‘eugenesia liberal’?

3. ¿Qué relación existe entre el debate ético y el debate jurídico? ¿Qué críticas han surgido al respecto?

4. ¿Cuáles son las doctrinas que se mencionan con referencia a los límites del poder del Estado para regular la eugenesia? ¿Qué efectos tendrían?

5. ¿A qué se debe la denominación 'eugenesia liberal'?

6. ¿Cuáles son sus características?

B. Completar los cuadros con las opiniones de los siguientes Profesores: (Indicar renglones de referencia).

Professor Rawls

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-

Renglón/nes:

Professor Dworkin

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Renglón/nes:

Professors Buchanan, Brock, Daniels and Wikler

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-
-
-
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Renglón/nes:

In the Face of a CNN Lawsuit, FEMA Agrees To Allow Media Coverage of Katrina's Dead: If the Case Had Proceeded, Who Would Have Won, and Why?

By Julie Hilden

Last Friday, September 9, CNN filed suit against the Federal Emergency Management Agency (FEMA). CNN challenged, as a First Amendment violation, FEMA's policy to prevent media coverage of the victims of Hurricane Katrina.

5 The pressure had, at first, been described as a "request." This move, alone, raised First Amendment hackles - with critics claiming this is just the kind of direct content control that government constitutionally cannot impose on the media.

Doubtless feeling their speech rights to be threatened, many media outlets rightly refused to honor that request: For instance, photos of floating bodies, and cloth-covered bodies on land, ran in the *New York Times* and other mainstream media.

10 Perhaps for this reason, on Friday morning, the "request" was converted into a formal "zero access" policy. Announcing the policy, were the director of the federal relief effort, Army Lt. Gen. Russell Honore, and New Orleans homeland security director Terry Ebbert.

15 On these facts, CNN sued in federal court in Houston. U.S District Judge Keith Ellison granted a temporary restraining order (TRO) against enforcement of the policy, until a full hearing could be held the next day.

But the next day -- Saturday, September 10 - before the judge could rule on the matter, the government reversed itself, and retracted its policy.

20 If the government had stuck to its policy, would it have lost in court? Very probably - especially since it made the mistake of converting its "request" into an outright ban. But CNN would still have had the burden of proving its case to permanently prevent enforcement of the policy.

The Initial Hurdle: Proving State Action

25 By converting its request into an all-out ban, the government hurt its own case in court - perhaps fatally.

30 Without an outright ban, CNN would have been faced with the initial hurdle of proving that the pressure was strong enough here to count as "state action." Constitutional rights are enforceable against government actions, and generally not against government speech, except insofar as that speech has the force of law.

And there's a good reason for that: Government, generally, ought to be able to say its piece, too, to try to influence the citizenry -- and even the media -- without getting sued simply for articulating its views.

Free government speech, too, is essential in a democracy.

35 Before the government's request turned into a zero-access policy, was it already "state action"? Or, put another way, did FEMA's words have the force of law? That depends on whether FEMA's agents enforced them.

Did FEMA truly "request" the media to desist, as a spokesperson's email said? Or was it telling them, in no uncertain terms, to do so?

- 40 And what happened if a particular photographer refused to comply? Were photographers kept off FEMA boats unless they promised to follow FEMA rules? Did FEMA's coordination of the rescue efforts otherwise create pressure to comply - with promises *not* to photograph the dead, traded for access?

Answers to questions like these would have been needed, but the government's
45 express declaration of a zero access policy mooted the need for such factual inquiries.

Why CNN's Suit Against the "Zero Access" Policy Was Extremely Strong

Once the government itself had resolved the "state action" question, CNN's case was extremely strong - for several reasons

- 50 First, as CNN pointed out, the policy was what is known as a "prior restraint": Rather than punishing violations through the criminal or civil law, the government was ensuring, by denying access, that journalists had no means to cover retrieval of bodies in the first place. The law's extremely strong preference is to allow photographs to take pictures, and writers to write, first - and to let the
55 government try to punish them, based on the specific facts, later.

Second, this is the kind of speech that the First Amendment was written to protect. There's no denying that Katrina has been a huge political bombshell. And the Supreme Court has many times said that speech on political issues is at the very core of the First Amendment. Freedom of the press embodies that principle
60 by protecting the media's ability to expose the secrets of government and inform the American people - as Justice Black suggested in his concurrence in the Pentagon Papers case.

What If There Had Been No "Prior Restraint" Issue Here?

CNN's case, for these reasons, was too strong for FEMA to overcome, once the
65 request had been converted into a ban. Courts almost never approve prior restraints.

But what if, instead of mandating a zero-access policy, the Katrina responders had convinced Congress to pass civil or criminal penalties for taking any photographs of any dead body, if the photos were procured without the next-of-kin's consent?

- 70 There would not be a prior restraint issue. And there would be at least some precedent: Some state laws keep autopsy photos private, for instance. For these reasons, the First Amendment issue, in this hypothetical situation, would be more difficult than in the actual case CNN brought.

Amendment 1 - Freedom of Religion, Press, Expression. Ratified 12/15/1791.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

A. Responder según el texto.

1. ¿Qué conflicto se planteó entre la CNN y la FEMA? ¿Por qué razones?

2. ¿Cómo procedieron los medios en esta situación? ¿Por qué se hace referencia a la Primera Enmienda?

3. ¿Qué medidas se tomaron como consecuencia de esta conducta?

4. ¿Qué sucedió en instancias judiciales?

5. ¿Qué hipótesis se plantea en el párrafo comprendido entre los renglones 19 y 22?

6. ¿Cuál es la importancia de la existencia de una 'state action'? ¿En qué afecta el ejercicio de los derechos constitucionales?

7. ¿Cómo puede definirse -según el contexto- el concepto de 'prior restraint'?

8. ¿De qué otra forma podría haberse manejado el conflicto si no hubiera habido 'prior restraint'?

The Criminal Defense Attorney Facing Prospective Client Perjury

Introduction

The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) create an obligation for lawyers to disclose to the tribunal when perjured testimony has been or may be introduced. The problems of identifying such perjury and the obligations that arise from Model Rule 3.3 are varied and complex. Client perjury puts the criminal defense attorney in an unenviable position. It creates a tension between the duty of zealous advocacy and the duty of candor toward the court.

Dean Monroe Freedman famously presents this problem in terms of the "perjury trilemma." Dean Freedman notes that lawyers face three obligations in performance. The first two stem from the important, almost sacred, attorney client relationship. First, there is the duty to investigate a client's case. As Dean Freedman argues, "in order to give clients the effective assistance of counsel to which they are entitled, lawyers are required to seek out all relevant facts." Second, there is the obligation of zealous client advocacy. These are potentially at odds with the third duty, the obligation of lawyers to the court. Lawyers are officers of the court and hold certain responsibilities as such. They have specific requirements imposed upon them in such a capacity that cannot be forsaken.

Disclosure of potential client perjury threatens the relationship between an individual accused of a crime and their one and only representative in the criminal justice system. "[T]o convert the defendant's only champion into yet another member of the state's legions seems an unnecessary and offensive step."

Dean Freedman argues that only two of these three obligations can be met at any given time. So which of the three should go? In our adversarial system, the relationship between a criminal defense attorney and her client is special. The first and second obligations are essential for zealous advocacy. The third, however, is essential for lawyers as participants in the judicial system as a whole. This creates a complicated and difficult situation for a criminal defendant attorney.

. . .

I. CONSTITUTIONAL DUTIES OF CRIMINAL DEFENSE ATTORNEYS

The interaction of a defendant's constitutional rights with the responsibilities of his lawyer to avoid presenting false evidence or making material misstatements of fact forms the basis of this Note; namely, what does a lawyer do when she believes that her client may commit perjury at his criminal trial? As discussed below, this question has both a constitutional and an ethical component. The constitutional question is whether the actions an attorney takes will deprive her client of either effective assistance of counsel or due process of law. State laws regarding the professional conduct of attorneys form the ethical component of the criminal defendant perjury problem.

The issue itself has yielded a multiplicity of approaches and decisions in the last quarter-century, but none has provided a definitive answer on the topic. The thorniness of the question should not, however, prevent its careful study and a deliberative approach to the topic. When do the actions of an attorney who acts upon the potential perjury of her criminal defendant client violate the client's federal constitutional rights?

Right to counsel have become enforceable against the states. In addition, the Supreme Court has recognized certain other rights as corollary to and emanating from those granted by the Fifth and Sixth Amendment, including the right of a criminal defendant to testify in his own defense.

In *Nix v. Whiteside*, the Court addressed the question of whether a lawyer's refusal to allow his client to perjure himself was ineffective assistance of counsel. In *Nix*, the defendant was charged with murder and claimed self-defense. The defendant, in his first interview with counsel, said that he did not see a gun in the decedent's hand but believed that there was one. The defendant repeated this story until just before trial, when he first claimed that he in fact saw something "metallic." After his counsel inquired about this change, he responded that "[i]f I don't say I saw a gun, I'm dead." Counsel then told the defendant that if the defendant testified about seeing something metallic, counsel would inform the court of the perjury and testify against the defendant as a rebuttal witness. The defendant then testified that he did not see a gun in the decedent's hand, and he was convicted. He challenged his conviction on the grounds that his lawyer's threats constituted ineffective assistance of counsel in that they deprived him of a fair trial. The Eighth Circuit Court of Appeals vacated the defendant's conviction on the grounds that the attorney's "threatened violation of client confidences breached the standards of effective representation." The Supreme Court reversed, holding, among extremely broad dicta about the values of professional responsibilities and the justice system, that the defendant could not claim ineffective assistance because he had "no 'right' to insist on counsel's assistance or silence" in the commission of perjury.

This decision is consistent with *Nix* in that here, counsel did not have any objective reason to believe that the defendant intended to perjure himself.

The *Wilcox* court eventually brought up the question "whether an attorney representing a defendant in a criminal case must, or indeed may, disclose his client's intentions to perjure himself. . . ." but shied away from the answer. Therefore, taken together, *Nix* and *Wilcox* stand for the proposition that there is no Sixth Amendment violation when a lawyer refuses to allow her client to testify in a criminal trial when she knows, not just suspects, that the client will perjure himself.

What an attorney should do with a perjurious client, the court admitted that the result was "unhappy" and anomalous, but that "the fundamental prerequisites of a fair trial have been irretrievably lost." "If in truth the defendant has committed perjury ... she does not by that falsehood forfeit her right to fair trial." *Lowery* indicates that, where counsel interjects herself and notifies that court that she believes the defendant will commit perjury, her action so prejudices the court against the defendant that it produces a due process violation. It is important to note that, while *Lowery* was decided pre-*Nix*, it was neither overruled nor directly addressed in that case.

Nix, *Wilcox*, and *Lowery* together create a basic framework for understanding how the Constitution intersects with ethical rules and canons. A lawyer may threaten to withdraw or to testify as a rebuttal witness in order to ensure that the client will not perjure himself without violating the Sixth Amendment when she knows that her client intends to perjure himself. However, when she only suspects, but does not know that her client will perjure himself, she risks violating the Sixth Amendment when she threatens to take such actions. Finally, counsel may violate her client's right to due process if she discloses to the court that she believes her client to be perjuring himself.

. . .

A. Responder.

1. ¿Qué problemática surge en torno a la norma 3.3 de las 'Model Rules'?

2. ¿Por qué Freedman plantea este problema como un 'trilema'?

3. ¿Cómo se relacionan los derechos constitucionales del acusado y las responsabilidades profesionales del letrado?

4. ¿Qué tema se abordó en el caso *Nix v. Whiteside*?

5. ¿Cómo se desarrollaron los hechos en dicho caso?

6. ¿Cuál fue la sentencia en primera instancia?

7. ¿Qué resolvió la Cámara de Apelaciones y luego la Corte Suprema?

[Empty rectangular box for answer]

8. ¿Qué problema planteó el caso 'Wilcox'?

[Empty rectangular box for answer]

9. ¿Qué se debatió en el caso 'Lowery'?

[Empty rectangular box for answer]

10. ¿En síntesis, ¿cuál es la importancia del marco que brindan los tres fallos mencionados anteriormente?

11. ¿Qué expresa el autor con la siguiente afirmación?

"[T]o convert the defendant's only champion into yet another member of the state's legions seems an unnecessary and offensive step." (Renglones 19-20).

Fuente: Harvard Law Review (Ansolabehere & Persily)

Vote fraud in the eye of the beholder: the role of public opinion in the challenge to voter identification requirements

“Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (*per curiam*)

The current debate over the constitutionality of laws mandating photo identification for voters presents a series of largely unanswered, and in some respects, unanswerable, empirical questions. For the most part, the parties to the litigation culminating in the case currently before the Supreme Court, *Crawford v. Marion County Elections Board*, have speculated about the number of illegal votes cast and the number of legal voters who would be prevented from voting, were voting conditioned on the production of a driver’s license or some other form of state-issued voter identification. When critics of voter ID requirements point to the lack of prosecutions or reported incidences of voter impersonation fraud, defenders of such laws reply, in part, that successful fraud goes undetected. When defenders of voter ID argue that such laws lead to very few people being turned away from the polls or having their votes go uncounted, critics respond that even a violation of the voting rights of a few is constitutionally impermissible, and that precious little data exist to assess the impact of such laws on the currently voting population or the deterrent effect it might have on future voters. With the scarcity of empirical findings to settle some of the factual issues central to this debate, there is great risk that the Court will resign itself – as it hinted it might in *Purcell v. Gonzalez*, quoted above – to its intuition that “fear” of election fraud “drives honest citizens out of the democratic process.” This intuition, however, presents a testable empirical proposition, which this Essay attempts to evaluate based on new survey data that assess the popular perception of election fraud and the likelihood that such beliefs lead to voter disengagement.

(. . .)

In this Essay, we do not endeavor to assess the extent of actual fraud or the likelihood of vote denial under a photo identification regime, but we consider those to be the central empirical questions that should guide the decision over the constitutionality of voter ID laws. The Court should not seek refuge in this field, as it has in others, in putative conventional wisdom as to the alleged harms caused by widespread perceptions of a defect in American democracy or the ability of voter ID laws to address them. That conventional wisdom is wrong, we argue, and should not substitute for the admittedly challenging predictive judgments as to the greater constitutional threat posed by actual fraud or by attempts to prevent it.

(...)

VOTER IDENTIFICATION AND FEARS OF FRAUD

35 Not only did the dictum in *Purcell* posit that fears of vote fraud will lower citizen
engagement, but the Court appeared to assume that voter identification laws, at
least to some degree, will lessen those fears and bolster voter confidence in
elections. Even if such fears do not reduce people's likelihood of voting, one might
still say that voter ID laws are worth supporting if they bolster public confidence.
40 However, the data that exist on the relationship between voter ID laws and fears of
fraud do not support even this more modest argument. We test this claim in three
ways. First, we measure the effect of statewide frequency of the use of voter
identification on individual participation rates. Second, we examine whether those
who were asked to show photo identification in 2006 in fact had more confidence in
45 the process in 2007. Third, we examine whether residents in states with stricter
identification requirements for voting, in fact, tend to think fraud happens less
frequently.

(...)

The data demonstrate no relationship between either individual level or aggregate
50 rates of voter identification and perception of fraud. The correlations between
beliefs about Voter Fraud and Vote Theft and the incidence of voter identification
are very small and statistically indistinguishable from zero in both samples. In the
2007 survey, the correlations between an individual's showing identification in 2006
and belief in Voter Fraud and Vote Theft were $-.01$ and $.03$, respectively. In the
55 same survey, the correlation between the percentage of people in a state asked to
show voter identification and belief in Voter Fraud and Vote Theft were $.03$ and $.05$,
respectively. And in the 2008 survey, the correlations between the percentage of
people in a state asked to show voter identification and beliefs in Voter Fraud and
Voter Impersonation were $-.02$ and $-.04$, respectively.

60 CONCLUSIONS

When judges base their decisions on untested empirical assumptions about political
behavior, there is always a risk that a more serious inquiry into the data will prove
them wrong. This risk is particularly great when judges attempt to assess American
public opinion and its likely consequences. We think the Court made this mistake in
65 *Purcell* and threatens to do so again in *Crawford*. We worry, in particular, that the
issue of vote fraud and voter ID is ripe for such conjectures about perceptions
because, as with campaign finance, the more relevant empirical claims about the
existence of fraud and the potential for disenfranchisement are so contested. Our
exploration of the data presented here, however, suggests that casual assertions
70 about popular beliefs should not substitute for the difficult balancing of the
constitutional risks and probabilities of vote fraud and vote denial.

Although a sizable share of the population believes that vote fraud commonly or
occasionally occurs, there is little or no relationship between beliefs about the
frequency of fraud and electoral participation (reported, validated, or intended).
75 Nor does it appear to be the case that universal voter identification requirements
will raise levels of trust in the electoral process. Such fears appear unaffected by
stricter voter ID laws, given that individuals asked to produce ID seem to have the
same beliefs about the frequency of fraud as those not asked for ID. We would not

80 fault the Court for its very plausible, even if currently false, intuition. It makes sense
to assume that as perceived fraud increases, the share of honest citizens willing to
participate in the fraudulent system would decline. Election boycotts in the face of
fears of election-rigging are commonplace in the developing world. We are also quite
sympathetic to the broad principle that states should act to bolster confidence in
elections. That confidence may be difficult to restore in the post-*Bush v. Gore* era,
85 when any irregularity – real or hypothesized – is perceived as having the potential
to decide even a national election. Nevertheless, states would do well to address
real problems using real metrics for success, while weighing favorable effects on
public opinion as a considerable side benefit.

90 The use of photo identification requirements bears little correlation to the public's
beliefs about the incidence of fraud. The possible relation of such beliefs to
participation appears even more tenuous. This lack of empirical support leads us to
conclude that, at least in the context of current American election practices and
procedures, public perceptions do not provide a firm justification for voter
identification laws.

A. Responder.

1. ¿Qué efecto produce en la población el fraude en la identidad de los votantes según lo resuelto en *Purcell v. González*?

2. ¿Sobre qué especulaciones se han basado las partes en la causa *Crawford v. Marion County Elections Board* que tramita ante la Corte Suprema?

3. ¿Qué argumentos han esgrimido los partidarios de requisitos más estrictos para la identificación de los votantes? ¿Qué han respondido los opositores?

PARTIDARIOS DE REQUISITOS DE IDENTIFICACIÓN MAS ERICTOS	OPOSITORES A REQUISITOS DE IDENTIFICACIÓN MAS ERICTOS
<ul style="list-style-type: none">••	<ul style="list-style-type: none">••

4. ¿Qué ejes deberían definir la constitucionalidad de las leyes sobre identificación de votantes?

5. Según el fallo *Purcell*, ¿qué efectos positivos derivarían de las leyes sobre identificación de votantes?

6. Nombrar tres posibles situaciones que den lugar a fraude mencionadas por los autores en el texto.

1.

2.

3.

7. ¿Cómo se relaciona lo expresado en el título con los contenidos de los segmentos subrayados?

Fuente: Jeffrey S. Parker, George Mason University School of Law Raymond A. Atkins, Covington and Burling. April 1999

Did The Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations

I. Introduction

In late 1991, the United States Sentencing Commission promulgated the first general sentencing guidelines for the determination of criminal sentences to be imposed on corporations convicted of crimes in the federal courts. (...)

5 II. The limited role of corporate criminal sentencing.

One of the continuing debates about criminal punishment concerns the extent to which the precise determination of penalties within the criminal sentencing process effectively serves any utilitarian goal of public law enforcement or is merely political theater. Even if we grant the point that some criminal sanction is more useful than none, there remain the questions of whether and when it is worthwhile at the margin to devote resources to refinements in the formal criminal penalty determination system, except perhaps as required to preserve marginal deterrence.

In legal tradition and literature there is a substantial body of practice and opinion suggesting limited utilitarian benefits from refinements in the criminal penalty determination system. The early English common law took this practice to an extreme establishing essentially a bimodal punishment system, where the choice was between felony, generally punishable by death (both physical and, through forfeiture of property, economic) and misdemeanor, generally punishable by relatively minor punishments (whipping, and so forth), followed by release. For most of this century, criminal sentencing in the United States was oriented away from precise penalty determination and toward "treatment" or "rehabilitation" of the offender under an "indeterminate" sentencing system. In recent years, more emphasis has been placed on maximal incarceration sentences as a means to "incapacitate" repeat offenders. Although utilitarian in some dimension, either rehabilitation or incapacitation would appear to conflict with the penalty structure implied by the utilitarian objective of deterrence, as resting on certain punishments proportioned to the harm of the offense and the probability of punishment. Some criminal sentencing theorists go further, to suggest that the determination of particular sentences should not be utilitarian at all...

Furthermore, though deterrence-based penalty determination may be preferable in a theory that assumes away adjudication costs, informational and other

transaction costs may overwhelm any practical benefit of such a policy. Thus, there is some question whether the institutions of criminal punishment are even
35 capable of refinement to the point of imposing precisely measured penalties to "fit the crime" both because of inherent limitations in the criminal justice system itself and because that system does not operate in a vacuum. Even where criminal punishment is the only or predominant form of sanction available- as in many "street crimes"- questions have been raised about the efficacy of the criminal
40 sentencing system in achieving predictable results in any utilitarian dimension, whether deterrence, rehabilitation or incapacitation . When the focus is shifted to "white collar" offenses, these doubts become more substantial because criminal penalties are no longer the only nor perhaps even the primary mode of sanction. In the case of the white-collar offender with substantial assets and reputation, the
45 principal sanction may be conviction itself, with its collateral consequences of reputation loss through "stigma" as well as exposure to non-criminal legal sanctions such as debarment, civil or administrative penalties, and compensatory and punitive civil damages. Furthermore, the nature and extent of these collateral consequences are largely beyond the control of the criminal justice system. In this
50 context, the formal criminal sentence itself - as opposed to the conviction and its collateral consequences may be supplemental only.

These effects become even more pronounced if we now narrow the focus further to criminal sanctions against corporate entities.

In this context, the case for any criminal liability at all is highly attenuated. Unlike
55 individuals, corporations have neither "liberty" nor "wealth" to protect as such. They do, however, often have substantial assets and reputation that can be affected by the collateral consequences of conviction, which appear to be even larger and more robust than in the case of individual white-collar offenders and are also outside the direct control of the criminal justice system. Even if we
60 assume that there is a case for entity-level liability, it does not follow that there is a case for any substantial criminal penalty, and far less that the system for determining such penalties requires a high degree of refinement or regulatory control. The formal criminal penalty against the corporate entity appropriately- and efficiently- may be relegated to a supplemental if not trivial role in the
65 overall law enforcement system.

If it is true that formal criminal penalties against corporate entities have a minimal role to play in an effective law enforcement system, then sensible public policy toward corporate criminal sentencing presumably would encourage that result. Are the observed public policies consistent with this hypothesis?

70 In this respect, we encounter the problem of divergence between political rhetoric and practical effects. Although we have very little knowledge of historical charging and sentencing practices, such evidence as exists suggests that criminal penalties against corporations traditionally were both rare in incidence and modest in magnitude. This observation would be consistent with a judicial
75 recognition that the precise determination of formal criminal penalties against corporate entities was tangential to the overall enforcement effort, as a practical matter. That condition is to be distinguished from a separate demand in the political markets for rhetoric of condemnation.

80 Prior to the mid-1980s, the judiciary was relatively unconstrained by legislation in
determining corporate criminal penalties. However, at that time, corporate
criminal penalties were swept up in the more general movement toward criminal
sentencing reform measures designed to shift toward a “determinate” sentencing
system of fixed sentences without parole, determined under guidelines binding on
the sentencing judges. At the federal level, that movement led to the Sentencing
85 Reform Act of 1984, which abolished parole and created the United States
Sentencing Commission to establish a determinate guidelines-based sentencing
system for the federal criminal courts, which was implemented for individual
defendants in late 1987. Corporate criminal penalties were no more than an
afterthought to that reform, and the commission did not adopt general corporate
90 sentencing guidelines until late 1991.

The commission’s 1991 promulgation was accompanied by some “get tough”
rhetoric that was reflected in tough-looking guidelines that the commission
advertised as intended to raise corporate penalty levels from past practice. To
some extent this was merely a continuation of a 50-year effort from various
95 quarters to increase public sensitivities to white-collar crime, generally, and
“crime in the suites” particularly. The main question we examine in this paper is
whether the resulting guidelines actually did change the level or structure of
corporate penalties.

Certainly, the corporate guidelines on their face purported to both raise the level
100 and radically restructure the determination of corporate criminal penalties in the
federal courts. But the commission may well have been responding to a demand
for political rhetoric rather than practical change in law enforcement. If the
commission recognized that efficient law enforcement favored the preguidelines
system but that political markets demanded “tough” rhetoric, then both criteria
105 could be satisfied by tough-sounding guidelines that in operative effect were so
permeable that they did not place binding constraints on sentencing judges.

From the judiciary’s point of view, in the absence of a binding constraint in the
new guidelines, there is no reason to expect a systematic change in corporate
penalty levels or structure. Under the assumption that the guidelines were
110 nonbinding in practice, judges’ incentives would be unchanged (...) Unlike
sentencing commissioners, judges in general would appear to receive no political
payoff from a systematic change in corporate criminal penalty levels or
distribution. If anything, an unforced change by sentencing courts could impose an
additional “tax” on the judiciary through its effect on the supply of corporate
115 criminal prosecutions brought by prosecutors, who presumably would respond to
any increase in penalty levels by devoting relatively more of their resources to
corporate prosecutions.

On the basis of these considerations, our empirical analysis tested the null
hypothesis that the new guidelines, despite their rhetoric, effected no systematic
120 change in the level or structure of corporate criminal penalties. In general, our
empirical results failed to reject that hypothesis.

(...)

A. Responder:

1. ¿Qué debates se plantean acerca de las penas?

2. Cómo evolucionaron las penas desde los comienzos del '*common law*' en Inglaterra hasta nuestro siglo?

3. ¿Qué particularidades presentan los '*white-collar offenses*'?

4. ¿Qué situación se plantea en el caso de la responsabilidad penal de las empresas?

5. ¿Qué factores condujeron a la creación de la '*U.S Sentencing Commission*'?

6. ¿Qué incidencia tuvieron las '*Directrices para la determinación de la responsabilidad penal*' sobre las decisiones de los jueces?

7. ¿Puede sostenerse que dichas directrices cumplieron el objetivo para el cual fueron concebidas? Justificar.