The Right to Migrate as a Human Right:
The Current Argentine Immigration Law
Barbara Hines†

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Introduction

Law 25.871, the Argentine immigration law enacted in January, 2004, represents a major step forward for the rights of immigrants, not only in Argentina, but throughout the world. 1 Law 25.871 repeals Law 22.439, the prior immigration law known as the Ley Videla (Videla Law), 2 which was passed in 1981 during the Argentine military dictatorship. 3 Despite the re-establishment of democracy in Argentina in 1983 and the promulgation of a new Constitution in 1994 that incorporated human rights treaties into Argentine domestic law, 4 the earlier immigration law remained in effect for twenty years after the end of the discredited and illegitimate military regime. 5

The new law establishes that migration is a human right—a principle that is not found in the immigration laws of any other large immigrant-receiving country 6 nor explicitly in any international human rights conventions 7. Law 25.871 extends constitutional and human rights protections

2. Jorge Videla was the head of the military junta in Argentina from 1976 until 1981.
4. CONST. ARG. art. 23, para. 22 (1994).
6. See, e.g., 8 U.S.C. §1101(f) (2006); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."); see generally European Comm’n, Towards a Common European Union Immigration Policy (Sept. 2007), http://ec.europa.eu/justice_home/fsj/immigration/fsj_immigration_intro_en.htm (describing EU management of illegal immigration, asylum, and migration and border controls under the Tampere program); see also Migration Act, 1958, § 4(1)-(2) (Austl.) (stating that “Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain”); Immigration and Refugee Protection Act, 2001 S.C., ch. 27 (Can.); Immigration Act, 1987, pt. 1 (N.Z.) (outlining requirements for exemptions, visas, and permits); Immigration Control and Refugee Recognition Act, Cabinet Order 319 of 1951, art. 1, (Japan) (stating that the Act’s purpose is to provide control over the entrance into and departure from Japan).
to all immigrants within the country, regardless of their legal status, and guarantees immigrants the rights to equal treatment, non-discrimination, and access to educational, medical, and social services. Yet, more than five years after its enactment, the Argentine government has yet to promulgate regulations that would ensure the full effect and implementation of the new law.

Nevertheless, in an era of increasing emphasis on security throughout the world, the openness of the new law contrasts with the restrictive immigration laws of other countries, particularly those of United States. Additionally, the Argentine law serves as a model for the advancement of immigrants’ rights and immigration policy, as it incorporates a human rights framework to implement immigration reform. It is also a breath of fresh air and optimism when compared to the restrictive laws of other countries, particularly the United States. Finally, an analysis of the Argentine law provides a comparative framework to critically analyze U.S. immigration law and policy and to advocate for a more equitable system in this country.

In this article, first, I will discuss the historical trends in Argentine immigration, the constitutional framework of Argentina, and prior immigration laws. Second, I will highlight the events leading to the passage of Law 25.871, including the advocacy work of the immigrants’ rights community and the framing of the law in the context of human rights. Third, I will analyze the major provisions of the new statute, relevant case law, and the practical experiences of lawyers in Argentina. Fourth, I will argue that there is an urgent need for regulations that will give full effect to the new law. Finally, throughout the article, I will highlight certain provisions of U.S. immigration law that starkly contrast with the generous provisions of the Argentine law. This comparison will serve to critique excessively restrictive U.S. immigration statutes and to demonstrate the benefits of the human rights model adopted by Argentina.

9. See infra Postscript, discussing regulations that the government promulgated during the editing of this article.
I. Historical Background and Constitutional Framework of Argentine Immigration Law

A. Historical Background

Since its independence, Argentina has been an immigrant-receiving country. In 1852, Juan Bautista Alberdi, the celebrated Argentine jurist and constitutionalist, coined the well-known phrase “to govern is to populate,” which shaped the immigration policies of Argentina. Successive governments in the nineteenth and early twentieth centuries encouraged immigration as a means to develop vast unpopulated areas of the country and to strengthen agricultural and cattle production. Consequently, immigrants constitute a fundamental part of the fabric of Argentine society.

Population statistics reflect the effects of these early public policies that promoted immigration. Between 1857 and 1913, over 2.7 million people immigrated to Argentina. By 1914, 29.9% of the population was foreign born, primarily of Spanish and Italian origin. Beginning in the 1960s and growing rapidly in the 1990s, the country of origin of new immigrants changed significantly. During this latter period, the majority of immigrants to Argentina came not from Europe, but rather from the neighboring countries of Chile, Paraguay, Bolivia, and Peru. Immigrants from China, Korea, and Central Europe, primarily Ukraine, also arrived in Argentina in smaller but still significant numbers.


recent national census of 2001, 1,531,940 foreign-born inhabitants comprise 4.2% of the total population, of which 66% hail from Latin America: Paraguay is the birthplace of 21%; Bolivia, 15%; Chile, 14%; Uruguay, 8%; Peru, 6%; Brazil, 2%. These recent immigrants arrived in Argentina through various methods: some were admitted temporarily but chose to remain indefinitely, some came under the auspices of bilateral agreements between Argentina and their native country, and others entered the country without proper documents. Although not numerically comparable to that of the late nineteenth and early twentieth centuries, the increase in immigration in the 1990s was due in part to the effects of the Argentine economic policy which set the exchange rate of the Argentine peso at one-to-one parity with the U.S. dollar. This “convertibility” policy contributed to lower inflation and economic growth, thereby making Argentina a desirable destination for immigrants.

Data on irregular migration to Argentina is scarce, as the government does not maintain precise statistics, and few researchers focus on this specific topic. Yet experts and government officials agree that the repealed 1981 Ley Videla generated an increase in the undocumented population. The prior law provided very few avenues for legal immigration, particularly for those from neighboring countries and delegated near unbridled discretion to immigration officials to deny, delay, or impede

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17. Jachimowicz, supra note 16; see also INDEC, supra note 16.


19. Violeta A. Correa, La Nueva Ley de Migraciones y la Participacion de las Organizaciones de la Sociedad Civil, in MIGRACION: UN DERECHO HUMANO, supra note 1, at 173-74.


21. I use the term “irregular status” and “irregular migrant” to describe persons who enter a country without proper documents, or who enter with a proper visa but fail to comply with the conditions of the visa or remain beyond their authorized stay. A large portion of the irregular population obtained legal status in the last several years. See discussion infra of Mercosur and non-Mercosur legalization programs.


23. Gabriel Chausovsky, Análisis de la Jurisprudencia a Partir de la Nueva Ley de Migraciones, Seminario Permanente de Migraciones, Instituto Gino Germani, Buenos Aires (July 2008) (citing to statement on http://www.patriagrande.gov.ar/ that is no longer available on website) (on file with author); see also Oteiza, supra note 16, at 103-05; see also Letter from Pablo Bruni, Gustavo Dalmiro Roca & Kuo Wei Sui Lee, attorneys, on behalf of Embassy of China, to Dr. Eusebio Rodriguez, National Director of Immigration (March 2004) [hereinafter Chinese Embassy letter] (on file with author). See discussion, infra, for more detail on the Ley Videla.
applications for legal status. The democratically elected government subsequently declared that the Ley Videla had created a “factory of persons in irregular status” who were marginalized because of their inability to legalize their status, to obtain lawful employment, or to access social benefits. Thus, prior to the new law and its regularization programs, the undocumented population was estimated to be between 750,000 and one million people, although at least one researcher maintains that these figures are exaggerated.

B. Constitutional Framework

Because immigration and population policies were fundamental to the formation and development of the Argentine nation, the Constitution provides very specific and generous constitutional protections for the foreign born. Both the current and former Argentine Constitutions promote European immigration. Article 25, first included in the 1853 Constitution and re-adopted in the 1994 Constitution, states that “the Federal Government shall encourage European immigration.” Some scholars interpret this provision as expressing merely a preference, rather than a requirement, that immigrants be of European origin; to support this argument, they rely on the second clause of Article 25, which states broadly that the government may not restrict the right of entry of any foreigner who arrives in Argentina for the purpose of engaging in beneficial activities that the Constitution enumerates.

24. See, e.g., Chinese Embassy letter, supra note 23. ("Due to bureaucratic hurdles or the absence of available norms, there are a considerable number of illegal residents from [China].").


26. See Bruno, supra note 22; see also discussion infra of Mercosur and non-Mercosur regularization programs.


29. “The Federal Government shall encourage European immigration, and it may not restrict, limit, or burden with any tax whatsoever the entry into Argentine territory of foreigners whose purpose is tilling the soil, improving industries, and introducing and teaching the sciences and the arts.” Const. Arg. art. 25; see also Ofelia I. Stahr-Inger de Cramuliti, La Politica Migratoria Argentina 36 (Depalma 1975).
The preambles of the Constitutions of 1853 and 1994 also extend the rights of liberty, general welfare, and justice to “all men in the world who wish to dwell on Argentine soil.” Specific constitutional provisions extend equal rights to all foreigners. “Inhabitants,” which the courts have interpreted to encompass all foreigners, even those with an irregular immigration status, enjoy broad civil rights, such as the right to exercise their profession and engage in business, the freedoms of expression and religion, and the right to freely enter and depart Argentine territory. Article 20 reiterates that foreigners enjoy the same civil rights as citizens. They may exercise their profession or engage in business; own, buy, and sell property; navigate the waterways; practice their religion freely; make wills and marry; and naturalize within two years of residency in the country.

Based on these constitutional principles, the courts have historically struck down laws that discriminated against foreign residents. For example, the courts have invoked Articles 14 and 20 to prevent the deportation of foreigners and have invalidated laws that mandate citizenship as an eligibility requirement for public and private employment. Recently, the Argentine Supreme Court adopted a strict scrutiny test for reviewing laws that discriminate against non-citizens, characterizing such claims as national origin discrimination and applying a presumption of unconstitutionality. Applying this judicially created test, the court has overturned


31. Id. at 413–16, for discussion of prior Argentine immigration caselaw.
laws that required lengthy periods of residence for access to government disability payments and Argentine citizenship for judicial positions. 37

The breadth of these constitutional protections becomes even more evident when contrasted with the limited protections afforded non-citizens under U.S. constitutional law. Although both the United States and Argentina are countries whose histories are intertwined with large-scale immigration, the constitutions of the two countries have taken markedly different approaches to immigrants’ rights. Unlike Argentina, the United States never adopted public policies to encourage widespread immigration and thus the U.S. Constitution neither promotes immigration nor explicitly provides equal rights to the foreign born. 38 The U.S. Supreme Court has repeatedly stated that the government exercises broad plenary power in matters of immigration law39 and has declared that “over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens];”40 the U.S. government’s power to deport a foreigner is “absolute and unqualified.”41 Because “Congress regularly makes rules that would be unacceptable if applied to citizens,” U.S. jurisprudence allows for the circumscription of basic rights of immigrants.42

Consequently, distinctions between citizens and non-citizens do not constitute “invidious” discrimination under U.S. law.43 Far from considering immigrants as a suspect class, warranting the higher strict scrutiny test, laws discriminating against non-citizens are valid unless “wholly irrational.”44 Moreover, the protection against national origin discrimination does not necessarily extend to alienage discrimination.45 Accordingly, courts have found many restrictive laws affecting non-citizens to be constitutional.46 For example, the Supreme Court has upheld laws that deny lawful permanent residents public employment as police officers and teachers47 and access to public benefits.48 Immigration laws treating men


38. See Gordon, supra note 27, at 500–02.


43. Diaz, 426 U.S. at 80.

44. Sudomir v. McMahon, 767 F.2d 1456, 1464 (9th Cir. 1985) (citing Diaz, 426 U.S. at 83).


46. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); see Diaz, 426 U.S. at 79–80.

47. Compare Ambach v. Norwick, 441 U.S. 68, 74, 80–81 (1979) (upholding N.Y. state law that requires that all teachers be U.S. citizens), and Foley v. Connellie, 435 U.S.
and women differently have also passed constitutional muster. Finally, the Court has given its imprimatur to laws allowing authorities to detain and expel immigrants, even long-time permanent residents, with minimal due process protections.

The marked differences in the two constitutional systems explain, in part, why Argentina has achieved broad immigration reform, as discussed in Section II of this article. Advocates and jurists posited that new legislation was essential in order for the immigration law to conform to constitutional standards. As one court described it, “the new immigration legislation has taken a turn which will achieve greater protection of the rights of migrants, promoting their integration into society . . . which concretely includes principles, declarations and constitutional rights which are in effect in our country. (Preamble, Art. 14 and Art. 20 of the National Constitution).” On the other hand, in the United States, advocates who urge immigration reform and equal treatment for immigrants cannot rely on constitutional norms and instead must turn to Congress and public opinion to protect and expand immigrants’ rights, making the task much more daunting.

C. Prior Immigration Law

1. Avellaneda Law and the Law of Residency

In 1876, the Argentine government enacted its first immigration law, Law No. 817 of Immigration and Colonization, popularly known as the Avellaneda Law, which incorporated the protection of foreigners that had been enshrined in the law and reflected the constitutional principles of openness toward foreigners and enjoyment of rights on an equal basis with citizens. During the period between 1869 and 1914, millions of primarily European immigrants arrived in Argentina.


52. See Balmaceda, supra note 13; supra text accompanying notes 27–37.

53. Corina Courtis & María Inés Pacecca, Sinopsis de las Migraiones En La Argentina Contemporanea, Capacitacion En Zonas de Frontera y Control Migratorio (CELS-ACNUR) (2004), at 1; see Novick, supra note 16, at 5.
Nevertheless, in reaction to the rise of anarchist and labor movements in Argentina, in 1902 the government enacted Law No. 4144, also known as the Law of Residency (Ley de Residencia), which circumscribed immigration and discriminated against the foreign-born based on their political activities.\footnote{Law No. 4144, Nov. 23, 1902, [1889-1919], A.D.L.A. 560, 560. During the same period, the United States passed similar laws. \textit{See} Immigration Act of 1918, Pub. L. No. 221-186, §§ 1-3, 40 Stat. 1012 (1918) (amended by the Immigration Act of 1920, Pub. L. No. 262-251, 41 Stat. 1008 (1920)) (providing for the exclusion of anyone who advocated the overthrow of the government by force, who opposed organized government, or who was a member of any organization teaching these views).} The Law of Residency authorized the executive branch to expel or prevent the entry of foreigners whose conduct compromised national security or public order.\footnote{Law No. 4144, Nov. 23, 1902, [1889-1919], A.D.L.A. 560, 560.} In the seminal case of the \textit{Transporte Chaco}, which addressed the deportation of anarchists and syndicalists, the Supreme Court upheld the law of Residency.\footnote{CSJN, 6/5/1932, “Simón Scheimberg y Enrique Corona Martínez s/ habeas corpus en representación de treinta y tres extranjeros detenidos en el ‘Transporte Chaco’ de la Armada Nacional,” Fallos (1932-164-344) (Arg.).} The Court reasoned that Article 25 of the Constitution, which entitles foreigners to enter the country to till the soil, improve industry, and teach the arts and sciences, did not prevent the government from expelling those whose residence did not fulfill these goals.\footnote{Id.; \textit{see also supra} note 29 (text of \textit{CONST. ARG.} art. 25).} Likewise, the Court further held that the deportations did not contravene Article 14 of the Constitution—which bestows broad civil rights on all inhabitants, including the rights to reside and to work in Argentina—because this provision does not protect activities that threaten the public order.\footnote{See \textit{CSJN}, 6/5/1932, “Simón Scheimberg y Enrique Corona Martínez s/ habeas corpus en representación de treinta y tres extranjeros detenidos en el ‘Transporte Chaco’ de la Armada Nacional,” Fallos (1932-164-344) (Arg.); \textit{see also supra} note 31 (text of \textit{CONST. ARG.} art. 14).}

2. \textit{The Videla Law}


Although the many shortcomings of the prior law are not the focus of this article, a brief discussion of Law No. 22.439 serves to highlight the signifi-
cance of the new law’s replacement of xenophobic and restrictive principles with humanitarian and egalitarian migration standards. The Ley Videla retreated from the open immigration laws and policies of the past. The stated purpose of the law was to promote immigration of those persons “whose cultural characteristics allow for adequate integration into Argentine society.” Nevertheless, as discussed previously, few avenues for legal immigration were available, even for those with appropriate “cultural characteristics.” Despite the Supreme Court’s earlier decision in the Transporte Chaco case establishing the right to due process in expulsion proceedings, under the Videla Law, immigrants could be deported for illegal entry, violation of the terms of stay, criminal conduct, and threats to national security or public order, without even minimal due process. An immigrant had no right to receive notice or judicial review of the immigration agency’s decision to deny benefits or to detain or expel him or her.

In addition, the law placed severe restrictions on the rights of undocumented immigrants and prevented their integration in Argentine society. Only permanent or temporary residents could attend secondary school. Undocumented immigrants could not purchase or rent property, and a seller or landlord who violated these prohibitions could be fined. The law required citizens and government officials to report undocumented immigrants who engaged in commercial transactions, attempted to marry, or sought medical treatment. The law empowered the immigration agency to conduct searches for purported immigration violations without reasonable suspicion, probable cause, or a court order. Equal protection, non-discrimination, and the right to immigrate were notably absent from the old legislation. During the military dictatorship, the Constitution was virtually suspended. De facto legislation declared that the Constitution

63. See generally Hines, supra note 13 (providing a detailed analysis of Law No. 22.439).
69. Law No. 22.439, arts. 32, 35, Mar. 23, 1981, [1981-A], L. A. 273 (repealed) (discussing the related sale and acquisition of real estate); id. art.105 (referring to notaries who prepare commercial documents); id. art. 101 (discussing the officials who perform marriage ceremonies); id. art. 103 (noting facilities that provide medical care); id. art. 104, 106 (referring to all municipal, provincial and federal agencies and employees).
70. Id. art.107.
was only operable to the extent that it did not conflict with the junta’s objectives, making constitutional challenges to the law impossible.71

II. The New Immigration Law

A. Events and Advocacy Leading to the Passage of the New Law

A confluence of factors led to the passage of the new immigration law: the incorporation of human rights norms into the 1994 Argentine Constitution; an energized human rights discourse in the context of immigrants’ rights; a growing immigrant population that had no means of regularizing status; the development of a vibrant immigrants’ rights and advocacy community; and litigation challenging the Videla Law at the Inter-American Commission on Human Rights (IACHR).72

After the reestablishment of democracy, the new government embarked on a reform of the 1853 Constitution. The experiences and aftermath of an era of grave human rights abuses led to the incorporation of human rights treaties and standards in the 1994 Constitution.73 Specifically, the Constitution gives constitutional hierarchy to ten major international treaties that Argentina had ratified at the time of the reform.74 In addition, other ratified international treaties, including future ones, are superior to domestic law, although inferior to the Constitution, and a two-thirds vote of Congress may provide these treaties with constitutional hierarchy.75 Because of the primacy of international law in the Constitution, advocates and lawyers in Argentina have been at the forefront of the development of strategic litigation and public policy based on international human rights law in both the domestic and international fora.76 Consequently, Argentina crafted and enacted its new immigration law from a human rights paradigm.

Beginning in the 1990s and continuing into the 21st century, the burgeoning non-European immigrant population had few prospects of

72. The author initially spent six months in 1996 in Argentina on a Fulbright Grant at the Centro de Estudios Legales y Sociales (CELS) working on immigration issues. She has frequently returned to Argentina and has continued extensive collaboration with CELS and the Comision Argentina de Refugiados (CAREF) since that time. The author also helped to establish the first immigration clinic in Argentina, sponsored by CELS, CAREF and the Universidad de Buenos Aires, and participated in strategy discussions regarding reform of the immigration law. The University of Texas School of Law immigration clinic filed an amicus brief at the IACHR in the De la Torre case discussed herein. Much of this section is based on the author’s professional experience and continued research and collaboration on immigration law in Argentina.
74. Id. at 291.
75. Const. Arg. art. 75, ¶ 22.
obtaining legal status in Argentina. Certain sectors of Argentine society, like their counterparts in the United States, reacted to the increase in the immigrant population with xenophobia. Public officials, the media and some trade unions blamed immigrants for increasing crime and unemployment. In reaction to anti-immigrant sentiment and marginalization, immigrants from neighboring countries residing in Argentina formed civic organizations to urge reform of the Argentine immigration laws and later joined forces with the human rights community to advocate for the new law.

At the same time, the Centro de Estudios Legales y Sociales (CELS) (Center for Legal and Social Studies), the leading human rights organization in Argentina, began to expand the focus of its litigation and publications beyond traditional human rights concerns to include immigration issues. Incorporating immigrants’ rights into the broader human rights debate, CELS highlighted in its 1995 annual human rights report the discrimination against immigrants and the illegality of the military-era immigration law under constitutional and international standards.

During this same period, CELS and Comisión Argentina de Refugiados (CAREF), the primary immigrants’ rights and direct services organization in Buenos Aires, began to receive mounting complaints from immigrants and community organizations regarding the inability of immigrants to obtain proper documentation and legal status; the denial of access to employment, education, and health care; the requirement that citizens and entities report the undocumented to the authorities; and the lack of due process in immigration proceedings. Thus, in December of 1996, CELS and the Abogados Por los Derechos Civiles (Lawyers for Civil Rights), another non-governmental organization, filed a habeas corpus challenge to the detention and deportation of Juan Carlos de la Torre, a Uruguayan who had resided for many years in Argentina with his Argentine-born wife and children, as violative of constitutional and international human rights norms. When the Argentine Supreme Court rejected the habeas petition as moot because Mr. de la Torre had already been deported, CELS filed a petition at the Inter-American Commission for Human Rights, challenging the immigration law and Mr. de la Torre’s summary deportation under the

77. See Correa, supra note 19, at 173; see also Giustiniani, supra note 1, at 13; Hines, supra note 13, at 417–21.
79. See generally Enrique Oteiza, Susana Novick & Roberto S. Abuj, Política Migratoria, Im migración Real, y Derechos Humanos en la Argentina, Informe Anual sobre la Situación de los Derechos Humanos en la Argentina, 147, 147–181 (Centro de Estudios Legales y Sociales 1996) (noting the emergence of an immigrants’ rights discussion in the public arena).
81. CSJN, 22/12/1998, “Recurso de hecho deducido por la defensa de De la Torre, Juan Carlos en la causa De la Torre, Juan Carlos s/ habeas corpus,” Fallos (1998-321-3646) (Arg.).
82. Id.; De La Torre v. Argentino, Case 12.306, Inter-Am. C.H.R.
American Convention on Human Rights and other human rights norms. The case was still pending at the Inter-American Commission at the time of the passage of Law 22.871. In fact, in 2003, as part of its negotiations with CELS for the resolution of the case, the Argentine government stated its willingness to reform the Ley Videla in order to comply with human rights standards.

The fact that democratically elected governments continued to keep Law No. 22.439 (Ley Videla) in effect served as a focal point for widespread criticism and advocacy within the human rights community, particularly after the constitutional reform. In order to address these concerns, in late 1996, a network of human and immigrants’ rights organizations formed the Mesa de Organizaciones en Defensa de los Derechos de los Inmigrantes (Committee of Organizations in Defense of the Rights of Immigrants) with the goal of repealing the Ley Videla. The original members of the Mesa were the Comisión Argentina para Refugiados (Argentine Commission for Refugees); the Centro de Estudios Legales y Sociales (Center for Legal and Social Studies); the Asamblea Permanente por los Derechos Humanos (Permanent Assembly for Human Rights); Movimiento Ecuéménico por los Derechos Humanos (Ecumenical Movement for Human Rights); Servicio de Paz y Justicia (Peace and Justice Service); Fundación de la Comisión Católica de Migraciones (Foundation of the Catholic Commission for Migration); Centro de Estudios Migratorios de América Latina (Center for Latin American Migration Studies); and the Departamento de Migraciones de la Confederación de Trabajadores Argentinos (Immigration Department of the Confederation of Argentine Workers).

The efforts of the Mesa played an important advocacy role that culminated in the passage of the new law. The group analyzed the defects of the prior law in light of human rights standards, presented a draft of new legislation to national deputies serving on the Population and Human Capital Committee (Comisión de Población y Recursos Humanos) of the Chamber of Deputies, testified at public hearings, and continued its advocacy efforts until the enactment of the new law in December 2003.

83. See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, supra note 7. The University of Texas School of Law Immigration Clinic filed an amicus brief at the IACHR in the De la Torre case, see supra note 72.


85. See, e.g., Katie Fleet, CENTRO DE ESTUDIOS LEGALES Y SOCIALES: INFORME ANNUAL SOBRE SITUACIÓN DE LOS INMIGRANTES Y DERECHOS HUMANOS, 261, 261-87 (1997); see also Chausovsky, supra note 66, at 169.


87. Correa, supra note 19, at 173.

88. Id., see also Lic. Alejandro Giusti, Audiencia Pública y Seminario Sobre Política y Legislación Migratoria en la República Argentina, in MIGRACIÓN: UN DERECHO HUMANO,
The Right to Migrate as a Human Right

B. The Enactment of the New Law

Human rights groups, immigrant communities, and constitutional scholars enthusiastically greeted the new law whose fundamental principles support the right to immigrate as a human right and provide protections for additional human rights and basic equality. Senator Rubén Giustiniani, the author of the legislation, declared that the law “goes in a real direction of social progress, based on integration and not exclusion, multilateralism in the region and not unilateralism, tolerance and not xenophobia. The current immigration law is based on a new focus that enriches democracy.”

Eugenio Zaffaroni, a noted constitutional scholar and member of the Argentine Supreme Court, declared that the passage of the new law represents a landmark and “signifies the reestablishment of legal compatibility with constitutional directives.” Similarly, a sociologist specializing in immigration issues stated that:

[In contrast to the law enacted by the military government that reflected a disciplined, rigid and controlled society and discriminated based on the country of origin of immigrants, the new model projects a multicultural inclusive society with regional integration that respects the rights of foreigners and values their cultural and social contributions.]

Argentine Ambassador Leonardo Franco declared before the United Nations that:

[The search for better conditions of life in other countries must not be reproachable and [must be] much less criminalized . . . . Argentina sealed this new spirit in its migrations policies through the National Law of Migrations in 2004. This new law reflects the commitment of our country to guarantee the full respect of human rights of the migrants and their families and at the same time establishes mechanisms of easy access to regulate migration, thus contributing to the elimination of any form of discrimination, xenophobia or racism.]

These provisions are exceptional in a global climate in which national security concerns and exclusionary and restrictive policies dominate the immigration debate.

supra note 1, at 269; Giustiniani, supra note 1, at 15, 35-36; Nora Perez Vichich, Los Trabajadores Migrantes en la Nueva Ley de Migraciones: De Objeto de Normas a Sujetos de Derecho, in MIGRACIÓN: UN DERECHO HUMANO, supra note 1, at 137-38.

89. See generally Giustiniani, supra note 1 (compiling both sections of the new law, and essays of scholars, discussing the law).

90. Id. at 14-15.

91. Eugenio Raúl Zaffaroni, Migración y Discriminación: La Nueva Ley en Perspectiva Histórica, in MIGRACIÓN: UN DERECHO HUMANO, supra note 1, at 45.


As Argentine advocates pushed for a more generous immigration regime, attempts to liberalize the current immigration laws in the United States have repeatedly failed. One possible explanation is that human rights norms are not part of the U.S. Constitution and thus do not serve as a foundation for legislative proposals or legal challenges. In addition, U.S. immigration policy is a more highly politicized and divisive issue than it is in Argentina, which hinders the prospects for reaching a consensus. Although the immigrant advocates in the United States are superior in numbers, organization, and financial resources to their counterparts in Argentina, U.S. anti-immigrant forces are equally numerous, well-funded and well-organized in their efforts to defeat immigration reform.94 In contrast, Argentina has no organized anti-immigrant movement nor is immigration policy an important political issue for the electorate; these factors made passage of the liberal law more achievable.95

Thus, instead of liberalizing its immigration norms, the United States has enacted a series of increasingly restrictive laws. Both the 1996 Illegal Immigration Reform and Immigrant Responsibility Act and the 2001 USA PATRIOT Act severely limit immigrants’ rights and determine deportation and inadmissibility based on expanded definitions of criminal conduct and overly broad terrorism definitions.96 In addition, in 2006 the U.S. Congress authorized the Secure Fence Act of 2006, an exorbitantly expensive boondoggle, to build a wall across the southern border of the United States intended “to establish operational control over the international land and maritime borders of the United States.”97 The estimated cost of the wall ranged from between two and four million dollars per mile.98

94. See, e.g., Pro immigrant groups: American Immigration Council (formerly the American Immigration Law Foundation); National Council of La Raza; National Immigration Forum. Anti-immigrant groups: American Immigration Control Foundation (“Representing many different ethnic groups and backgrounds, AIC Foundation supporters have a deep commitment to preserving our common heritage as Americans, and to helping AIC Foundation educate our fellow citizens on the disastrous effects of uncontrolled immigration.” American Immigration Control Foundation, About AICF, http://www.aicfoundation.com/buildingblocks/pages/About_AICF.aspx (last visited May 15, 2010)); Center for Immigration Studies (“It is the Center’s mission to expand the base of public knowledge and understanding of the need for an immigration policy that gives first concern to the broad national interest.” Center for Immigration Studies, Mission Statement, http://www.cis.org/About (last visited May 15, 2010)); The Federation for American Immigration Reform (“The Federation for American Immigration Reform (FAIR) is a national, nonprofit, public-interest, membership organization of concerned citizens who share a common belief that our nation’s immigration policies must be reformed to serve the national interest.” The Federation for American Immigration Reform, About, http://www.fairus.org/site/PageNavigator/about/ (last visited May 15, 2010)).


98. BLAS NÚÑEZ-Neto & YULE Kim, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS No. RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BOR-
Although immigration reform focusing on a legalization program for the eleven to twelve million undocumented aliens in the United States has been introduced each year in Congress since 2005, no law has ever passed.\textsuperscript{99} In addition, all legislative proposals include stricter border enforcement and security as a \textit{quid pro quo} for reform.\textsuperscript{100} Some proposals have been even more draconian. In December 2005, the House of Representatives passed H.B. 4437, which, for the first time, criminalized undocumented immigrant status in the United States and broadened the definition of alien smuggling to include any assistance given to an undocumented immigrant; at the same time, the law provided no avenue for regularization of the undocumented population.\textsuperscript{101} In reaction to H.B. 4437, in the spring of 2006, hundreds of thousands of immigrants and advocates in the United States took to the streets to protest the legislation and to demand immigration reform.\textsuperscript{102} Although comprehensive immigration legislation was introduced in both 2006 and 2007,\textsuperscript{103} it was defeated and immigration reform again failed.\textsuperscript{104}

Some opine that the protests in 2006 generated more energy for opposition within the anti-immigrant groups and led to increased enforcement policies.\textsuperscript{105} Under the expanded grounds of deportation under the 1996 and 2001 immigration laws, Immigration and Customs Enforcement (ICE)
arrests of non-citizens between 2003 and 2008 climbed over 1,500%. 106
In fiscal year 2008 (FY08), ICE removed 356,739 immigrants from the
United States, a 23.5% increase over the total in the prior year. 107 ICE
worksite raids resulted in 6,287 arrests in FY08, an increase of 27% over
the prior year. 108 Thus, in contrast to U.S. policies, the Argentine immigra-
tion law is a welcome change and, reflecting different realities, demon-
strates a markedly distinct approach to immigration policy.

C. Provisions of the New Law109

1. General Principles

The most novel and groundbreaking provision of the law is the recogni-
tion of the fundamental right to migrate. The specific language is power-
ful: “The right to migrate is essential and inalienable to all persons and the
Republic of Argentina shall guarantee it based on principles of equality and
universality.” 110 The overarching principle of equality informs the provi-
sions on admission, residency, and deportation. Indeed, although the law
does not provide for open borders, it nevertheless reflects a philosophical
and human rights orientation.

In fact, Law 25.871 is broader in scope than the International Conven-
tion on the Protection of the Rights of All Migrant Workers and Members
of Their Families, the principal international human rights migration treaty,
of which Argentina is a signatory. 111 Although the Convention recognizes
the international phenomenon of migration, it does not frame the right to
migrate as a human right as the Argentine legislation does. 112 The pream-
ble to the Convention notes “the importance and extent of the migration
phenomenon, which involves millions of people and affects a large number
of States in the international community,” but makes clear that the Con-
vention does not limit a State’s ability to establish immigration admission
standards. 113 While the Convention does mandate that basic human
rights for which other international treaties provide be afforded to all
migrants, it differentiates between the specific protections extended to legal

106. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL
pdf/ice08ar_final.pdf.
107. Id. at 8.
108. Id. at 17.
109. The new law does not address asylum and refugee status. Instead, in 2006,
Argentina passed an extensive new refugee and asylum law. Law No. 26.165, Nov. 28,
110. Law No. 25.871, art. 4, Dec. 17, 2003, [30322] B.O. 2; see Pablo Ceriani
Cernadas, Nueva Ley: un Paso Hacia una Concepción Distinta de la Migración, in MI-
GRACIÓN: UN DERECHO HUMANO, supra note 1, at 113, 113 (2004).
111. Argentina ratified the Migrant Convention on Feb. 23, 2007; International Conven-
tion on the Protection of the Rights of All Migrant Workers and Members of Their
112. See generally G.A. Res. 45, supra note 111.
113. Id. at pmbl., art. 79.
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and irregular migrants residing within a signatory country. The fact that only forty-one countries have signed the Convention underscores the extent to which the Argentine law is progressive. None of the large immigrant-receiving countries, including the United States, Canada, or the European states, have been willing to approve even the narrower protections of the Convention.

The general principles under Article 3 of the Argentine law demonstrate its fundamental pro-immigration approach. The objectives of the law are to develop immigration policies and strategies in order to comply with international obligations relating to human rights and the integration and mobility of immigrants; to contribute to the achievement of the government’s demographic policies relating to population and geographic growth; to contribute to the enrichment and strengthening of the social and cultural fabric of the country; to guarantee the right to family reunification; to promote permanent residents’ integration into Argentine society; to ensure that all persons who seek admission temporarily or permanently enjoy the benefit of non-discriminatory admission criteria and procedures in conformance with constitutional, international statutory, and bilateral standards; to promote and provide information regarding the rights and obligations of immigrants, established under national and international law, while maintaining traditions of open and humanitarian treatment of immigrants and their families; to promote the integration of the immigrant labor force residing legally in the country to maximize their personal and employment skills for social and economic development; and to encourage visitors to the country. Many of these concepts are codified more specifically in subsequent provisions of the law.

Only two general principles address security and crime: the safeguarding of international order and justice by denying the entry or stay of persons involved in criminal activity; and international cooperation, communication, and technical training to prevent and combat transnational organized crime. Notably, the new immigration law diverges from the earlier model of encouragement of European immigration and instead emphasizes regional integration and immigration.

2. Equal Treatment and Non-Discrimination

In furtherance of its human rights framework, including the right to migrate, the new law extends standards of equal treatment and non-discrimination to all immigrants. The term “immigrant” is broadly defined as any person who wishes to enter, travel through, or reside permanently,

114. Id. at Part IV.
117. Id. at titls. II, IV.
118. Id. art. 3(j)-(k).
119. See Giustiniani, supra note 1, at 19–24, 36–42 (2004). However, the Constitution continues to provide for encouragement of European immigration. Id.
temporarily, or transitorily in Argentina.\textsuperscript{120} Laudably, the statute uses the term “irregular” to describe the status of a non-citizen, instead of the more inflammatory terms “illegal” and “illegality” used by the Videla Law or “illegal alien” employed by anti-immigrant groups in the United States.\textsuperscript{121} These pejorative terms stereotype them as criminals when, in fact, under current U.S. immigration law, undocumented status is not a crime; it is a civil violation for non-criminal conduct as an unauthorized status-holder under both the Argentine and U.S. law, but does not constitute a penal offense.\textsuperscript{122}

In addition, the law specifies that immigrants enjoy the same rights and protections as citizens, particularly with regard to social and public services, health, education, access to the justice system, employment, and social security.”\textsuperscript{123} The law further clarifies that irregular immigration status cannot be a reason to deny access to health care or public or private education at any level.\textsuperscript{124} The latter two provisions impose an obligation on educational and health care authorities to orient and assist the non-citizen to resolve his or her irregular immigration status.\textsuperscript{125}

The law defines discrimination as acts or omissions based on nationality, ethnicity, religion, sex, economic status, or physical characteristics that restrict the exercise of rights protected under the Constitution, international treaties, or domestic law.\textsuperscript{126} This provision ensures that immigrant status cannot be used as a pretext for discrimination. Finally, the government must comply with all ratified international conventions that guarantee migrant rights.\textsuperscript{127} The United Nations Committee on the Elimination of All Racial Discrimination has recognized the importance of these provisions of Law 25.871.\textsuperscript{128}

Although the anti-discrimination and equality sections of the law purport to apply universally, Article 5 contradictorily requires that “the government guarantee . . . equal treatment . . . so long as they [foreigners]
satisfy the established conditions for their entry and stay [in the country],
according to the laws . . . . “129 A literal reading of the text of this article
could lead to the conclusion that some type of disparate treatment might
still be permissible against persons in irregular status. Such an interpreta-
tion would contravene the more liberal provisions of the law including the
broad definition of an “immigrant” as any person who wishes to enter or
reside in Argentina under Article 2, the inalienable right to immigrate
under Article 4, the right to equal access to all rights and privileges
afforded citizens under Article 6, and the numerous references throughout
the law to constitutional, humanitarian, and human rights standards.130
Commentators urge that this possible inherent textual conflict must be
resolved through regulations in favor of equal treatment of all immigrants,
regardless of their immigration status.131 This is but one example of the
urgent need for the issuance of regulations.

Article 28 also clarifies that citizens of countries with whom Argentina
has entered into a specific migration agreement shall enjoy the most
favorable treatment, either under the immigration law or the migration
agreement.132 This provision also takes into account the formation of the
Mercosur in 1991, a free trade and free movement regional organiza-
tion.133 Current full members include Brazil, Argentina, Paraguay, and
Uruguay; associate members include Chile, Bolivia, Ecuador, Peru, and
Colombia.134 Accordingly, Article 28 states that preferential immigration
status afforded to citizens of the Mercosur countries in order to achieve
free movement does not violate the principles of equality provided for in
the law.135

Law 25.871 promotes cultural integration and education in the immi-
grant community. The federal, state, and municipal governments must
provide non-citizens and their families with information, that, when feasi-
ble, should be in a language the immigrant can understand regarding their
rights and obligations under the new law, the requirements for entry and
stay, and other related issues.136 Moreover, the government must adopt
appropriate measures to ensure the free dissemination of this information

130. See, e.g., id., art. 12.
131. See Gobierno de la Ciudad de Buenos Aires, Subsecretaria de Derechos Humana-
os, Comentarios a propósito de la reglamentación de la Ley 25.871 (undated) (comment-
ing on Law No. 25.871) (on file with author).
133. Treaty Establishing a Common Market between the Argentine Republic, the Fed-
eral Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Paraguay
www.siec.oas.org/Trade/MCRS/MCRSRTOC.ASP.
134. Id.
135. The Mercosur was founded in 1991 by the Protocol of Asuncion and was
amended in 1994 by the Treaty of Ouro Preto. See id.; Additional Protocol to the Treaty
ourop_e.asp.
through employers, unions, and other institutions. To foster cultural integration and multiculturalism, the government must provide Spanish language classes, promote awareness and appreciation of immigrants’ cultural, social, economic and religious expressions, and establish training courses for public employees and private entities. Finally, the government must facilitate the input and participation of foreigners in policymaking that may affect immigrant communities.

These latter provisions regarding the cooperative role of Argentine federal, state, and municipal authorities in the integration and protection of immigrants stand in stark contrast to trends in the United States. Many local and state governments have committed themselves to rooting immigrants out of their communities and have entered into written agreements with the Department of Homeland Security to enforce immigration laws, an area traditionally the province of the federal government. Additionally, local and state police increasingly arrest immigrants for minor traffic or criminal offenses and turn them over to federal immigration authorities for deportation. Latino immigrants are most frequently the target of these practices and studies have shown a disparate impact on the Latino community as a whole, including evidence of racial profiling. Sheriff Joe Arpaio in Phoenix, Arizona, runs the most notorious of these local programs, in which he houses immigrants in tents, marches them through the streets in black and white striped prison clothing, sowing terror throughout the Latino community. Most recently, the Arizona legislature enacted a sweeping immigration law that includes such provisions as requiring local police to ascertain the immigration status of all those suspected of being in the U.S. without proper documents and making una-
torized immigration status a state trespass offense.\textsuperscript{144}

In addition to local enforcement initiatives, some states and municipalities have passed ordinances or referenda that restrict undocumented immigrants’ access to employment and housing under the guise of regulations of business, health, and safety.\textsuperscript{145} Some courts have struck down these laws as a violation of due process or, more frequently, as an improper attempt to regulate immigration law, the province of the federal government; yet other courts have found these laws permissible.\textsuperscript{146} Thus, while Argentina has promoted integration of its immigrant community and provided a path for legalization of its undocumented community, U.S. government officials have gone to the other extreme, discouraging immigrants from living in their communities.

3. Admission Standards

a. General Principles

The law, based on the inalienable right to migrate, provides that:

Any person who requests to be admitted permanently or temporarily to the Argentine Republic, enjoys the right to non-discriminatory criteria and procedures in terms of the rights and guarantees established by the National Constitution, international treaties, bilateral agreements and laws.\textsuperscript{147}

Moreover, the government must implement measures that promote the legalization of foreigners\textsuperscript{148} and ensure that delays in immigration processing do not adversely affect them.\textsuperscript{149} Family reunification is a fundamental underpinning of the admission process, as evidenced by the general principles of Law 25.871\textsuperscript{150} and Article 10, which specifically provides that “the State shall guarantee the right to family reunification of immigrants with their parents, spouses, minor unmarried children, or adult children with

\textsuperscript{144} S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). Numerous plaintiffs, including the United States, have filed lawsuits challenging the constitutionality of the Arizona law.

\textsuperscript{145} See cases cited infra note 146.

\textsuperscript{146} Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 477 (M.D. Pa. 2007) (striking down a city ordinance that regulated access to housing and employment of undocumented immigrants); Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 761–62 (N.D. Tex. 2007) (granting a preliminary injunction of a city ordinance that required tenants to provide evidence of citizenship or immigration status prior to entering into a lease); Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 879 (N.D. Tex. 2008) (striking down prior Farmers Branch ordinance); Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976, 988 (9th Cir. 2008) (amended in Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 861 (9th Cir. 2009)) (upholding validity of state law, the Legal Arizona Workers Act, which sanctions suspension or revocation of business licenses of employers who knowingly or intentionally hired undocumented workers); Gray v. City of Valley Park, Mo. 567 F.3d 976, 987 (affirming district court decision to uphold validity of city ordinance that made it unlawful for business owners to recruit, hire, or continue to employ undocumented workers).

\textsuperscript{147} Law No. 25.871, art. 3(f), Dec. 17, 2003, [30322] B.O. 2.

\textsuperscript{148} Id. art. 17.

\textsuperscript{149} Id. art. 26.

\textsuperscript{150} Id. art. 3(d).
special needs.”

In reversing the denial of a visa to the Chinese wife of an Argentine resident, the Argentine Supreme Court noted that “the new Argentine immigration policy, Law 25.871, not only repealed the old law . . . but also established . . . a substantial change in objectives that must be kept in mind for the admission of foreigners.” Accordingly, the Court rejected the government’s decision to deny the visa based on “criminal proclivity” and held that the principles of family reunification must govern all admission decisions.

In contrast, in the United States, criminal conduct trumps family reunification goals in decisions regarding admissibility and deportation. Immigration officials have the authority to deport even long-time permanent residents and to deny admission to family members of citizens and residents if those family members have engaged in criminal activity.

b. Admission Categories

Law 25.871 establishes four distinct legal statuses: permanent residence, temporary residence, transitory residence, and provisional residence.

(1) Permanent Residence

Permanent residence is broadly available to those who wish to settle permanently in the country. The law specifically recognizes that a spouse, child, or parent of an Argentine citizen may obtain permanent residence. Unfortunately, the statute does not provide any further detail regarding other categories of persons who may obtain permanent residence, again warranting the need for regulations to flesh out this provision.

(2) Temporary Residence

Temporary residence for an initial period of three years and renewable thereafter in similar increments is available to migrant workers; persons with independent income sources; retirees with income from a foreign government, an international organization, or a foreign corporation; investors; scientists; and specialized workers employed by public or private entities; athletes; artists; and religious workers.

Additionally, persons seeking medical treatment in Argentina and their immediate family, legal representative, or guardian may receive a tem-

151. Id. art. 10.
153. Id.
156. Id. art. 22.
157. Id. art. 23(a)–(g).
porary visa for one year, which is renewable in similar increments. \footnote{158} Academics may enter for one year with similar authorized extensions.\footnote{159} Students pursuing high school, three year degrees or university studies; asylees and refugees; and citizens of the Mercosur member and associated countries may receive temporary residence for two years, renewable in similar increments. \footnote{160}

Finally, the Ministry of the Interior or the Ministry of Foreign Relations, International Commerce and Culture has the discretion to admit temporary residents for humanitarian reasons or for any governmental interest not encompassed in the statute. \footnote{161} Unlike other temporary residents, for the latter category, the statute does not set out the length of the visa nor any extensions. Presumably the regulations, once promulgated, will set out time frames. \footnote{162}

(3) Transitory Residence

Transitory residents are tourists, passengers in transit, border travelers, crew of international transport, seasonal migratory workers, academics, persons seeking medical treatment, and foreigners whom the Immigration Department determines deserve special treatment. \footnote{163} Once again, the statute fails to specify the length of stay for this category.

(4) Provisional Residence

The law specifically provides for provisional residence while any permanent, temporary, or transitory immigration process is pending. This status is valid for 180 days and may be renewed until an application is finalized. A foreigner with such status may enter, remain in, and depart the country and work or study. \footnote{164} This provision of the law is a definite improvement over the repealed Law 22.439, which allowed the agency to issue or cancel provisional status through a patchwork of resolutions authorizing provisional residency for different nationalities for different periods of time with no administrative or judicial safeguards. \footnote{165} In contrast, the new law extends provisional status to all foreigners with pending immigration proceedings for a fixed, renewable period of time and makes clear that certain rights attach to such status.

\footnote{158}{Id. art. 23(h).}
\footnote{159}{Id. art. 23(i).}
\footnote{160}{Id. art. 23 (j)-(l); See Treaty of Asuncion, supra notes 133-35; See discussion \textit{infra} at II. D. regarding additional immigration provisions for citizens of the Mercosur.}
\footnote{161}{Law No. 25.871 at art. 23(m)-(n), Dec. 17, 2003, [30322] B.O. 2.}
\footnote{162}{Id.}
\footnote{163}{Id. art. 24(a)-(g).}
\footnote{164}{Id. art. 20.}
\footnote{165}{Law 22.439, art. 21, March 23, 1981 [1981-A], L.A. 273 (repealed); see, e.g., Res. No. 1315, July 7, 1997, A.O.N. (extending Resolution No. 3850, Oct. 10, 1994, to Peruvians); see Hines, supra note 13, at 404, 410.}
4. Labor, Property Rights and Penalties

Permanent residents have an unrestricted right to work and to engage in other types of remunerative activities; by contrast, temporary residents may do so only during their authorized stay in the country. Furthermore, the law prohibits transitory residents from working or engaging in remunerative activities unless they are seasonal migrants or receive express permission from the immigration authorities. Although the Argentine law enshrines principles of non-discrimination, the law contradictorily limits the rights of those in irregular immigration status. Such immigrants may not engage in remunerative activities and employers who hire unauthorized immigrants are subject to monetary fines. Nevertheless, irregular immigrant workers still maintain all labor rights with regard to any employment that they might obtain. Law 25.871 also prohibits the renting of housing to persons in irregular status and imposes administrative fines for any violation. The law further requires any person who enters into transactions regarding real estate, mortgages, registrable goods, or incorporations with an irregular migrant to report such transaction to the immigration authorities; however, like the employment prohibitions, any such transaction still remains valid despite these statutory prohibitions.

These restrictions directly contradict the principles of equality, non-discrimination, and protection of human rights that the statute espouses in general terms. First, the rental prohibition limits immigrants’ housing options and arguably forces irregular immigrants into substandard and illegal housing. Second, the required reporting of irregular immigrants who enter into transactions infringes on an immigrant’s ability to purchase property, transact business, purchase and register an automobile, or form a corporation. Third, reporting of irregular immigrants contradicts the law’s provisions which foster federal, state, and municipal efforts at immigrant integration. These reporting provisions also harken back to the Videla Law, which required the reporting of not only immigrants who engaged in similar transactions, but also those seeking access to social services and medical care. Although it remains to be seen how strictly these provi-
sions will be enforced, regulations should be drafted to narrow this provision to conform with the law’s overarching human rights principles.

In addition to administrative fines, Law 25.871 defines various criminal sanctions ranging from prison sentences of one to six years for human trafficking, furthering a non-citizen’s illegal stay for direct or indirect benefit, and using false documentation to request an immigration benefit for a third party.\textsuperscript{175} The law prescribes longer prison sentences if the actions involve aggravating factors such as violence, abuse, recidivism, drugs, or terrorism, or if the victim is a minor.\textsuperscript{176} One federal provincial court has ruled that defendants who ran a prostitution ring of Paraguayan women in irregular immigration status were guilty of criminal violations of the immigration laws.\textsuperscript{177} The defendants unsuccessfully argued that they were merely providing employment and housing and should only be sanctioned under the administrative prohibitions of Articles 55 and 59.\textsuperscript{178}

5. Denial of Admission, Cancellation of Residency and Expulsion Proceedings\textsuperscript{179}

The sections of the law regarding admission and expulsion criteria are generally consistent with the new law’s open and generous framework. They also reasonably balance the right to immigrate with the government’s sovereign power to determine whom to admit or whom to deport. First and foremost, before denying admission, cancelling residency, or deporting a person, the Immigration Department must take into account humanitarian factors, such as family ties, length of residency in the country, occupation, and personal and social conditions\textsuperscript{180} and provide an opportunity to regularize status.\textsuperscript{181}

a. Denial of Admission

The law includes provisions that can result in the denial of entry or stay in Argentina. The presentation of false or altered documents bars a person from reentry for five years.\textsuperscript{182} Evading immigration inspection and non-compliance with other provisions of the immigration law are also grounds for denial of admission and deportation.\textsuperscript{183} Persons who have committed genocide, war crimes, acts of terrorism, crimes against humanity, or other acts punishable by the International Criminal Court; who belong to international or national criminal organizations; who have been convicted of smuggling non-citizens for profit; or who have been involved

\textsuperscript{176.} Id.
\textsuperscript{178.} Id.
\textsuperscript{179.} For the purposes of this article, the terms "expulsion" and "deportation" are interchangeable.
\textsuperscript{181.} Id. art. 61.
\textsuperscript{182.} Id. arts. 29(a), 35.
\textsuperscript{183.} Id. arts. 29(i)–(k), 37.
in or convicted of promoting prostitution, human trafficking, or sexual exploitation may likewise be denied entry or stay. 184 A non-citizen who has been convicted of a crime in Argentina or in another country, or who has a criminal history of weapons, drugs or human trafficking, or money laundering for which a sentence of three years may be imposed under Argentine law may be denied admission or stay in the country. 185 A non-citizen who has been ordered to be deported or prohibited from reentry may not return until such order has been revoked or the period of inadmissibility, as stated in the order, has expired. 186

If a question or suspicion regarding admission arises at the border or port of entry, entry will be denied until such time as the issue is resolved. 187 A decision denying admission must be appealed to the Immigration Department from outside the country within fifteen days. 188 In cases of danger to health or physical well-being, the immigration authorities may admit the applicant provisionally. 189 The Immigration Department, with the approval of the Ministry of Interior, may waive these impediments for family unity or humanitarian reasons. 190

Courts have construed the grounds of inadmissibility narrowly. For example, in interpreting the criminal grounds of inadmissibility under Article 29, the Supreme Court in Zhang, Hang clarified that an actual criminal conviction, rather than alleged criminal acts, is required to deny admission. 191 Noting the law’s principles of family reunification and humanitarian goals, the Court emphasized that immigration authorities have broad authority to waive the grounds of inadmissibility. 192

b. Deportation and Cancellation of Residency

The government may cancel a grant of residency and initiate expulsion proceedings against persons who: (1) have obtained documents through fraud; (2) have received a sentence of five years for crimes of malicious or who are criminal recidivists; (3) have lived outside Argentina for more than two years, subject to certain exceptions; (4) are transitory, temporary, or permanent residents who fail to comply with the purpose of the grant of status, or who have received financial support from the Argentine government and have failed to comply with conditions of such support; or (5) have participated in genocide, war crimes, terrorism, crimes against humanity or similar acts, or who belong to organizations that are subject to prosecution by the International Criminal Court or by domestic courts. 193

184. Id. art. 29(d)–(h).
185. Id. art. 29 (c).
186. Id. art. 29(b).
187. Id. art. 35.
188. Id.
189. Id.
190. Id. arts. 29, 34.
192. Id.
Persons in irregular status are also subject to deportation.\textsuperscript{194} Anyone who is deported may not return for a minimum of five years or longer, depending on the seriousness of the deportation charge, although the Immigration Department may waive this prohibition.\textsuperscript{195}

Like the provisions regarding inadmissibility, before initiating deportation proceedings, the government must consider the person’s profession, family ties with Argentine citizens, the period of authorized stay, and other personal and social factors.\textsuperscript{196} In the case of a person in irregular immigration status, the government must first provide him or her with an opportunity to regularize his or her status. If the non-citizen does not take steps to legalize his/her status, the government will issue an expulsion decree but suspend its execution and initiate formal deportation proceedings before a judicial court.\textsuperscript{197} In light of the government’s regularization programs for Mercosur citizens and others who resided in Argentina at the time of the passage of the law, this latter provision establishes a mechanism for many to avoid deportation.\textsuperscript{198} Additionally, the Mercosur program suspended expulsions of citizens of Mercosur countries to allow them an opportunity to apply for legal status.\textsuperscript{199} Thus, in practice, few, if any, expulsions, other than those related to criminal conduct, have taken place since the passage of the new law.\textsuperscript{200}

These provisions differ substantially from U.S. immigration law under which removal proceedings may be initiated against deportable non-citizens, regardless of their length of residence or legal status in the United States, or their employment, personal, social, or family situation.\textsuperscript{201} Since the passage of the 1996 immigration laws, thousands of non-citizens, many of them lawful permanent residents, have been deported with no recourse whatsoever, causing untold uprooting, suffering and family separation.\textsuperscript{202} Only in the most exceptional cases will the Department of Homeland Security exercise prosecutorial discretion and decline to proceed with removal.

\textsuperscript{194} Id. art. 61.

\textsuperscript{195} Id. art. 63.

\textsuperscript{196} Id. arts. 61, 63.

\textsuperscript{197} Id. art. 61.

\textsuperscript{198} See discussion of Mercosur and Non-Mercosur Regularization Programs, infra at II.D.


Clearly, the more nuanced Argentine approach to deportation is a better and more humanitarian model.

c. Administrative and Judicial Review

The new law provides for administrative review, reconsideration, and subsequent judicial review in cases involving the denial or cancellation of residence or admission and expulsion decrees. When administrative review or reconsideration is sought, the authorities must make a decision within thirty days. After exhausting administrative review, the affected party may appeal to the federal court. In deportation cases, even if the affected party does not contest the administrative decision, the Immigration Department must submit the case to a competent judicial authority. Federal courts with jurisdiction over administrative decisions or any federal court in the provinces of Argentina are authorized to hear such immigration cases.

The government’s duty to present the case to a competent court constitutes a remarkable departure from prior law, which authorized summary deportation with no access to judicial review. As one federal court stated:

Expulsion cannot be directly executed by the administrative authorities (as it was under the prior law), but rather it is a suspended measure, since there must be judicial intervention to review the administrative decision. Under Law 25.871, the administrative immigration decisions cannot be executed without judicial control.

This includes, not only the expulsion decision, but the administrative decision that determines irregular status and the other circumstances of the case, since the expulsion is the consequence and effect of a prior declaration of either irregular status or cancellation of previously granted residence.

In addition to the procedures for deportation, the law provides for a remedy of “pronto despacho,” similar to mandamus, for the immigration

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205. Id. art. 76.

206. Id. art. 84.

207. Id. arts. 61, 74.

208. Id. art. 98.

agency’s failure to resolve a case or application within the time required by law, or if no time frame is specified, within a reasonable period of time.\footnote{Law No. 25.871, art. 85, Dec. 17, 2003, [30322] B.O. 2.} This recourse addresses immigration attorneys’ and advocates’ complaints of unreasonable delays in adjudications by the Immigration Department.

d. Additional Criminal Deportation Mechanisms

The law provides for additional specific deportation mechanisms for criminals. Under Article 64, after a non-citizen has served one-half of the sentence imposed, the Immigration Department may issue a deportation order, which simultaneously extinguishes the remainder of the criminal sentence.\footnote{Id. art. 64(a). This immigration provision references Law No. 24.660, art. 17, which provides for semi-release and rehabilitative programs for certain persons who have been convicted of more minor offenses and have served one-half of their sentence.} Similarly, the department may issue a deportation order against a non-citizen in irregular status who has completed probation,\footnote{Law No. 25.871, art. 64(b), Dec. 17, 2003, [30322] B.O. 2.} or who is charged with a lesser crime for which probation or other rehabilitative measures are available.\footnote{Id. art. 64(c).} In the latter case, the criminal prosecution is terminated.\footnote{Id.} Most cases reach the courts because non-citizens have requested that these deportation procedures be invoked and many non-citizens are represented by the immigration lawyers provided by the national Public Defenders Office (Defensoría General de la Nación) of the Public Ministry.\footnote{Const. Arg. art. 120 (the Public Ministry (Ministerio Público) is comprised of the Attorney General, the Federal Prosecutor, and Federal Defenders Offices. The Ministry is considered “the representative of Argentine society.”); see also Convenio con el Ministerio Público de la Defensa, http://www.migraciones.gov.ar/novedades/includes/datosNovedad.php?historico=s&id=63&lang= (last visited May 15, 2010); interview with Pablo Asa, Director, CAREF/CELS/UBA Immigration Clinic, Attorney at the Immigration Commission of the Defensoría General de la Nación, in Buenos Aires, Arg. (July 3, 2009); interview with Verónica Asurey, Immigration and Criminal Defense Attorney, in Buenos Aires, Arg. (July 14, 2009).}

These two provisions have proved controversial. Commentators have argued that Article 64 violates the law’s underlying principles of non-discrimination, equality, and family reunification. Some posit that non-citizens, unlike Argentine citizens, are unfairly subjected not only to criminal sanctions, but expulsion as well, an argument that immigration advocates have unsuccessfully raised in the United States.\footnote{See, e.g., Cernadas, supra note 110, at 117; Teresa A. Miller, Citizenship & Severity: Recent Immigration Reforms and the New Penology, 17 Geo. Immigr. L.J. 611, 616 (2003); Morales & Asurey, supra note 84, at 269.} On the other hand, others, including prosecutors, maintain that the law is unconstitutional because it denies Argentines equal treatment; they point to the fact that the law allows only non-citizens to have their sentences reduced and extinguished.\footnote{See generally Jose Nicasio Dibur, El Artículo 64 de la Ley de Política Migratoria Argentina: Una Norma Inconstitucional?, I.L. (2005-C-224).}
For example, in the case of Nicholas P. Chukura O’Kasili, the non-citizen invoked the provisions of Article 64(a) to extinguish his criminal sentence via expulsion.218 The federal prosecutor from the Public Ministry argued that the law impermissibly discriminated against Argentines convicted of crimes who are required to complete their entire sentence and that the immigration law also violated the separation of powers.219 The defense countered that the prosecutor could not invoke the right to equality in the abstract on behalf of Argentines, because they were not parties to the case, to the detriment of the non-citizen.220 The federal criminal court ruled that Article 64 did not violate the rights of Argentines to equal treatment under Articles 14, 16, and 20 of the Constitution.221 In addition, the court held that the reduction of a non-citizen’s sentence via deportation did not infringe on the separation of powers because the executive branch is merely enforcing the law, as enacted by the legislature, and not modifying the penal code.222

In the case of Chambi Loaiza, Adolfo, the accused non-citizen sought deportation and argued that, based on constitutional principles of equality, Article 64(c) should be extended to all crimes, rather than be limited to those for which probation or other rehabilitative sentences are available.223 The court rejected this argument and held that the plain language of the statute applied only to minor crimes.224 In addition, the court noted that to hold otherwise might encourage non-citizens to commit crimes, knowing that they would be deported, rather than face criminal prosecution and incarceration.225

Similarly, in another case before the same court, a non-citizen argued that the provisions of Article 64(c) should be applied to his drug trafficking crime, for which rehabilitative measures are not available.226 Although the court rejected his argument,227 based on the language of the statute, the dissent concluded that Article 64(c) should be applied broadly, regardless of the nature of the offense.228 Reasoning that one of the purposes of Article 3(j) of Law 25.871 is to remove non-citizens who have committed crimes, the dissenting judge concluded that it is in the national interest to extend Article 64(c) to convicted non-citizens, regardless of the nature of

219. Id.
220. Id.
221. Id.
222. Id. See also C.N.C.P., Sala III, 29/6/2005, “Flores Martínez Mauricio Osmar / recurso de inconstitucionalidad” (Arg.) (rejecting similar arguments made by the prosecutor).
224. Id.
225. Id.
227. Id.
228. Id. (Dra. Angela Ester Ledesma, dissenting).
the criminal offense, in order to rid Argentina of immigrant criminals. 229

6. Right to Counsel

Non-citizens within Argentina who lack sufficient financial resources have the right to free legal assistance and access to interpreters. 230 Article 86 of Law 25.871 specifically states that the regulations must protect the constitutional right to present a defense. 231 Although there are no regulations in place, recently the Defensoría General de la Nación, the national federal public defenders’ office, began to provide immigrants with attorneys to represent them in their administrative and judicial expulsion proceedings. 232 In Buenos Aires, two attorneys handle the administrative immigration proceedings, and the National Immigration Department (Dirección Nacional de Migraciones) provides the funding for these attorneys. 233 Other lawyers within the Defensoría handle these cases when they reach the federal tribunals. 234 In the provinces outside Buenos Aires, general attorneys from the Defensoría handle both the administrative and judicial immigration cases. 235

U.S. law on indigent non-citizens’ right to counsel varies significantly from its Argentine counterpart. In the United States, there is no right to appointed counsel for indigent non-citizens in removal proceedings, even though the Supreme Court has described the severe consequences of deportation as “banishment” and the “loss of all that life is worth living.” 236 The need for legal representation, however, is apparent, given that non-citizens who have legal representation have a much greater chance of success in their court proceedings than those who lack representation. 237 The guarantee of counsel under the Argentine law is a great advancement in the protection of immigrants’ rights and should be adopted in the United States.

229. Id.
231. Id.
232. See supra note 215. The national federal defenders are part of the Ministerio Público.
234. Id. art. 86.
236. 8 U.S.C. § 1229a(b)(4)(A) (2006) (providing that an alien has a “privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing.”); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure and at times the equivalent of banishment or exile.”); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (“[D]eportation may result also in loss of both property and life, or of all that makes life worth living.”).
7. Detention

The Argentine law’s strictly limited use of detention demonstrates its rights-protective nature. Detention is generally only permissible after a final order of deportation. If deportation cannot be achieved within a “prudential” time frame or if there are other compelling reasons, the immigrant may be released, pending deportation.\footnote{Law No. 25.871, art. 71, Dec. 17, 2003, [30322] B.O. 2.} In exceptional circumstances, detention may be authorized before the issuance of a final order.\footnote{Id. arts. 69–70.} Even then, the government must seek a detention order from a competent judicial body solely in order to execute the deportation.\footnote{Id. art. 70.} The Immigration Department must suspend such detention in cases in which the detainee is the parent, child or spouse of an Argentine citizen.\footnote{Id.} The law also provides for conditional release when deportation cannot be achieved within a “prudential” time frame or for any other reasons that might justify release.\footnote{Id. art. 71.} In practice, few non-citizens, other than those accused of crimes, are detained.\footnote{See interview with Pablo Asa, Director, CAREF/CELs/UBA Immigration Clinic, Attorney at the Immigration Commission of the Defensoría General de la Nación, supra note 215.}

In the case of Zeng Xiankai, the federal appellate court strictly interpreted the provisions of Article 70 relating to preventive detention pending deportation.\footnote{Juzgado Federal [Juzg. Fed.] [lower federal courts], 22/6/2004, “Zeng Xiankai s/ habeas corpus,” La Ley [L.L.] (2004-E-4) at 4 (Arg.).} The court ordered the release of a Chinese citizen whom the immigration authorities had ordered deported for possession of false documents, but whose deportation order was not yet final. The court reasoned that detention prior to a final order is only justified under exceptional circumstances, as the statute clearly states, and not merely because of unauthorized status.\footnote{Id.; Law No. 25.871, art. 70, Dec. 17, 2003, [30322] B.O. 2. (“In exceptional cases and when the circumstances justify it, the National Immigration Department or the Ministry of the Interior may request from the judicial authority the detention of a foreigner even if the expulsion order is not final.”).} The court particularly emphasized that the authorities did not follow the procedures of Article 61, which require that the Immigration Department give the non-citizen a fixed period of time in which to regularize his status before entering an expulsion order.\footnote{Law No. 25.871, art. 61, Dec. 17, 2003, [30322] B.O. 2. (“Upon confirming a foreigner’s irregular status in the country, and considering his profession and Argentine citizen relatives, length of residence, and other personal and social conditions, the National Immigration Department shall order the foreigner to regularize his status during a set time period in lieu of an expulsion decree.”).}

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239. Id. arts. 69–70.
240. Id. art. 70.
241. Id.
242. Id. art. 71.
245. Id.; Law No. 25.871, art. 70, Dec. 17, 2003, [30322] B.O. 2. (“In exceptional cases and when the circumstances justify it, the National Immigration Department or the Ministry of the Interior may request from the judicial authority the detention of a foreigner even if the expulsion order is not final.”).
246. Law No. 25.871, art. 61, Dec. 17, 2003, [30322] B.O. 2. (“Upon confirming a foreigner’s irregular status in the country, and considering his profession and Argentine citizen relatives, length of residence, and other personal and social conditions, the National Immigration Department shall order the foreigner to regularize his status during a set time period in lieu of an expulsion decree.”).
houses persons accused of crimes.247

In contrast, U.S. law provides broad statutory authority for detention of immigrants pending the outcome of their removal hearing.248 Although some immigrants may be released on bond, many are subject to mandatory detention, a practice which the U.S. Supreme Court has deemed constitutional.249 These provisions, combined with increased enforcement policies in the United States, have led to a burgeoning detention of immigrants. At the end of 2008, there were approximately 440,000 non-citizens in ICE detention with an average of 30,000 detainees on any given day.250 Detainees are housed in sub-standard, penal-like facilities.251 One hundred and seven people have died in immigration detention since October 2003, and reporters have widely documented the lack of adequate medical and mental health care.252 Despite the Obama administration’s expression of its willingness to reform detention conditions and explore alternatives to detention for some immigrants, the detainee population has not decreased.253 Thus, the Argentine system of immigrant detention, which limits detention to those with final deportation orders, and even then only based on a judicial order, is certainly more humane.

D. Mercosur and Non-Mercosur Regularization Programs

In December 2002, members and associate members of the Mercosur entered into an agreement to ensure free circulation of citizens within all respective countries.254 Incorporating these principles, Article 23 of Law 25.871 states that all citizens of the Mercosur and associated countries are eligible for temporary residence and subsequent permanent residence.255 In addition, Article 28 clarifies that the preferential immigration status

248. 8 U.S.C. § 1225(b)(2)(A) (2006) (“in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229(a) of this title.”).
251. Detention Watch, supra note 250.
afforded to citizens of the Mercosur countries in order to achieve free movement does not violate the general principles of equality provided for in the law.256

In 2004, after the passage of Law 25.871, the government enacted the National Program of Normalization of Immigration Documents (Programa Nacional de Normalizacion Documentaria Migratoria), popularly known as the Patria Grande (Big Country) program, to further the regularization of Mercosur citizens.257 The program got off to a slow start, however. Not until a fire in a clandestine sweatshop on March 30, 2006 killed six undocumented Bolivians, did the government begin to focus on the program in earnest.258 As of 2008, the government had approved a total of 560,131 applications from the following countries: Paraguay, 50.8% of the total; Bolivia, 27.8%; Peru, 13.2%; Uruguay, 2.6%; and Chile, Venezuela, Brazil, Ecuador, and Colombia, each less than 2%.259

In June 2004, the government implemented Article 17 of Law 25.871, which mandates that the government establish mechanisms to legalize the status of irregular immigrants, by decreeing a legalization program for non-Mercosur citizens.260 In adopting the program, the government recognized this population’s established family and community ties in Argentina and their vulnerability to exploitation.261 The decree grants temporary status for two years to anyone residing in the country as of June 30, 2004, and provides for subsequent permanent residence status under Law 25.871.262 As of 2008, 12,062 applications had been granted, 75% of which were from Chinese immigrants.263

III. The Need for Regulations

The importance of Law 25.871 in advancing a human rights-based model for immigration cannot be overstated. Yet despite its importance, the government has not, after almost five years, issued any regulations per-
taining to the law. As shown throughout this article, regulations will serve to clarify, reconcile, or expand provisions of the law; the lack of regulations impedes the full implementation of the law’s human rights goals.264

Regulations also serve an important function for the government officials who administer the law. While a statute sets out broad parameters and legal principles, regulations provide clear and objective criteria for government officials to apply the law. As one scholar has noted:

[I]n the absence of rules, agencies and their employees usually have wide discretion with respect to the manner in which they interpret and apply typical broadly worded . . . statutes. As a result, similarly situated individuals may be the subject of widely disparate agency actions . . . . [R]ules can serve the valuable purposes of reducing the discretion of agency personnel and reducing the incidence and magnitude of inter-decisional inconsistencies.265

It is unclear why the Argentine government has neglected to enact regulations for Law 25.871. In September 2004, Dr. Adriana Alonso, representing Argentina before the Organization of American States, asserted that the government was in the process of issuing regulations with the input of government agencies and non-governmental organizations.266 Dr. Alonso stated that the development of regulations was difficult because of the substantial differences between the new law and the old law, which had been in effect for more than twenty years.267 She noted that it was not the best time to promulgate regulations for Law 25.871 because of the unfavorable economic situation and high unemployment rate.268 Curiously, she declared that the regulatory process was based on principles of equality and thus “they were attempting to be careful so as to avoid reverse discrimination, that is, not to create unequal treatment in which those harmed are [Argentine] nationals.”269 This explanation is specious because the law’s principles provide immigrants with the same rights, regardless of the economic or political situation of the country, and thus the current situation does not excuse the delay in the passage of regulations.

Other experts have varying theories for the lack of political will to undertake the regulatory process. One opined that the promulgation of regulations would limit the authority of the Immigration Department and, for that reason, government officials within the department are resisting their issuance.270 A human rights attorney stated that it is not uncommon

266. Basis of the Presentation of Dr. Adriana Alonso for the Special Meeting of the Working Group, Organization of American States 5 (scm.oas.org/doc_public/SPANISH/HIST_04/CP13349S04.DOC).
267. Id.
268. Id.
269. Id.
270. Email from Judge Gabriel Chausovsky to Barbara Hines (Jul. 26, 2009) (on file with author).
for lengthy delays in regulations after the passage of a statute.\footnote{271}{Interview with Diego Morales, Director of Litigation, CELS, in Bogota, Colom. (Nov. 14, 2009). Delays in issuing regulations have similarly occurred in U.S. immigration law. For example, the statute defining unlawful presence, a new ground of inadmissibility, was enacted in 1996 but regulations defining this term have yet to be promulgated. \cite{8 U.S.C. § 1182(a)(9) (2006)}. Similarly, in 2000, Congress created the U Visa, but did not promulgate regulations until seven years later. \cite{8 U.S.C. § 1101(a)(15)(U)(i)(III) (2006); New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53014, 53015 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, & 299)).}

Finally, one commentator explained that, at least in 2009, the current government was preoccupied with mid-term Senate and Deputy elections and wanted to avoid tackling any potentially controversial issue.\footnote{272}{Interview with Pablo Asa, Director, CELS/CAREF/UBA Immigration Clinic, Attorney at the Immigration Commission of the Defensoría General de la Nación, \supra note 215.}

The lack of regulations impedes the law's ambitious and broad principles of immigrants' integration, education, participation, and equality, all of which require regulatory authority, detail, and funding. Regulations would also provide government officials with the necessary objective standards to ensure fair and impartial decision-making. Attorneys report that Argentine immigration authorities, particularly border personnel, currently lack the requisite training and knowledge to apply the law correctly in all situations.\footnote{273}{Chausovsky, \supra note 23, at 9; interview with Pablo Asa, Director, CELS/CAREF/UBA, \supra note 215.}

In addition, the Argentine law contains areas of potential conflict between provisions or provisions too general for implementation that the regulatory process can resolve. Various stakeholders have commented to the government regarding specific areas ripe for regulation. For example, representatives of the Chinese immigrant community have urged that the regulations should make clear that persons eligible for permanent residence under Article 22 should not be limited to relatives of natural born or elective citizens but should also include relatives of naturalized citizens and current permanent residents.\footnote{274}{See Chinese Embassy letter, \supra note 23.}

Representatives of the United Nations High Commissioner for Refugees have urged that the regulations include a flexible definition of “family” so as to meet the needs of refugees and to foster cultural diversity.\footnote{275}{Propuestas del Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR) para la reglamentación de la Ley de Migraciones No. 25.871 [Proposals of the United Nations High Commissioner for Refugees (UNHCR) for the Regulation of Migration Act no. 25.871] (spring 2004) (on file with author).}

The City of Buenos Aires has pointed out the inherent contradictions of Article 5, which limits equal treatment to those legally in the country, and thus has advocated a harmonization of Article 5 with other provisions that are more generous to all immigrants, regardless of status.\footnote{276}{Government of the City of Buenos Aires, Human Rights Department, Comentarios a Propósito de la Reglamentación de la Ley 25.871 [Commentaries Concerning the Regulation of Law No. 25.871].} Regulations could also resolve other inherent con-
tradictions, such as the limitations on the ability of irregular immigrants to rent homes or to engage in business transactions.

Although it is true that regulations can sometimes be a vehicle for a more restrictive reading of a law, the government has actively sought the input of immigrants’ rights groups in interpreting Law 25.871. Initially, the government invited the Mesa de Organizaciones en Defensa de los Derechos de los Inmigrantes (Committee of Organizations in Defense of the Rights of Immigrants), an organization that had actively lobbied for the passage of the new immigration law, and other stakeholders, to participate in the drafting of the regulations.277 Subsequently, in 2008, the Immigration Department formalized the relationship with stakeholders and created a committee to draft regulations, comprised of representatives of some of the original Mesa members as follows: CELS, International Migration Organization (OIM), Fundación del Comisión Católica de Migraciones, Centro de Estudios Migratorios Latinoamericanos (Center for Latin American Migration Studies), the United National High Commissioner for Refugees, and the Asamblea Permanente de Derechos Humanos (Permanent Human Rights Assembly).278 The participation of these groups should ensure that the regulations are compatible with the goals of the statute.279

Although courts have, in the absence of regulations, applied Law 25.871 in a manner that effectuates the law’s human rights and non-discriminatory goals,280 the lack of regulations prejudices affected immigrants. Many do not have the necessary resources or level of education to vindicate their rights under the judicial system and should not be forced to rely on the courts to ensure proper application of the law in their cases. Thus, it is imperative that the government promulgate regulations to ensure the achievement of the law’s broad human rights goals.

Conclusion

The ground-breaking premise of Law 25.871—that the right to migrate is a human right—is a significant advancement in the promotion of the human rights of immigrants. The law’s principles of equality, non-discrimination, and due process bring Argentine norms in line with both international human rights standards and Argentine constitutional law. Nevertheless, to give full effect to the human rights and egalitarian principles of Law 25.871, the government must issue regulations to ensure the effective implementation of the law’s goals.

Finally, Argentina’s adoption of pro-immigrant legislation stands in stark contrast to the policy and legislative decisions of the United States.

278. Id.; Llega la reglamentación pendiente hace 4 años, PERIODICO MIGRACIONES (Dirección Nacional de Migraciones, Ministerio del Interior de la Nación, Buenos Aires, Arg.), Nov. 2008 at 1.
280. See supra text accompanying notes 191, 218–222, 244–245.
Although it may seem unrealistic to expect the United States, given its political realities, to enact an immigration law like Argentina’s, the Argentine experience nevertheless provides lessons for U.S. immigration reform, and hopefully the U.S. can implement a more humanitarian and fair immigration system.

Postscript

On May 6, 2010, the Argentine government adopted regulations interpreting Law 25.781.281 The introductory portion of the regulations reiterates and emphasizes the fundamental expansive principles of the new law. For example, the regulations point out that Argentina has reformulated its immigration policy in order to promote the respect for human rights, mobility of migrants, family reunification and Latin American regional integration.282 The government did not, however, adopt a regulation for every section of the law, and as a result some of the regulatory issues raised in this article remain unresolved.

The regulations take important steps to ensure equal and non-discriminatory access to education, health, employment, and other public benefits. The Immigration Department must collaborate with state and local governments to achieve immigrants’ integration into society.283 The Department is also tasked with guaranteeing immigrants’ access to public services and employment.284 The Ministries of Education, Health and Labor must adopt policies to achieve these goals285 In addition, the Immigration Department must provide training for the migration police and other government officials and employees to ensure compliance with new law.286 Hopefully, enhanced training will address the human rights community’s concern that public officials, particularly border officials, do not have an adequate understanding of the protective nature of the new law.287 The regulations also require the Immigration Department to implement programs to facilitate the legalization process for immigrants, including provision of information in immigrants’ native languages and provision of linguistic interpreters.288

The regulations broaden the category of permanent residents, as stakeholders had urged.289 Spouses, minor unmarried children, and parents of permanent residents and naturalized citizens may apply for permanent residence.290 Temporary residents of the Mercosur are eligible for permanent residence after two years, while temporary residents of other

282. Id.
283. Id. art. 6
284. Id.
285. Id. art. 7, 8, 19.
286. Id. art. 9 (a), (b).
287. See supra text accompanying note 273.
288. Ley 25.871 Reglamentación, art. 9 (c), 17.
289. See supra text accompanying note 274.
290. Ley 25.871 Reglamentación, art. 22(a), (b).
countries become eligible after three years. The regulations also provide more detail regarding the grounds for temporary residence based on humanitarian reasons, clarifying that this status applies to those who would be subjected to human rights violations in their country of origin, persons with life threatening health conditions who cannot secure medical treatment in their home country, and victims of human trafficking.

The regulations make clear that the detention of an immigrant to ensure her deportation requires a judicial order and that normally such detention may not exceed fifteen days. Detention before a final deportation order is permissible only in limited circumstances and likewise, only with a court order. In the latter case, the regulations mandate that either the Immigration Department or the Ministry of the Interior report to the court every ten days concerning the progress of the case, thereby affording the detainee a measure of due process. The regulations also incorporate detention standards, including the segregation of immigrants from criminal prisoners, access to medical care, and the possibility of detention in private facilities. In addition, in cases involving expulsion or the denial of entry into the country, the Immigration Department must notify the Public Ministry of pending cases and suspend administrative actions until the immigrant has received legal assistance to protect her interests.

Despite these refinements of the law, the regulations still fail to address certain important issues. For example, the government failed to issue regulations to reconcile Article 5 of Law 25.871, limiting equal treatment to those in legal status, with the other overarching non-discriminatory provisions of the law that protect all immigrants, regardless of legal status. Likewise, the regulations fail to address the prohibition against entering into business transactions with or renting housing to immigrants in irregular status and the reporting requirement for such transactions. Thus, while the law and the regulations are a great step forward, it remains the responsibility of the government and immigration advocates to ensure that the liberal human rights goals of the new law are achieved.

291. Id. (c).
292. Id. art. 23 (m).
293. Id. art. 70.
294. Id.
295. Id.
296. Id. art. 72.
297. Id. art. 86.
298. Id. art. 35(a).
299. See supra text accompanying notes 129–131.
300. See supra text accompanying notes 171–172.