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## Special Project: Current Issues in Immigration

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# Special Project<sup>+</sup>

## Current Issues in Immigration

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*“Give me your tired, your poor, your huddled masses  
yearning to breathe free”<sup>1</sup> ~ Emma Lazarus*

### INTRODUCTION

These words, so famously engraved upon a plaque inside the Statue of Liberty, have become an anachronism in modern American politics. In recent years our society has witnessed a maelstrom arise concerning immigration law and enforcement, with vocal factions spouting angry vitriol about the need to tighten borders and crack down on illegal immigration. Intense debate was sparked 2006 after

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<sup>+</sup> Each year, the VANDERBILT LAW REVIEW publishes one issue with notes devoted solely to a topic of current interest. These notes collectively constitute the Special Project. Past Special Projects have delved into a wide array of topics, from asbestos litigation, 36 VAND. L. REV. 573 (1983), to criminal constitutional law in state courts, 47 VAND. L. REV. 795 (1994), to the Americans with Disabilities Act, 52 VAND. L. REV. 763 (1999).

1. Emma Lazarus, *The New Colossus*, 1883.

the House of Representatives passed a restrictive bill that called for a wall to be built along 700 miles of the U.S.-Mexican border, criminalized the aiding or encouraging of illegal immigrants to remain in the country, and imposed new penalties on employers who hired illegal immigrants.<sup>2</sup> The bill was controversial, but seemed generally in line with public wishes.<sup>3</sup> The Senate responded by passing a more immigrant-friendly bill that would give most illegal immigrants currently in the country a chance to become citizens.<sup>4</sup> Despite intense efforts, Congress has been unable to compromise and pass a comprehensive immigration reform bill. The issue remains a divisive one. Americans are divided deeply on the subject of immigration, and passions run deep on both sides of the issue.<sup>5</sup>

Today, Emma Lazarus's poem describes our past, more than our present. Many Americans still think of their nation as a country of immigrants, a melting pot, a place of opportunity for those that were willing to work hard, regardless of socio-economic status at birth, but many reject this as a vision for the future.<sup>6</sup> While fear of foreigners always existed, the United States had a liberal and inviting immigration policy in its early years.<sup>7</sup> The country needed immigrants to help develop its vast territories. Welcome for immigrants peaked in the early 1860s, when the Homestead Act promised 160 acres to any immigrant willing to settle and cultivate the land for at least 5 years.<sup>8</sup>

After the Civil War, however, the United States began to develop immigration policies that sought to protect American borders from certain types of immigrants. In 1875, Congress passed a law

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2. The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005), available at <http://judiciary.house.gov/media/pdfs/immbillsection.pdf>.

3. Carol M. Swain, *Introduction*, in *DEBATING IMMIGRATION* 1, 9 (Carol M. Swain ed., 2006) (describing the House bill as punitive but in harmony with public wishes).

4. S. 2611, 109th Cong. (2006); see Rachel L. Swarns, *Senate, In Bipartisan Act, Passes Immigration Bill*, N.Y. TIMES, May 26, 2006, at A1 (describing the main features of the Senate bill).

5. Recent polls show that 46% of Americans feel that immigration helps the country more than it hurts it, and 44% believe that it hurts the country more than it helps. PollingReport.com, *Immigration*, NBC News/Wall Street Journal Poll (June 8-11, 2007), <http://www.pollingreport.com/immigration.htm>

6. See Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race and Other Deep Divides*, 21 S. ILL. U. L.J. 101, 106 (1996) (asserting that Americans see immigration as a "core ingredient of our national identity" and celebrate immigrants and the pioneer spirit they epitomize).

7. See Keith FITZGERALD, *THE FACE OF THE NATION: IMMIGRATION, THE STATE, AND THE NATIONAL IDENTITY* 102 (1996) (noting that while immigration and the controversies surrounding it had played a major role in American history, no lasting national legislation was passed to regulate immigration before the Civil War).

8. The Homestead Act of 1862, ch. 75, 12 Stat. 392, *repealed* by Pub. L. No. 94-579, tit. VII, § 702, 90 Stat. 2787 (1976).

that barred convicts and prostitutes from entering the country.<sup>9</sup> Just a year before Lazarus wrote her poem, Congress passed the Chinese Exclusion Act, the nation's first race-based immigration law.<sup>10</sup> More race-based immigration law followed when Congress enacted the Quota Act of 1921, which limited the number of immigrants of each race to three percent of that ethnic population already residing in the country.<sup>11</sup> In 1962, John F. Kennedy lamented that Americans welcome the tired and the poor "as long as they come from Northern Europe, are not too tired or too poor or slightly ill, never stole a loaf of bread, never joined any questionable organization, and can document their activities for the past two years."<sup>12</sup> In the 1960s, Congress phased out the quota system and substituted immigration laws that favor family reunification and needed skills. That system remains largely intact today.<sup>13</sup>

The current immigration debate, recently rekindled by the 2006 House Bill, repeats old themes, but focuses on new priorities. Old concerns about the cultural impact of immigration,<sup>14</sup> English as the national language,<sup>15</sup> the effect of immigration on the economy, especially in the job market,<sup>16</sup> the consequences for democracy in a heterogeneous society,<sup>17</sup> and the social justice implications of

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9. Act of March 3, 1875, 18 Stat. 477; see Diana Vellos, *Immigrant Latina Workers and Sexual Harassment*, 5 AM. U. J. GENDER & L. 407, 414-15 (1997).

10. Chinese Exclusion Act, 22 Stat. 58 (1882); Vellos, *supra* note 9, at 415 (describing the history of early immigration law).

11. Vellos, *supra* note 9, at 416.

12. John F. Kennedy, *A Nation of Immigrants*, in IMMIGRATION: DEBATING THE ISSUES 124 (Nicholas Capaldi ed., 1997).

13. Center for Immigration Studies, *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act* (Sept. 1995), <http://www.cis.org/articles/1995/back395.html>.

14. See Arthur Mr. Schlesinger Jr., *The Disuniting of America*, in IMMIGRATION: DEBATING THE ISSUES, *supra* note 12, at 221, 230 (discussing the challenge of the increasing numbers of non-European immigrants and the unifying importance of Western ideas of individual freedom, political democracy, and human rights).

15. See Linda Chavez, *One Nation, One Common Language*, in IMMIGRATION: DEBATING THE ISSUES, *supra* note 12, at 253, 257 (opposing bilingual education); see also ACLU Briefing Paper, *English Only*, in IMMIGRATION: DEBATING THE ISSUES, *supra* note 12, at 258, 259 (opposing proposed "English Only" laws because they abridge the rights of individuals who are not proficient in English).

16. See Steven A. Camarota, *Immigrant Employment Gains and Native Losses, 2000-2004*, in DEBATING IMMIGRATION 139, 139 (Carol M. Swain ed., 2006) (positing that immigration is adversely impacting the employment of native-born workers); see also Peter Brimelow, *Economics of Immigration and the Course of the Debate since 1994*, in DEBATING IMMIGRATION, *supra*, at 157, 158 (alleging that current mass immigration does not contribute to American economic growth).

17. See BRENT A. NELSON, *AMERICA BALKANIZED: IMMIGRATION'S CHALLENGE TO GOVERNMENT* (1994) (theorizing that the mobilization of ethnic blocs as political conflict groups creates problems of conflict management for the government).

immigration<sup>18</sup> have carried into the twenty-first century. However, two developments give new urgency to the issue. First, increased security concerns in the wake of 9/11 have focused the debate on securing the nation's borders.<sup>19</sup> Second, the sheer numbers of illegal immigrants illuminate our current system's failings.<sup>20</sup> Whether the solution to the United States's immigration woes lies in passing new laws or better enforcing the ones it already has, everyone acknowledges that the system needs work.

The passion and polemics that surround the current immigration debate only increase the need for careful and reasoned scholarship analyzing the current issues in immigration law. This year's Special Project critically examines recent developments in immigration law. My Note examines the interpretation of a law that allows cancellation of deportation orders to victims of domestic violence. Circuit courts have split as to whether a Board of Immigration Appeals' decision to deny cancellation of removal to a petitioner claiming status as a victim of domestic abuse is reviewable by federal courts.<sup>21</sup> Because federal courts cannot review discretionary decisions made by the Attorney General, if the decision as to whether a petitioner has suffered domestic abuse sufficient to satisfy the statutory meaning requirement of "extreme cruelty" is discretionary, federal courts cannot review the determination.<sup>22</sup> The Note proposes that the courts implement a per se approach to extreme cruelty decisions. This approach would state definitively that when cycles of severe violence are present, such as to invoke theories of the psychology of domestic violence like battered women's syndrome, an extreme cruelty decision is nondiscretionary, and thus reviewable.<sup>23</sup> However, where less severe forms of domestic abuse are present, such as simple verbal or emotional abuse, courts should respect the

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18. See Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?*, in *DEBATING IMMIGRATION*, *supra* note 16, at 63, 80-81 (examining the moral dilemmas of immigration policy).

19. Gallup polls show that the number of Americans who supported decreasing immigration rose 20 percentage points after 9/11. Public Agenda, *Immigration: Bills and Proposals*, [http://www.publicagenda.org/issues/major\\_proposals\\_detail.cfm?issue\\_type=immigration&list=1](http://www.publicagenda.org/issues/major_proposals_detail.cfm?issue_type=immigration&list=1) (last visited Nov. 12, 2007).

20. In March 2005, the Pew Hispanic Center estimated that at that point there were 11,000,000 illegal immigrants currently in the country. JEFFREY S. PASSEL, PEW HISPANIC CTR., *ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1* (2005), <http://pewhispanic.org/files/reports/44.pdf>.

21. Anna Byrne, Note, *What is Extreme Cruelty? Judicial Review of Deportation Cancellation Decisions for Victims of Domestic Abuse*, *VAND. L. REV.* 1815(2007).

22. 8 U.S.C. § 1229b(b)(2)(A)(i)(I) (2000) (barring judicial review of discretionary decisions made by the Attorney General).

23. Byrne, *supra* note 21, at 1823.

determination of the agency when deciding whether these acts constitute extreme cruelty and deny judicial review.<sup>24</sup>

Andrew Kennedy's Note also addresses deportation law, here in the context of expedited removal of aliens convicted of aggravated felonies. The Note argues that the definition of aggravated felony has expanded so greatly that expedited removal laws now overreach their goal of protecting the public from dangerous criminals.<sup>25</sup> Instead, these laws often are applied to aliens who have committed relatively minor crimes and allow deportation without procedural safeguards where such a harsh remedy does not fit the crime committed.<sup>26</sup> Thus, due process has taken a backseat to domestic security and procedural efficiency. The Note proposes that to fix the imbalance Congress should modify the definition of aggravated felony within the context of immigration law and adjust the procedural remedies available.<sup>27</sup>

Nicole Lerescu's Note explores bars to refugee status under asylum law. Generally, the state excludes persons who have participated or assisted in the persecution of others from seeking asylum in the United States.<sup>28</sup> This Note argues that a narrow exception should be recognized when the persecution was committed under duress.<sup>29</sup> The solution borrows principles from both from international standards advanced by the United Nations High Commissioner for Refugees and from domestic criminal law, where duress serves as an excuse for conduct that otherwise would be classified as criminal.<sup>30</sup>

That all three of the notes in this Special Project issue focus on exclusion and deportation and argue for lenient interpretations of these laws is perhaps a reaction to the current debate over immigration. Unfortunately, the rhetoric employed in arguing for tougher immigration laws is often extreme.<sup>31</sup> The authors of these notes eschew blanket approaches and look for logical exceptions to harsh immigration laws. They suggest that wholesale application of

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24. *Id.*

25. Andrew Kennedy, Note, *Expedited Injustice: The Problems Regarding the Current Law of Expedited Removal of Aggravated Felons*, VAND. L. REV. 1847 (2007).

26. *Id.*

27. *Id.* at 1867.

28. 8 U.S.C. § 1101(a)(42) (2000).

29. Nicole Lerescu, Note, *An Argument in Favor of Interpreting the Immigration and Nationality Act § 101(a)(42) to Include a Duress Exception*, VAND. L. REV. 1875 (2007).

30. *Id.* at 1900.

31. See, e.g., Americans for Immigration Control, A Brief History of Immigration, [http://www.immigrationcontrol.com/short\\_history.htm](http://www.immigrationcontrol.com/short_history.htm) (last visited Nov. 11, 2007) (calling for an end to immigration in order to prevent Latino militants in the Southwest from seceding from the nation).

immigration law, without careful consideration of the deported as individuals, would do a disservice to the country as well as to the poor and the tired who wish to live there.

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