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- **"The New Civil Death: Rethinking Punishment in the Era of Mass Conviction"**   
*University of Pennsylvania Law Review*, Vol. 160, p. 1789, 2012  
*UC Davis Legal Studies Research Paper No. 308*

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Most people convicted of felonies are not sentenced to prison; a majority receive straight probation, or probation with a jail term. However, this hardly means that the conviction is inconsequential. Tens of thousands of federal, state, and local laws, regulations, and ordinances restrict the civil rights, employment, eligibility for public benefits, residence and other aspects of the status of convicted persons.

Accordingly, for many, the most serious and long-lasting effects of conviction flow from the status of being convicted and the concomitant lifetime subjection to collateral consequences. However, courts generally treat collateral consequences as non-punitive civil regulations, and therefore not subject to constitutional limitations on criminal punishment.

This treatment of collateral consequences is surprising. In cases like *Weems v. United States* and *Trop v. Dulles*, the Supreme Court understood systematic loss of status not only to be punishment, but to be cruel and unusual punishment.

Further, collateral consequences have practically revived the traditional punishment of civil death. Civil death deprived offenders of civil rights, such as the right to sue, and other aspects of legal status. Most civil death

statutes were repealed in the Twentieth Century, but its equivalent has been reproduced through systematic collateral consequences. Instead of losing rights immediately, convicted people now hold their rights at sufferance, subject to limitation and restriction at the discretion of the government.

The new civil death, loss of equal legal status and susceptibility to a network of collateral consequences, should be understood as constitutional punishment. In the era of the regulatory state, collateral consequences may now be more significant than was civil death in past decades. The actions of judges, defense attorneys, and prosecutors should attend to what is really at stake in criminal prosecutions.

### "Testation and Speech"

*Georgetown Law Journal, Vol. 101, 2012*  
*Loyola-LA Legal Studies Paper No. 2012-17*  
*UC Davis Legal Studies Research Paper No. 307*

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Courts, scholars, and lawyers think of testation — the creation of a will or a trust — as a transfer of wealth. As a result, they analogize the field of decedents' estates to property, contract, and corporate law: other spheres that regulate the use, conveyance, and investment of assets. Conversely, this Article identifies a quality that makes testation unique: it is a singular form of self-expression. For instance, conditional gifts, charitable bequests, and other posthumous directives often communicate a testator's or settlor's deeply-felt views. Likewise, owners' distributional choices can be profoundly revelatory: by rewarding some beneficiaries and snubbing others, they offer a final assessment of their lives, their loved ones, and the world.

Recognizing testation's expressive impact has broad implications. For one, there has long been consensus that the Constitution does not apply to limits on testamentary freedom. However, because testation is a "speech act," some wills and trusts rules, such as the doctrine of undue influence, must satisfy the First Amendment. Moreover, conceptualizing testation as speech bolsters the normative case for testamentary freedom and cuts against the grain of recent developments in decedents' estates. In the last decade, the rise of law and economics and an unprecedented intergenerational wealth transfer have inspired a series of doctrinal changes that shift power away from testators and settlors in order to enhance the value of the estate. This new fixation on profit maximization overlooks the virtues of testamentary self-expression — the fact that it facilitates autonomy and self-determination — and reflects an impoverished vision of wills and trusts law.

### "Abortion, Contraception and the ACA: The Realignment of Women's Health"

*Howard Law Journal, Vol. 55, 2012*  
*UC Davis Legal Studies Research Paper No. 304*

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Abortion and contraception have become the two most highly contested health care services in the ongoing debate over the Patient Protection and Affordable Care Act (ACA). Initial interpretations cast these conflicts as extensions of the abortion wars that have pervaded national politics since the 1970s. That explanation is correct, but incomplete. The abortion wars have drawn a line between reproductive and sexual health, on the one hand, and women's health, on the other. Yet, the federal government's efforts to promote health disparities research, as well as the neoliberal framing of health care have also played a role in dislodging women's health from its experience-based, civil rights foundations.

This article also considers the effects of the ACA's exclusion of abortion and inclusion of contraception on the understanding of women's health. Normatively, the segregation and isolation of abortion narrows the scope of women's health. Materially, the ACA increases barriers to abortion access for women most at risk of unintended pregnancy. This effect will certainly exacerbate social, economic, and health inequalities for low-income women. The 2011 decision by the U.S. Department of Health and Human Services to include coverage for prescription contraceptives without cost-sharing as part of women's preventive care under the ACA constitutes a victory for women's health and women's rights advocates. Yet, coverage of contraception as preventive care, in conjunction with a broad ban on abortion coverage, recasts conception as abortion prevention. That description moves contraception from its autonomy and equality-based foundations to a narrower framing that aligns with the agendas of religious conservatives and neoliberals.

### "Protecting the Attorney-Client Privilege in Business Negotiations: Would the Application of the Subject-Matter Waiver Doctrine Really Drive Attorneys from the Bargaining Table?"

*Duquesne University Law Review, Forthcoming*  
*UC Davis Legal Studies Research Paper No. 306*

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Privilege law is arguably the most important doctrinal area in the law of evidence. Most evidentiary doctrines relate primarily to the courts' institutional concerns about the reliability of the evidence that the trier of fact relies on. In contrast, privileges impact extrinsic social policy such as out-of-court interactions between spouses and attorneys and their clients. It is no accident that since the adoption of the Federal Rules of Evidence in 1975, the Supreme Court has handed down more decisions relating to privilege law than concerning any other part of the Federal Rules.

In particular, in recent years the topic of privilege waivers has garnered a good deal of attention. In 2008, Congress enacted Federal Rule of Evidence 502 governing waivers in federal court. There was a split of authority over the question of whether the inadvertent production of privileged material during pretrial discovery effected a waiver of the privilege. Litigants had begun to spend enormous sums of money on pre-production privilege reviews. In order to reduce that cost, Congress intervened and prescribed a general rule that inadvertent production does not result in a waiver.

Although Rule 502 largely resolved one waiver issue, another dispute is ongoing. That dispute relates to another pretrial context, that is, business negotiations. In the past, when a waiver occurred, the courts applied the subject matter waiver rule: The scope of the waiver not only included the disclosed information but also extended to other communications relevant to the same subject matter. The rule seemed to apply to waivers during pretrial business negotiations as well as waivers occurring during litigation.

However, in recent years several courts have refused to apply the subject matter waiver rule to extrajudicial waivers during business negotiation. They have advanced several arguments to justify their refusal. To begin with, they have noted several supposed distinctions between the negotiation and litigation settings. More importantly, they have asserted that the application of the subject matter waiver rule to the negotiation context will pressure clients to instruct their attorneys not to participate in negotiations.

The thesis of this article is that the arguments against extending the subject matter waiver rule to the negotiation settling are flawed. Part II of the enclosed article examines the supposed distinctions between the negotiation and litigation settings and finds that they are largely illusory. Part II then turns to the prediction that the extension of the rule to business negotiations will drive attorneys from the bargaining table. Part II demonstrates that the prediction rests on fundamental misconceptions about the concept of "communication" in privilege law. Part II concludes that the argument underlying the prediction is "exactly backwards."

This issue is of obvious importance to attorneys litigating waiver issues. However, the issue is of even greater importance to transactional attorneys who for decades have played an important role in their clients' business negotiations.

## "Judicial Remands of Immigration Cases: Lessons in Administrative Discretion from *INS v. Cardoza-Fonseca*"

*Arizona State Law Journal, Forthcoming*  
*UC Davis Legal Studies Research Paper No. 305*

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This article is a symposium contribution for a symposium issue of the ASU Law Journal. One might not imagine that there could be much to say about the topic of remands, that is when a court reverses or vacates a decision and remands the case to a lower court or administrative agency for further proceedings. However, the first remand symposium in the 2004 Arizona State Law Journal offered multiple insights into the nature of remands and garnered considerable attention. It included contributions that investigated an array of remand situations, including those involving punitive damages, administrative law, criminal sentencing, and international tribunals. Indeed, one article looked at an incredibly important practical issue about which many lawyers and law professors are familiar: when the Supreme Court grants a petition for writ of certiorari, vacates the lower court judgment, and remands the case for further consideration. Despite what some critics say about legal scholarship, the symposium did not focus on esoterica, i.e., topics that only a law professor could love.

In its wisdom, the editors of the Arizona State Law Journal have seen fit to hold an encore of the original remand symposium. As frequently is the case, it unquestionably will be hard to replicate the success of the original. However, this symposium will no doubt offer novel observations from a diversity of perspectives about the operation and impacts of judicial remands.

Our contribution to this symposia considers the lessons that can be learned from the remand by a reviewing court of an immigration ruling by an administrative agency. We use as the cornerstone of our analysis the Supreme Court's path-breaking decision in *INS v. Cardoza-Fonseca*, which affirmed a court of appeals' reversal of a removal order by the Board of Immigration Appeals with instructions for the Board, on remand, to apply the proper legal standard to a claim for asylum.

Asylum, the substantive issue at the core of *INS v. Cardoza-Fonseca*, is a particularly high stakes claim under American law. The noncitizen claims that, if deported to his or her native land, he or she will suffer likely persecution — including possible imprisonment, torture, or even death — because of their race, religion, nationality, political opinion, and related grounds. The decision in an asylum case determines as a legal matter whether the noncitizen will be allowed to remain in the United States or involuntarily returned to his or her homeland. Similar to a death penalty case, an asylum decision can literally have life or death consequences for the noncitizen.

After a quarter century, the Supreme Court's seminal decision in *INS v. Cardoza-Fonseca* remains at the heart of modern asylum and refugee law. It almost unquestionably is the leading American decision in the field. Most relevant to a symposium analyzing remands, *Cardoza-Fonseca* is a notable example of the U.S. government in effect abandoning a removal case upon remand by the highest court in the land. There are other prominent examples as well, suggesting that it is not an outlier.

Much scholarly commentary in recent years has been critical of the tightening relationship between criminal law and immigration law, both in criminalizing violations of the immigration laws and deporting noncitizens caught up in the American criminal justice system. Needless to say, the increasing use of the criminal law in the enforcement of the U.S. immigration laws has grabbed considerable scholarly attention. Indeed, a new genre of cutting-edge immigration law scholarship — “cimmigration” law — has emerged from these developments.

In this Article, we attempt to sketch out an important disjunction between immigration law and criminal law. A state criminal conviction that is vacated by a higher court is most likely to be retried on remand. The reason is painfully simple: a local district attorney is not inclined to allow a criminal case that has been reversed to languish on remand without further proceedings (and thus let a criminal suspect go free). Political pressures on prosecutors to punish a perceived criminal are likely to be at their strongest at the local level where the crime was committed. Local prosecutors' offices are ordinarily headed by people who are directly politically accountable to local citizens, usually a district attorney or the equivalent who must run for office. Put simply, a local district attorney will be held accountable at the polls if perceived by the public as not zealously prosecuting serious criminal offenders. Especially with respect to serious crimes, a crime victim and family, as well as public opinion in the community, will tend to place great pressure on local prosecutors to prosecute the alleged offender both in the first instance and on remand.

In contrast, the federal government, through Congress and the Executive Branch, regulates immigration on a national level. The political pressures on the system for removal of individual noncitizens from the United States in no way resemble the kind of direct, localized political pressure on local criminal prosecutors. There generally is no direct and specific political pressure, especially like that emerging from the community in which a crime was committed, in the structure of the U.S. immigration bureaucracy. Nor is there evidence, whatever administrative law theorists might claim generally, that a president, who oversees the operation of the modern administrative state, is generally elected based on the prosecution of individual removal cases. That is the case, even though the general enforcement of the U.S. immigration laws can be a hot-button political issue. Nor are the attorneys of the U.S. government who pursue removal cases subject to a direct check through the ballot box.

Part I of this Article considers the leading Supreme Court decision in *INS v. Cardoza-Fonseca* and analyzes the failure of the U.S. government on remand to seek to remove the asylum-seeker from the United States. Part II identifies important distinctions between the treatment of removal and criminal cases on remand, and analyzes why there are significant differences about what might occur on remand in those two types of cases.

## "Structural Racism, Workplace Discrimination, and the United States Supreme Court, 1971-1989"

*UC Davis Legal Studies Research Paper No. 309*

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In the last forty years, sociologists have produced a vibrant body of literature on structural racism that explains why dramatic racial disparities persist and focuses on social structure instead of bigoted individuals. In this analysis, social structure rather than the intentions of bigoted individuals account for the discrepancies of outcomes between the races. Sociologists emphasize the effects of racism on groups, rather than individuals. Structural racism perpetuates the effects of past overt discrimination because it arises from policies and procedures that appear on the surface to be race-neutral. The combination of invisibility, automaticity, and white self-interest renders it as elusive as it is effective. White privilege figures as importantly as black disadvantage in accounting for racial disparity.

We link the disciplines of sociology and constitutional history to demonstrate that since 1970, the Supreme Court has failed to recognize structural racism in the workplace, and has promulgated legal doctrines that protect it, assure its continuation, and disable other branches of both the federal and state governments from eradicating it. The Court's sociological and psychological assumptions run counter to reality and embed unacknowledged policy preferences. Doctrinal assumptions about colorblindness, facial neutrality, and white innocence enable the Justices not just to willfully ignore structural racism, but to protect it as a constitutional good.

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