

# 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.<sup>1</sup> Law 25.871 repeals Law 22.439, the prior immigration law known as the Ley Videla (Videla Law),<sup>2</sup> which was passed in 1981 during the Argentine military dictatorship.<sup>3</sup> 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,<sup>4</sup> the earlier immigration law remained in effect for twenty years after the end of the discredited and illegitimate military regime.<sup>5</sup>

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<sup>6</sup> nor explicitly in any international human rights conventions<sup>7</sup>. Law 25.871 extends constitutional and human rights protections

1. The National Congress passed the law on December 4, 2003, the Senate on December 17, 2003, and it was formally published in the Boletín Oficial on January 21, 2004. Law No. 25.871, Dec. 17, 2003, [30322] B.O. 1; Rubén Giustiniani, *Fundamentos de la Ley*, in *MIGRACIÓN: UN DERECHO HUMANO* 19, 35–36 (Prometeo 2004).

2. Jorge Videla was the head of the military junta in Argentina from 1976 until 1981.

3. Law No. 25.871, art. 124, Dec. 17, 2003, [30322] B.O. 2 (repealing Law No. 22.439, Mar. 23, 1981, [1981-A] L.A. 273).

4. CONST. ARG. art. 23, para. 22 (1994).

5. See Law No. 25.871, art. 124, Dec. 17, 2003, [30322] B.O. 2 (repealing Law No. 22.439, which was enacted in 1981).

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](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).

7. See *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. Res. 45/158, U.N. GAOR, 45th Sess.,

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.<sup>8</sup> Yet, more than five years after its enactment, the Argentine government has yet to promulgate regulations<sup>9</sup> 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.<sup>10</sup>

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.

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Supp. No. 49A, U.N. Doc. A/45/49 (1990) (entered into force July 1, 2003). The European Convention of Human Rights and the International Covenant on Civil and Political Rights only guarantee the freedom of movement to those lawfully within the country, although these instruments recognize the right to leave and reenter one's own country. International Covenant on Civil and Political Rights, art. 12, Dec. 16, 1966, S. EXEC. DOC E, 95-2 (1978), 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 4, art. 2, Nov. 4, 1950, Europ. T.S. No. 5. The American Convention on Human Rights recognizes not only these rights but also the right to seek asylum in a third country. Organization of American States, American Convention on Human Rights, pt. I, ch. 2, art. 22, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

8. Law No. 25.871, art. 6, Dec. 17, 2003, [30322] B.O. 2.

9. See *infra* Postscript, discussing regulations that the government promulgated during the editing of this article.

10. See Karen Engle, *Comparative Law as Exposing the Foreign System's Internal Critique: An Introduction*, 1997 UTAH L. REV. 359, 366-68 (1997) (discussing the use of comparative law to critique one's own system).

## 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> By 1914, 29.9% of the population was foreign born, primarily of Spanish and Italian origin.<sup>14</sup> 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.<sup>15</sup> Immigrants from China, Korea, and Central Europe, primarily Ukraine, also arrived in Argentina in smaller but still significant numbers.<sup>16</sup> According to the most

11. Juan Bautista Alberdi, *Bases y Puntos de Partida Para la Organizacion Politicas de la Republica Argentina*, in 3 OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI 371, 527 (Buenos Aires, La Tribuna Nacional 1886); DAVID ROCK, *ARGENTINA 1516-1987: FROM SPANISH COLONIZATION TO ALFONSIN* 114 (Univ. of Cal. Press 1987) (1985); see also Corte Suprema de Justicia [CSJN], 23/06/09, “Ni, I-Hsing s/ Carta de ciudadanía (recurso extraordinario),” at 20-21 available at [http://www.csjn.gov.ar/cfal/fallos/cfal3/cons\\_fallos.jsp](http://www.csjn.gov.ar/cfal/fallos/cfal3/cons_fallos.jsp) (search by party name) (Arg.) (discussing the historical and constitutional bases for the promotion of immigration).

12. See FELIX LUNA, *A BRIEF HISTORY OF ARGENTINA* 116-19, 136-39 (Judith Ravin trans., Planeta 1995); see also ROCK, *supra* note 11, at 114-15, 131-33, 141-43.

13. Raúl C. Rey Balmaceda, *El Pasado: la Inmigración en la Historia Argentina*, in 2 GEODOMOS 19, 44 (Graciela M. de Marco, et al. eds., 1994); see also Barbara Hines, *An Overview of Argentine Immigration Law*, 9 IND. INT’L. & COMP. L. REV. 395, 397 (1999).

14. Balmaceda, *supra* note 13, at 44; Hines, *supra* note 13, at 397.

15. Hines, *supra* note 13, at 397-98.

16. See Enrique Oteiza et al., *Política Migratoria: Inmigración Real y Derechos Humanos en la Argentina*, in INFORME ANUAL SOBRE LA SITUACIÓN DE LOS DERECHOS HUMANOS EN LA ARGENTINA 87 (Centro de Estudios Legales y Sociales 1996); see also Maia Jachimowicz, *Argentina: A New Era of Migration and Migration Policy*, MIGRATION INFO. SOURCE, Feb. 2006, <http://www.migrationinformation.org/Profiles/display.cfm?ID=374>; Susana Novick, Univ. of Buenos Aires, *Evolución Reciente de la Política Migratoria Argentina* at 5, Paper Presented at 25th Int’l Population Conference, Tours, France (July 18-23, 2005), available at <http://www.iigg.fsoc.uba.ar/pobmigra/archivos/iussp.pdf>; INDEC, *Población Extranjera Empadronada en el País por Lugar de Nacimiento Según Sexo y Grupos de Edad* (2001), <http://www.indec.gov.ar/nuevaweb/cuadros/2/migracion1.xls>; Organización Internacional para las Migraciones, *Perfil Migratorio de Argentina*, at 12, (Nov. 2008), available at <http://www.oimconosur.org/archivos/descarga.php?id=../imagenes/archivos/144.pdf&name=Argentina%20-%20Perfil%20Migratorio%20de%20la%20Argentina>; Special Migration Agreement Arg.-Ukr., Oct. 24, 2001, Law No. 25.496, Nov. 19, 2001, [29787] B.O. 1.

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%.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> This “convertibility” policy contributed to lower inflation and economic growth, thereby making Argentina a desirable destination for immigrants.<sup>20</sup>

Data on irregular migration<sup>21</sup> to Argentina is scarce, as the government does not maintain precise statistics, and few researchers focus on this specific topic.<sup>22</sup> Yet experts and government officials agree that the repealed 1981 Ley Videla generated an increase in the undocumented population.<sup>23</sup> 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

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

18. See, e.g., Special Migration Agreement Arg.-Ukr., Oct. 24, 2001, Law No. 25.496, Nov. 19, 2001, [29787] B.O. 1 (bilateral agreement).

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

20. See Dr. P. Ruben Mercado, *The Argentine Recovery: Some Features and Challenges 1-2* (The Teresa Lozano Long Institute of Latin American Studies (LLILAS), University of Texas, VRP Working Paper, 2007), available at <http://lanic.utexas.edu/project/etext/llilas/vrp/mercado2.pdf>.

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.

22. See, e.g., Sebastian Bruno, VII Jornadas de Sociología: Cifras Imaginarias de la Población Limitrofe en la Argentina (Nov. 2007), available at [http://iigg.fsoc.uba.ar/pobmigra/archivos/bruno\\_cimaginationarias.pdf](http://iigg.fsoc.uba.ar/pobmigra/archivos/bruno_cimaginationarias.pdf); see also Perfil Migratorio de Argentina, *supra* note 16, at 21. The websites of INDEC (Instituto Nacional de Estadística y Censos para la República), <http://www.indec.mecon.ar/> (last visited May 15, 2010), and the Dirección de Migraciones, <http://www.migraciones.gov.ar/> (last visited May 15, 2010), do not include statistics regarding irregular immigrants.

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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

## 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.<sup>27</sup> 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.”<sup>28</sup> 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.<sup>29</sup>

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24. See, e.g., Chinese Embassy letter, *supra* note 23. (“[D]ue to bureaucratic hurdles and the absence of available norms, there are a considerable number of illegal residents from [China].”).

25. Chausovsky *supra* note 23, at 1.

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

27. See Mitchell Gordon, *Don't Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type*, 8 WASH. U. GLOBAL STUD. L. REV. 487, 500-02 (2009).

28. CONST. ARG. art. 25 (1853); CONST. ARG. art. 25 (1994), *reprinted and translated in* 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD [hereinafter CONSTITUTIONS OF THE WORLD] (Gisbert H. Flanz ed., Marcia W. Coward trans., Oceana Publications, Inc. 1995). Although U.S. law does not explicitly state a preference for European immigrants, numerous immigration statutes have excluded non-Europeans. See, e.g., Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874 (1924) (repealed 1952); Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5 (repealed 1952); Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952) (instituting numerical limitations based on national origin to benefit northern Europeans). Some scholars of U.S. immigration history sustain that the current anti-immigrant movement in the United States is a reaction against Mexican and other non-European immigration. See BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY 134-54* (Temple Univ. Press 2004); see generally MAE M. NGAI, *IMPOSSIBLE SUBJECTS* (Princeton Univ. Press 2004) (analyzing the history of non-European immigration in the United States).

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. STAHRINGER DE CRAMUTI, *LA POLÍTICA 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.”<sup>30</sup> 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.<sup>31</sup> Article 20 reiterates that foreigners enjoy the same civil rights as citizens.<sup>32</sup> 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.<sup>33</sup>

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<sup>34</sup> and have invalidated laws that mandate citizenship as an eligibility requirement for public and private employment.<sup>35</sup> 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.<sup>36</sup> Applying this judicially created test, the court has overturned

30. CONST. ARG. pmb. (1994).

31. “All inhabitants of the Nation enjoy the following rights, in accordance with the laws that regulate their exercise, namely: of working in and practicing any lawful industry; of navigating and trading; of petitioning the authorities; of entering, remaining in, traveling through and leaving the Argentine territory; of publishing their ideas through the press without prior censorship; of using and disposing of their property; of associating for useful purposes; of freely practicing their religion; of teaching and learning. CONST. ARG. art. 14 (1994) (*reprinted and translated in CONSTITUTIONS OF THE WORLD, supra* note 28). The constitution of 1853 contained the same article. Corte Suprema de Justicia [CSJN], 1928, “Maciá y Gassol,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1928-151-211) (Arg.); CSJN, 23/3/1956, “Sosa, Lino,” Fallos (1956-234-203) (Arg.). Although this article does not address naturalization under Argentine law, the Supreme Court, relying on constitutional provisions, recently held that a person who had resided in the country in irregular status met the two-year residence requirement for naturalization. See “Ni, I-Hsing s/ Carta de ciudadanía (recurso extraordinario),” *supra* note 11, at 30.

32. “Foreigners enjoy in the territory of the Nation all the civil rights of a citizen; they may engage in their industry, trade or profession, own, purchase or transfer real property, navigate the rivers and coasts, freely practice their religion, [and] make wills and marry in accordance with the laws.” CONST. ARG. art. 20 (1994), CONST. ARG. art. 20 (1853) (*reprinted and translated in CONSTITUTIONS OF THE WORLD, supra* note 28).

33. CONST. ARG. art. 20 (1994).

34. See, e.g., CSJN, 1928 “Maciá y Gassol,” Fallos (1928-151-211) (Arg.); CSJN 23/3/1956 “Sosa, Lino,” Fallos (1956-234-203) (Arg.); CSJN, 28/9/1979, “Carrizo Coito, Sergio,” Fallos (1980-302-604) (Arg.).

35. CSJN, 8/11/1988, “Repetto c/ Provincia de Buenos Aires,” Fallos (1988-311-2272) (Arg.) (private school teacher); CSJN, 24/2/1998, “Calvo y Pesini, Rocío c/ Córdoba Provincia s/ amparo,” Fallos (1998-321-194) (Arg.) (public hospital employee). See Hines, *supra* note 13, at 413-16, for discussion of prior Argentine immigration caselaw.

36. For example, in the United States, under the strict scrutiny test, a law must be narrowly tailored to meet a compelling state interest. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

laws that required lengthy periods of residence for access to government disability payments and Argentine citizenship for judicial positions.<sup>37</sup>

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.<sup>38</sup> The U.S. Supreme Court has repeatedly stated that the government exercises broad plenary power in matters of immigration law<sup>39</sup> and has declared that "over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens];"<sup>40</sup> the U.S. government's power to deport a foreigner is "absolute and unqualified."<sup>41</sup> 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.<sup>42</sup>

Consequently, distinctions between citizens and non-citizens do not constitute "invidious" discrimination under U.S. law.<sup>43</sup> Far from considering immigrants as a suspect class, warranting the higher strict scrutiny test, laws discriminating against non-citizens are valid unless "wholly irrational."<sup>44</sup> Moreover, the protection against national origin discrimination does not necessarily extend to alienage discrimination.<sup>45</sup> Accordingly, courts have found many restrictive laws affecting non-citizens to be constitutional.<sup>46</sup> For example, the Supreme Court has upheld laws that deny lawful permanent residents public employment as police officers and teachers<sup>47</sup> and access to public benefits.<sup>48</sup> Immigration laws treating men

37. CSJN, 16/11/2004, "Hooft, Pedro C. F. v. Provincia de Buenos Aires / acción declarativa de inconstitucionalidad" Jurisprudencia Argentina [J.A.] (2005-IV-516) (Arg.) (requirement of citizenship for judges); CSJN, 8/8/2006, "Gottschau, Evelyn Patrizia c/ Consejo de la Magistratura de la Ciudad Autónoma de Buenos Aires s/ amparo," J.A. (2006-IV-596) (Arg.) (requirement of citizenship for judicial clerk position); CSJN, 4/9/2007, "Reyes Aguilera, Daniela v. Estado Nacional," S.J.A. 7/11/2007 (Arg.) (requirement of 20 years residence in order for a non-citizen to receive government disability payments).

38. See Gordon, *supra* note 27, at 500-02.

39. Mathews v. Diaz, 426 U.S. 67, 79-80 (1976).

40. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

41. Fong Yue Ting v. U.S., 149 U.S. 698, 707 (1893).

42. Diaz, 426 U.S. at 79-80; Reno v. Flores, 507 U.S. 292, 305-306 (1993); Demore v. Kim, 538 U.S. 510, 521-523 (2003).

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).

45. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973).

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. Connelley*, 435 U.S.

and women differently have also passed constitutional muster.<sup>49</sup> 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.<sup>50</sup>

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).”<sup>51</sup> 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.<sup>52</sup> During the period between 1869 and 1914, millions of primarily European immigrants arrived in Argentina.<sup>53</sup>

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291, 299-300 (1978) (upholding N.Y. state law that requires state troopers to be U.S. citizens), with CONST. ARG. ARTS. 20, 25 (protecting a non-citizen’s right to employment), CSJN, 8/11/1988, “Ines Maria Repetto v. Provincia de Buenos Aires,” Fallos (1988-311-2272) (Arg.), and CSJN, 24/2/1998, “Calvo y Pesini, Rocio c/ Córdoba Provincia s/ amparo,” Fallos (1998-321-194) (Arg.).

48. Diaz, 426 U.S. at 79-80.

49. Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 70 (2001) (holding that the government may place more restrictive requirements on a father, as opposed to a mother, in order to transmit citizenship to a child born out of wedlock); Fiallo v. Bell, 430 U.S. 787, 798-99 (1977) (holding that disparate treatment of immigration benefits for fathers and mothers of children born out of wedlock was constitutional).

50. 8 U.S.C. §§ 1226(c), 1227 (2008) (providing grounds for deportation); Demore v. Kim, 538 U.S. 510, 531 (2003). See generally Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (discussing the minimal due process safeguards that the law provides for immigrants).

51. Tribunal Oral en lo Criminal Federal Nro. 1 de Córdoba (TOralCrimFedCórdoba)(Nro1), 04/04/2007, “Jalil, Gabriel E. y Otros,” La Ley [L.L.] (2007-D-84) (Arg.).

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

53. Corina Courtis & María Inés Pacecca, *Síntesis de las Migraciones En La Argentina Contemporánea*, CAPACITACIÓN 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.<sup>54</sup> The Law of Residency authorized the executive branch to expel or prevent the entry of foreigners whose conduct compromised national security or public order.<sup>55</sup> In the seminal case of the *Transporte Chaco*, which addressed the deportation of anarchists and syndicalists, the Supreme Court upheld the the Law of Residency.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

## 2. *The Videla Law*

In 1981, the military dictatorship adopted a significantly more restrictive statute, Law No. 22.439,<sup>59</sup> known as *La Ley Videla* (the Videla Law), to replace the Avellaneda immigration law and its subsequent implementing decrees.<sup>60</sup> This law disgracefully remained in effect for twenty years after the demise of the dictatorship.<sup>61</sup> When the democratically elected government took power in late 1983, it continued to apply the laws the junta had enacted, except for the few specific statutes the government did repeal.<sup>62</sup> 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-

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54. Law No. 4144, Nov. 23, 1902, [1889-1919], A.D.L.A. 560, 560. During the same period, the United States passed similar laws. 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).

55. Law No. 4144, Nov. 23, 1902, [1889-1919], A.D.L.A. 560, 560.

56. CSJN, 6/5/1932, "Simón Scheimberg y Enrique Corona Martínez s/ hábeas corpus en representación de treinta y tres extranjeros detenidos en el 'Transporte Chaco' de la Armada Nacional," Fallos (1932-164-344) (Arg.).

57. *Id.*; see also *supra* note 29 (text of CONST. ARG. art. 25).

58. See CSJN, 6/5/1932, "Simón Scheimberg y Enrique Corona Martínez s/ hábeas corpus en representación de treinta y tres extranjeros detenidos en el 'Transporte Chaco' de la Armada Nacional," Fallos (1932-164-344) (Arg.); see also *supra* note 31 (text of CONST. ARG. art. 14).

59. Law No. 22.439, Mar. 23, 1981, [1981-A] L.A. 273 (repealed).

60. See Decree No. 4805, 1963, [1963] A.L.J.A. 66, *ratified* by Law No. 16.478, 1964, [1964] A.L.J.A. 52; see also Decree No. 17294, 1967, [1967-B] A.L.J.A. 1516.

61. See Alicia Carmona, Independent Scholar, N.Y. Univ., Presentation at the 2009 Congress of Latin American Studies, *La Morenada: Culture and Status in the Bolivian Collectivity of Buenos Aires* (2009).

62. Enrique I. Groisman, *Los Gobiernos de Facto en el Derecho Argentino*, 4 REVISTA DEL CENTRO DE ESTUDIOS CONSTITUCIONALES 35, 43-44 (1989).

cance of the new law's replacement of xenophobic and restrictive principles with humanitarian and egalitarian migration standards.<sup>63</sup>

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."<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup> Undocumented immigrants could not purchase or rent property, and a seller or landlord who violated these prohibitions could be fined.<sup>68</sup> The law required citizens and government officials to report undocumented immigrants who engaged in commercial transactions, attempted to marry, or sought medical treatment.<sup>69</sup> The law empowered the immigration agency to conduct searches for purported immigration violations without reasonable suspicion, probable cause, or a court order.<sup>70</sup> 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).

64. Law No. 22.439, art. 2, Mar. 23, 1981 [1981-A] L.A. 273 (repealed). See Giustini-ani, *supra* note 1, at 34-35 (providing extensive criticism of the former law and highlighting its discriminatory and repressive nature).

65. Law. No. 22.439, art. 3, Mar. 23, 1981 [1981-A] L.A. 273 (repealed) (discussing the authority to remove immigrants for not following the law).

66. Law. No. 22.439, art. 78, Mar. 23, 1981 [1981-A] L.A. 273 (repealed). See CSJN, 6/5/1932, "Simón Scheimberg y Enrique Corona Martínez s/ hábeas corpus en representación de treinta y tres extranjeros detenidos en el 'Transporte Chaco' de la Armada Nacional," Fallos (1932-164-344) (Arg.); Gabriel Chauovsky, *El Estado y la Expulsión de Extranjeros*, REVISTA DE CIENCIAS JURÍDICAS Y SOCIALES, EDITADA POR LA FACULTAD DE CIENCIAS JURÍDICAS Y SOCIALES DE LA UNIVERSIDAD NACIONAL DEL LITORAL, 1997, at 169.

67. Law No. 22.439, art. 102, Mar. 23, 1981 [1981-A] L.A. 273 (repealed).

68. Law No. 24.393, art. 48, Nov. 18, 1994 [1994-C] L.A. 3228 (modifying Law No. 22.439, art. 48, Mar. 23 1981 [1981-A] L.A. 273); Law. No. 22.439, arts. 32, 48, Mar. 23, 1981 [1981-A] L.A. 273 (repealed).

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.<sup>71</sup>

## 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).<sup>72</sup>

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.<sup>73</sup> Specifically, the Constitution gives constitutional hierarchy to ten major international treaties that Argentina had ratified at the time of the reform.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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

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71. Law No. 21,258, Mar. 24, 1976, [XXXVI-B] A.D.L.A. 1032; William C. Banks & Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1, 30-31 (1993).

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 Comisión 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.

73. Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLOM. J. TRANSNAT'L LAW 281, 288-91 (1999).

74. *Id.* at 291.

75. CONST. ARG. art. 75, ¶ 22.

76. See, e.g., LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES (Martin Abregú & Christian Courtis eds., Editores del Puerto 1997) (discussing the application of treaties on human rights by local courts).

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.<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup>

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.<sup>80</sup> 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.<sup>81</sup> When the Argentine Supreme Court rejected the habeas petition as moot because Mr. de la Torre had already been deported,<sup>82</sup> 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

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77. See Correa, *supra* note 19, at 173; see also Giustiniani, *supra* note 1, at 13; Hines, *supra* note 13, at 417-21.

78. See Victor Piché & Diego Morales, *Immigration Policy in Argentina: Between Theory and Practice*, MCGILL: HANS & TAMAR OPPENHEIMER CHAIR IN PUBLIC INTERNATIONAL LAW, Mar. 8, 2010, <http://oppenheimer.mcgill.ca/Politiques-migratoires-en>.

79. See generally ENRIQUE OTEIZA, SUSANA NOVICK & ROBERTO S. ARUJ, POLÍTICA MIGRATORIA, INMIGRACIÓN REAL, Y DERECHOS HUMANOS EN LA ARGENTINA, INFORME ANNUAL 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).

80. See Correa, *supra* note 19, at 173-77.

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<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup> 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 Ecuémico 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).<sup>87</sup>

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.<sup>88</sup>

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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.

84. Interview with Pablo Ceriani, Former Attorney, CELS and Professor, Universidad de Lanus, in Sevilla, Spain (Jul. 19, 2006). See Diego Morales & Verónica Asurey, *La Nueva Ley de Migraciones y Las Cuestiones de Derecho Penal y Procesal. Una Bienvenida Sin Sombbrero*, 2004/A NUEVA DOCTRINA PENAL 259, 263 (2004); Letter to Consejo Permanente de la Organización de los Estados Americanos, Comisión de Asuntos Jurídicos y Políticos (Sept. 27, 2004) (on file with author).

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

86. See SUSANA NOVICK, LAS MIGRACIONES EN AMÉRICA LATINA (Catálogos S.R.L. Av. Independencia 1860, 1225 - Buenos Aires - Argentina 2008).

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*,

## 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.<sup>89</sup> 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.”<sup>90</sup>

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.”<sup>91</sup> Similarly, a sociologist specializing in immigration issues stated that:

[I]n 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.<sup>92</sup>

Argentine Ambassador Leonardo Franco declared before the United Nations that:

[T]he 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 [sic] time establishes mechanisms of easy access to regulate migration, thus contributing to the elimination of any form of discrimination, xenophobia or racism.<sup>93</sup>

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

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*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.

92. Susana Novick, *Una Nueva Ley para un Nuevo Modelo de Desarrollo en un Contexto de Crisis y Consenso*, in *MIGRACIÓN: UN DERECHO HUMANO*, *supra* note 1, at 67, 84–85 (author’s translation).

93. Ambassador Leonardo Franco, Vice-Minister for Latin American Policy of the Ministry of Foreign Affairs, International Trade and Worship of the Argentine Republic, Statement to the U.N. General Assembly on Argentina, High-Level Dialogue on International Migration and Development (Sep. 15, 2006), available at <http://www.un.org/webcast/migration/pdfs/argentina-e.pdf>.

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.<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> 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."<sup>97</sup> The estimated cost of the wall ranged from between two and four million dollars per mile.<sup>98</sup>

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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](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)).

95. See Victoria Slater, "To Govern is to Populate": Argentine Immigration Law and What it can Suggest for the United States, 31 Hous. J. INT'L L. 693, 718, 730 (2009).

96. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

97. Secure Fence Act of 2006, Pub.L. 109-367, § 2, 120 Stat. 2638, 2638 (2006).

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.<sup>99</sup> In addition, all legislative proposals include stricter border enforcement and security as a *quid pro quo* for reform.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> Although comprehensive immigration legislation was introduced in both 2006 and 2007,<sup>103</sup> it was defeated and immigration reform again failed.<sup>104</sup>

Some opine that the protests in 2006 generated more energy for opposition within the anti-immigrant groups and led to increased enforcement policies.<sup>105</sup> Under the expanded grounds of deportation under the 1996 and 2001 immigration laws, Immigration and Customs Enforcement (ICE)

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DER 27-28 (May 13, 2008); see Submission to the Inter-American Commission on Human Rights, The Working Group on Human Rights and the Border Wall, Obstructing Human Rights: The Texas-Mexico Border Wall 12, (June 2008), <http://www.utexas.edu/law/academics/centers/humanrights/borderwall/analysis/briefing-FULL-SET-OF-REPORTS.pdf>.

99. See Slater, *supra* note 95, at 716-18.

100. See, e.g., Secure America and Orderly Immigration Act of 2005, S. 1033, 109th Cong. (2005) and H.R. 2330, 109th Cong. (2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007); see also, e.g., Tamar Jacoby, Senior Fellow, Manhattan Inst., Testimony at Immigration Overhaul: Hearing Before S. Comm. on the Judiciary, 109th Cong. (2005), available at <http://www.manhattan-institute.org/html/jacoby07-26-05.htm>.

101. Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

102. Online Newshour, Demonstrators March Nation Wide Protesting HR-4437, PBS, Apr. 10, 2006, [http://www.pbs.org/newshour/bb/latin\\_america/jan-june06/immigration\\_4-10.html](http://www.pbs.org/newshour/bb/latin_america/jan-june06/immigration_4-10.html); Immigration Issue Draws Thousands Into Streets, MSNBC, Mar. 25, 2006, <http://www.msnbc.msn.com/id/11442705/>; see also Xochitl Bada, Jonathan Fox, & Andrew Steele, WOODROW WILSON INT'L CTR. FOR SCHOLARS, INVISIBLE NO MORE: MEXICAN MIGRANT CIVIC PARTICIPATION IN THE UNITED STATES 39-40 (2006), available at <http://www.wilsoncenter.org/news/docs/invisible%20No%20More1.pdf>. The number of participants in all the demonstrations has varied between several hundred thousand and over a million. Organizers have asserted that more people have attended all of the demonstrations than reported by public authorities and the press.

103. See, e.g., Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006), reintroduced in 2007 as Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007).

104. See Slater, *supra* note 95, at 716-17.

105. See Richard D. Pineda & Stacey K. Sowards, *Flag Waving as a Visual Argument: 2006 Immigration Demonstrations and Cultural Citizenship*, 43 ARGUMENTATION & ADVOC. 164, 164 (2007); David D. Kirkpatrick, *Demonstrations on Immigration Harden a Divide*, N.Y. TIMES, Apr. 17, 2006, at A16.

arrests of non-citizens between 2003 and 2008 climbed over 1,500%.<sup>106</sup> 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.<sup>107</sup> ICE worksite raids resulted in 6,287 arrests in FY08, an increase of 27% over the prior year.<sup>108</sup> Thus, in contrast to U.S. policies, the Argentine immigration law is a welcome change and, reflecting different realities, demonstrates a markedly distinct approach to immigration policy.

### C. Provisions of the New Law<sup>109</sup>

#### 1. General Principles

The most novel and groundbreaking provision of the law is the recognition of the fundamental right to migrate. The specific language is powerful: “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.”<sup>110</sup> The overarching principle of equality informs the provisions 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 Convention 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.<sup>111</sup> 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.<sup>112</sup> The preamble 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 Convention does not limit a State’s ability to establish immigration admission standards.<sup>113</sup> 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

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106. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL REPORT 4 (2008), available at [http://www.ice.gov/doclib/pi/reports/ice\\_annual\\_report/pdf/ice08ar\\_final.pdf](http://www.ice.gov/doclib/pi/reports/ice_annual_report/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, 2006, [31045] B.O. 1.

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 *MIGRACIÓN: UN DERECHO HUMANO*, *supra* note 1, at 113, 113 (2004).

111. Argentina ratified the Migrant Convention on Feb. 23, 2007; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990), available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-13.en.pdf>.

112. See generally G.A. Res. 45, *supra* note 111.

113. *Id.* at pmbl., art. 79.

and irregular migrants residing within a signatory country.<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup> Many of these concepts are codified more specifically in subsequent provisions of the law.<sup>117</sup>

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.<sup>118</sup> Notably, the new immigration law diverges from the earlier model of encouragement of European immigration and instead emphasizes regional integration and immigration.<sup>119</sup>

## 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,

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114. *Id.* at Part IV.

115. The Secretary-General, *U.N. Multilateral Treaties: Status of Treaties, Deposited with the Secretary-General*, U.N. Doc. Res. 45/158, Chapter IV-13, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-13.en.pdf>.

116. Law No. 25.871, art. 3(a)-(i), Dec. 17, 2003, [30322] B.O. 2.

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.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup>

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.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup>

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.<sup>126</sup> 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.<sup>127</sup> The United Nations Committee on the Elimination of All Racial Discrimination has recognized the importance of these provisions of Law 25.871.<sup>128</sup>

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]

120. Law No. 25.871, art. 2, Dec. 17, 2003, [30322] B.O. 2.

121. Compare Chausovsky, *supra* note 23, and Cámara Federal de Apelaciones de Paraná [CFed], 10/12/2004, “Ali Yun, Lingyan Zheng y Yu Junyun / habeas corpus,” L.S. Crim. 2004-II-396 (Arg.) with Law No. 22.439, arts. 33–37, Mar. 23, 1981, [1981-A] L.A. 273 (repealed). See also Press Release, National Association of Hispanic Journalists, NAHJ Urges News Media to Stop Using Dehumanizing Terms When Covering Immigration (Mar. 27, 2006), <http://www.nahj.org/nahjnews/articles/2006/March/immigrationcoverage.shtml>.

122. Press Release, National Association of Hispanic Journalists, NAHJ Urges News Media to Stop Using Dehumanizing Terms When Covering Immigration (Mar. 27, 2006), <http://www.nahj.org/nahjnews/articles/2006/March/immigrationcoverage.shtml>.

123. Law No. 25.871, art. 6, Dec. 17, 2003, [30322] B.O. 2.

124. *Id.* arts. 7–8.

125. *Id.* art. 6.

126. *Id.* art. 13.

127. *Id.* arts. 12–13.

128. See U.N. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by State Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Argentina*, ¶ 5, CERD/C/65/CO/1 (Dec. 10, 2004).

satisfy the established conditions for their entry and stay [in the country], according to the laws . . . .”<sup>129</sup> 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 interpretation 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.<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup> This provision also takes into account the formation of the Mercosur in 1991, a free trade and free movement regional organization.<sup>133</sup> Current full members include Brazil, Argentina, Paraguay, and Uruguay; associate members include Chile, Bolivia, Ecuador, Peru, and Colombia.<sup>134</sup> 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.<sup>135</sup>

Law 25.871 promotes cultural integration and education in the immigrant community. The federal, state, and municipal governments must provide non-citizens and their families with information, that, when feasible, 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.<sup>136</sup> Moreover, the government must adopt appropriate measures to ensure the free dissemination of this information

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129. Law No. 25.871, art. 5, Dec. 17, 2003, [30322] B.O. 2.

130. See, e.g., *id.*, art. 12.

131. See Gobierno de la Ciudad de Buenos Aires, Subsecretaría de Derechos Humanos, *Comentarios a propósito de la reglamentación de la Ley 25.871* (undated) (commenting on Law No. 25.871) (on file with author).

132. Law No. 25.871, art. 28, Dec. 17, 2003, [30322] B.O. 2.

133. Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Paraguay (Treaty of Asunción), art. I, Mar. 26, 1991, 30 I.L.M. 1041, available at <http://www.sice.oas.org/Trade/MRCSR/MRCSRTOC.ASP>.

134. *Id.*

135. The Mercosur was founded in 1991 by the Protocol of Asunción and was amended in 1994 by the Treaty of Ouro Preto. See *id.*; Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR (Protocol of Ouro Preto), Dec. 17, 1994, 34 I.L.M. 1244, available at [http://www.sice.oas.org/trade/mrcsr/ourop/ourop\\_e.asp](http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp).

136. Law No. 25.871, arts. 9, 14, Dec. 17, 2003, [30322] B.O. 2.

through employers, unions, and other institutions.<sup>137</sup> 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.<sup>138</sup> Finally, the government must facilitate the input and participation of foreigners in policymaking that may affect immigrant communities.<sup>139</sup>

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.<sup>140</sup> Additionally, local and state police increasingly arrest immigrants for minor traffic or criminal offenses and turn them over to federal immigration authorities for deportation.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup> 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 unau-

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137. *Id.* art. 9.

138. *Id.* art. 14.

139. *Id.* art. 11.

140. Immigration and Nationality Act § 287(g), 8 U.S.C. 1357 (1990).

141. See, e.g., MAI THI NGUYEN & HANNAH GILL, THE LATINO MIGRATION PROJECT, THE 287(G) PROGRAM: THE COSTS AND CONSEQUENCES OF LOCAL IMMIGRATION ENFORCEMENT IN NORTH CAROLINA COMMUNITIES at 1-2 (2010), available at <http://isa.unc.edu/migration/resources.asp>.

142. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009), available at <http://www.gao.gov/new.items/d09109.pdf>; Brandon Formby, *Criminal Alien Program Still Taking Illegals Arrested for Minor Offenses*, DALLAS MORNING NEWS, Jan. 20, 2008; Brandon Formby & Stephanie Sandoval, *Irving Cannot Detain Some Illegal Immigrants*, DALLAS MORNING NEWS, Nov. 21, 2007; Randy Kennedy, *Texas Mayor Caught in Deportation Furor*, N.Y. TIMES, Apr. 5, 2009, at A1; Trevor Gardner II & Aarti Kohli, *The CAP Effect: Racial Profiling in the ICE Criminal Alien Program*, Policy Brief, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY (Sept. 2009).

143. Terry Tang, *Arizona Sheriff Puts Illegal-Alien Inmates in Tents*, FOX NEWS, Feb. 4, 2009, <http://www.foxnews.com/wires/2009Feb04/0,4670,ImmigrantsTentCity,00.html>; Eddi Trevizo & Derek Cooley, *Inmates Marched to Segregated Area of Tent City*, THE ARIZ. REPUBLIC, Feb. 4, 2009, <http://www.azcentral.com/community/phoenix/articles/2009/02/04/20090204abrck-inmatesmarch0204-ON.html>.

thorized immigration status a state trespass offense.<sup>144</sup>

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.<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup>

Moreover, the government must implement measures that promote the legalization of foreigners<sup>148</sup> and ensure that delays in immigration processing do not adversely affect them.<sup>149</sup> Family reunification is a fundamental underpinning of the admission process, as evidenced by the general principles of Law 25.871<sup>150</sup> 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

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.

145. See cases cited *infra* note 146.

146. *Lozano v. City of Hazleton*, 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).

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

148. *Id.* art. 17.

149. *Id.* art. 26.

150. *Id.* art. 3(d).

special needs.”<sup>151</sup>

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.”<sup>152</sup> 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.<sup>153</sup>

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.<sup>154</sup>

## b. Admission Categories

Law 25.871 establishes four distinct legal statuses: permanent residence, temporary residence, transitory residence, and provisional residence.<sup>155</sup>

### (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.<sup>156</sup> 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.<sup>157</sup>

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

151. *Id.* art. 10.

152. CSJN, 23/10/2007, “Zhang, Hang v. Estado Nacional-Ministerio de Relaciones Exteriores y Culto / recurso de hecho,” Fallos (2007-330-4554) (Arg.).

153. *Id.*

154. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938–39 (2000); see Legomsky, *supra* note 50, at 482–86.

155. Law No. 25.871, art. 20, Dec. 17, 2003, [30322] B.O. 2.

156. *Id.* art. 22.

157. *Id.* art. 23(a)–(g).

porary visa for one year, which is renewable in similar increments.<sup>158</sup> Academics may enter for one year with similar authorized extensions.<sup>159</sup> 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.<sup>160</sup>

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.<sup>161</sup> 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.<sup>162</sup>

### (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.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup> 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.

158. *Id.* art. 23(h).

159. *Id.* art. 23(i).

160. *Id.* art. 23 (j)-(l); *See* Treaty of Asuncion, *supra* notes 133-35; *See* discussion *infra* at II. D. regarding additional immigration provisions for citizens of the Mercosur.

161. Law No. 25.871 at art. 23(m)-(n), Dec. 17, 2003, [30322] B.O. 2.

162. *Id.*

163. *Id.* art. 24(a)-(g).

164. *Id.* art. 20.

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.<sup>166</sup> 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.<sup>167</sup> 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<sup>168</sup> and employers who hire unauthorized immigrants are subject to monetary fines.<sup>169</sup> Nevertheless, irregular immigrant workers still maintain all labor rights with regard to any employment that they might obtain.<sup>170</sup> Law 25.871 also prohibits the renting of housing to persons in irregular status and imposes administrative fines for any violation.<sup>171</sup> 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;<sup>172</sup> however, like the employment prohibitions, any such transaction still remains valid despite these statutory prohibitions.<sup>173</sup>

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.<sup>174</sup> Although it remains to be seen how strictly these provi-

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166. Law No. 25.871, art. 51, Dec. 17, 2003, [30322] B.O. 2.

167. *Id.* art. 52.

168. *Id.* art. 53.

169. *Id.* arts. 55, 59-60.

170. *Id.* art. 16. This provision relating to the labor rights of workers in irregular immigration status is consistent with the advisory opinion of the Inter-American Commission of Human Rights. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Sept. 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18. In that opinion, the Inter-American Court rejected the decision of the U.S. Supreme Court in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), which severely limited the right to a remedy for violation of the labor rights of undocumented immigrants in the United States.

171. Law No. 25.871, arts. 55, 59, Dec. 17, 2003, [30322] B.O. 2.

172. *Id.*

173. *Id.* art. 58.

174. Hines, *supra* note 13, at 420.

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.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

### 5. *Denial of Admission, Cancellation of Residency and Expulsion Proceedings*<sup>179</sup>

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<sup>180</sup> and provide an opportunity to regularize status.<sup>181</sup>

#### 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.<sup>182</sup> Evading immigration inspection and non-compliance with other provisions of the immigration law are also grounds for denial of admission and deportation.<sup>183</sup> 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

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175. Law No. 25.871, arts. 116-121, Dec. 17, 2003, [30322] B.O. 2.

176. *Id.*

177. Tribunal Oral en lo Criminal Federal nro.1 de Córdoba [TOral-CrimFedCórdoba], 4/4/2007, "Jalil, Gabriel y otros," L.L. (2007-D-84) (Arg.).

178. *Id.*

179. For the purposes of this article, the terms "expulsion" and "deportation" are interchangeable.

180. Law No. 25.871, arts. 29, 61, Dec. 17, 2003, [30322] B.O. 2.

181. *Id.* art. 61.

182. *Id.* arts. 29(a), 35.

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.<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup>

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.<sup>187</sup> A decision denying admission must be appealed to the Immigration Department from outside the country within fifteen days.<sup>188</sup> In cases of danger to health or physical well-being, the immigration authorities may admit the applicant provisionally.<sup>189</sup> The Immigration Department, with the approval of the Ministry of Interior, may waive these impediments for family unity or humanitarian reasons.<sup>190</sup>

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.<sup>191</sup> 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.<sup>192</sup>

#### 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 malice 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.<sup>193</sup>

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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.

191. See CSJN, 23/10/2007, "Zhang, Hang v. Estado Nacional-Ministerio de Relaciones Exteriores y Culto / recurso de hecho," Fallos (2007-330-4554) (Arg.).

192. *Id.*

193. Law No. 25.871, art. 62(a)-(e), Dec. 17, 2003, [30322] B.O. 2.

Persons in irregular status are also subject to deportation.<sup>194</sup> 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.<sup>195</sup>

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.<sup>196</sup> 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.<sup>197</sup> 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.<sup>198</sup> Additionally, the Mercosur program suspended expulsions of citizens of Mercosur countries to allow them an opportunity to apply for legal status.<sup>199</sup> Thus, in practice, few, if any, expulsions, other than those related to criminal conduct, have taken place since the passage of the new law.<sup>200</sup>

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.<sup>201</sup> 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.<sup>202</sup> Only in the most exceptional cases will the Department of Homeland Security exercise prosecutorial discretion and decline to proceed with

194. *Id.* art. 61.

195. *Id.* art. 63.

196. *Id.* arts. 61, 63.

197. *Id.* art. 61.

198. See discussion of Mercosur and Non-Mercosur Regularization Programs, *infra* at II.D.

199. O.A.S. Permanent Council, Comm. on Juridical and Political Affairs, Working Group to Prepare an Inter-Am. Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families, *Outline of the Presentation by Dr. Adriana Alonso for the Special Session of the Working Group to Be Held on Sept. 30 and Oct. 1, 2004* (Sept. 27, 2004) available at <http://www.oas.org/consejo/CAJP/Migrant%20workers%20documents.asp>.

200. Decree No. 1169/2004, art. 13, Sept. 6, 2004, [30483] B.O. 1; see also 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 4, 2008).

201. See HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 3 (2009), <http://www.hrw.org/en/reports/2009/04/15/forced-apart-numbers-0>. "Removal" is the term employed for the deportation or denial of admission.

202. See, e.g., Kanstroom, Daniel, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?* 3 STAN. J. C.R. & C.L. 195, 195-196 (2007).

removal.<sup>203</sup> 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.<sup>204</sup> When administrative review or reconsideration is sought, the authorities must make a decision within thirty days.<sup>205</sup> After exhausting administrative review, the affected party may appeal to the federal court.<sup>206</sup> 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.<sup>207</sup> Federal courts with jurisdiction over administrative decisions or any federal court in the provinces of Argentina are authorized to hear such immigration cases.<sup>208</sup>

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.<sup>209</sup>

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

203. See Memorandum on Prosecutorial Discretion from William J. Howard, Principal Legal Adviser, U.S. Dep't of Homeland Sec., U.S. Immigration and Customs Enforcement (Oct. 24, 2005), available at [http://www.refugees.org/uploadedFiles/Participate/National\\_Center/Resource\\_Library/Oct24th\\_2005\(1\).pdf](http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Oct24th_2005(1).pdf); see also Memorandum on Exercising Prosecutorial Discretion from Doris Meissner, Commissioner, U.S. Dep't of Justice, Immigration and Naturalization Serv. (Nov. 17, 2000), available at [http://www.miracoalition.org/uploads/V\\_/hg/V\\_hgJbpG0Xs-0mZLN7CDQ/Prosecutorial-Discretion1.pdf](http://www.miracoalition.org/uploads/V_/hg/V_hgJbpG0Xs-0mZLN7CDQ/Prosecutorial-Discretion1.pdf); Legomsky, *supra* note 50; Christopher Nugent, *Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens*, 5 U. Md. L.J. RACE RELIGION GENDER & CLASS 243, 246-50 (2005); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1693 (2009).

204. Law No. 25.871, arts. 74-90, Dec. 17, 2003, [30322] B.O. 2.

205. *Id.* art. 76.

206. *Id.* art. 84.

207. *Id.* arts. 61, 74.

208. *Id.* art. 98.

209. Compare Law No. 22.439, arts. 37-38, Mar. 23, 1981, [1981-A] L.A. 273 (repealed) with Cámara Federal de Apelaciones de Paraná [CFed], 10/12/2004, "Ali Yun, Lingyan Zheng y Yu Junyun / habeas corpus," L.S. Crim. 2004-II-396 (Arg.) (author's translation).

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.<sup>210</sup> 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.<sup>211</sup> Similarly, the department may issue a deportation order against a non-citizen in irregular status who has completed probation,<sup>212</sup> or who is charged with a lesser crime for which probation or other rehabilitative measures are available.<sup>213</sup> In the latter case, the criminal prosecution is terminated.<sup>214</sup> 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.<sup>215</sup>

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.<sup>216</sup> 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.<sup>217</sup>

210. Law No. 25.871, art. 85, Dec. 17, 2003, [30322] B.O. 2.

211. *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.

212. Law No. 25.871, art. 64(b), Dec. 17, 2003, [30322] B.O. 2.

213. *Id.* art. 64(c).

214. *Id.*

215. 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=si&id=65&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).

216. 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.

217. See generally Jose Nicasio Dibur, *El Artículo 64 de la Ley de Política Migratoria Argentina: Una Norma Inconstitucional?*, L.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.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup> 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.<sup>222</sup>

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.<sup>223</sup> The court rejected this argument and held that the plain language of the statute applied only to minor crimes.<sup>224</sup> 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.<sup>225</sup>

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.<sup>226</sup> Although the court rejected his argument,<sup>227</sup> 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.<sup>228</sup> 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

218. Cámara Nacional de Casación Penal [C.N.C.P.], Sala I, 28/2/2005, “Chukura O’Kasili, Nicholas / recurso de inconstitucionalidad” (Arg.).

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).

223. C.N.C.P., Sala III, 6/11/2006, “Chambi Loaiza Adolfo / recurso de casación” (Arg.).

224. *Id.*

225. *Id.*

226. C.N.C.P., Sala III, 12/6/2007, “Cercedo Masgo Pedro Miguel / recurso de casación” (Arg.).

227. *Id.*

228. *Id.* (Dra. Angela Ester Ledesma, dissenting).

the criminal offense, in order to rid Argentina of immigrant criminals.<sup>229</sup>

## 6. *Right to Counsel*

Non-citizens within Argentina who lack sufficient financial resources have the right to free legal assistance and access to interpreters.<sup>230</sup> Article 86 of Law 25.871 specifically states that the regulations must protect the constitutional right to present a defense.<sup>231</sup> 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.<sup>232</sup> 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.<sup>233</sup> Other lawyers within the Defensoría handle these cases when they reach the federal tribunals.<sup>234</sup> In the provinces outside Buenos Aires, general attorneys from the Defensoría handle both the administrative and judicial immigration cases.<sup>235</sup>

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."<sup>236</sup> 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.<sup>237</sup> 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.*

230. Law No. 25.871, art. 86, Dec. 17, 2003, [30322] B.O. 2.

231. *Id.*

232. *See supra* note 215. The national federal defenders are part of the Ministerio Público.

233. Law No. 25.871, art. 4, Dec. 17, 2003, [30322] B.O. 2.

234. *Id.* art. 86.

235. *Id.* art. 98; *see also* 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; Convenio con el Ministerio Publico de la Defensa, <http://www.migraciones.gov.ar/novedades/includes/datosNovedad.php?historico=si&rid=65&lang=> (last visited May 15, 2010).

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.").

237. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, *MIGRATION POLICY INSTITUTE: INSIGHT*, Apr. 2005, at 1; Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 *GEO. IMMIGR. L.J.* 739, 747 (2002); Beth J. Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 *B.C. THIRD WORLD L.J.* 393, 404 (2000).

## 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.<sup>238</sup> In exceptional circumstances, detention may be authorized before the issuance of a final order.<sup>239</sup> Even then, the government must seek a detention order from a competent judicial body solely in order to execute the deportation.<sup>240</sup> The Immigration Department must suspend such detention in cases in which the detainee is the parent, child or spouse of an Argentine citizen.<sup>241</sup> 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.<sup>242</sup> In practice, few non-citizens, other than those accused of crimes, are detained.<sup>243</sup>

In the case of *Zeng Xiankai*, the federal appellate court strictly interpreted the provisions of Article 70 relating to preventive detention pending deportation.<sup>244</sup> 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.<sup>245</sup> 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.<sup>246</sup> Writing for the same court in a similar case, Judge Chausovsky emphasized that under Article 72, the authorities may only detain immigrants for limited periods of time in facilities the auxiliary immigration police or the Department of Immigration police operate, and never in a penal institution, which

238. Law No. 25.871, art. 71, Dec. 17, 2003, [30322] B.O. 2.

239. *Id.* arts. 69-70.

240. *Id.* art. 70.

241. *Id.*

242. *Id.* art. 71.

243. 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.

244. 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.).

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.<sup>247</sup>

In contrast, U.S. law provides broad statutory authority for detention of immigrants pending the outcome of their removal hearing.<sup>248</sup> 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.<sup>249</sup> 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.<sup>250</sup> Detainees are housed in sub-standard, penal-like facilities.<sup>251</sup> 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.<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup> 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.<sup>255</sup> In addition, Article 28 clarifies that the preferential immigration status

247. Juzgado Federal [Juzg. Fed.], 10/12/04, "Ali Yun, Lingyan Zheng, Yu Junyun / habeas corpus," L.S.CRIM. 2004-II-396 at 6 (Arg.).

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.").

249. 8 U.S.C. § 1226(c) (2006); *Demore v. Kim*, 538 U.S. 510, 521-523 (2003).

250. Detention Watch, About the U.S. Detention and Deportation System, <http://www.detentionwatchnetwork.org/aboutdetention> (last visited May 15, 2010); Amnesty Int'l, *Jailed Without Justice: Immigration Detention In the USA* (Mar. 2009), available at <http://www.amnestyusa.org/immigrant-rights/immigrant-detention-report/page.do?id=1641033>.

251. Detention Watch, *supra* note 250.

252. Nina Bernstein, *Officials Obscured Truth of Migrant Deaths in Jail*, N.Y. TIMES, Jan. 10, 2010, at A1.

253. DORA SCHRIRO, DEP'T OF HOMELAND SECURITY: IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (Oct. 6, 2009) (citing a daily immigrant detention figure on Sept. 1, 2009 of 31,075); Trac Immigration, *Huge Increase in Transfers of ICE Detainees*, <http://trac.syr.edu/immigration/reports/220/> (last visited May 15, 2010) (citing a total immigrant detainee population of 369,483 in 2009).

254. Acuerdo sobre residencia para nacionales de los Estados Partes del Mercosur Bolivia y Chile, Dec. 6, 2002, <http://www.parlamento.gub.uy/htmlstat/pl/acuerdos/acue17927-2.htm>.

255. Law No. 25.871, art. 23, Dec. 17, 2003, [30322] B.O. 2.

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.<sup>256</sup>

In 2004, after the passage of Law 25.871, the government enacted the National Program of Normalization of Immigration Documents (Programa Nacional de Normalización Documentaria Migratoria), popularly known as the Patria Grande (Big Country) program, to further the regularization of Mercosur citizens.<sup>257</sup> 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.<sup>258</sup> 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%.<sup>259</sup>

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.<sup>260</sup> In adopting the program, the government recognized this population's established family and community ties in Argentina and their vulnerability to exploitation.<sup>261</sup> 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.<sup>262</sup> As of 2008, 12,062 applications had been granted, 75% of which were from Chinese immigrants.<sup>263</sup>

### 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-

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256. Law No. 25.871, art. 28, Dec. 17, 2003, [30322] B.O. 2.

257. Law No. 25.902, June 9, 2004, [30443] B.O. 3; Decree No. 836/2004, July 7, 2004, [30438] B.O. 4.

258. Brian Byrnes, *Making Room: Argentina Finds a Place for its Local Immigrants*, NEWSWEEK INTERNATIONAL, Sept. 11, 2006, available at <http://www.newsweek.com/id/45526>.

259. MINISTERIO DEL INTERIOR, DIRECCIÓN NACIONAL DE MIGRACIONES (2008), <http://www.migraciones.gov.ar/prensa/noticias/24-12-08%20Perfil%20migratorio%20de%20Argentina.htm>.

260. Decree No. 1169/2004, Sept. 13, 2004, [30483] B.O. 1.

261. *Id.*

262. *Id.*; Law No. 25.871, arts. 10-11, Dec. 17, 2003, [30322] B.O. 2.; SUSANA NOVICK, ALEJANDRO HENER, & PABLO DALLE, INSTITUTO DE INVESTIGACIONES GINO GERMANI, FACULTAD DE CIENCIAS SOCIALES UNIVERSIDAD DE BUENOS AIRES, EL PROCESO DE INTEGRACIÓN MERCOSUR: DE LAS POLÍTICAS MIGRATORIAS Y DE SEGURIDAD A LAS TRAYECTORIAS DE LOS INMIGRANTES, at 50-51 (Dec. 2005), <http://www.iigg.fsoc.uba.ar/pobmigra/archivos/dt46.pdf>.

263. MINISTERIO DEL INTERIOR, DIRECCIÓN NACIONAL DE MIGRACIONES (2008), <http://www.migraciones.gov.ar/prensa/noticias/24-12-08%20Perfil%20migratorio%20de%20Argentina.htm>.

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.<sup>264</sup>

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.<sup>265</sup>

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.<sup>266</sup> 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.<sup>267</sup> 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.<sup>268</sup> 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."<sup>269</sup> 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.<sup>270</sup> A human rights attorney stated that it is not uncommon

264. Chausovsky, *supra* note 23, at 9.

265. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, VOL. 1, 373 (Aspen 2002). A further justification for the U.S. regulatory process relates to the requirement of public comment and public hearings under the Administrative Procedures Acts. Argentina does not have a comparable mechanism.

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](http://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.<sup>271</sup> 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.<sup>272</sup>

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.<sup>273</sup>

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.<sup>274</sup> 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.<sup>275</sup> 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.<sup>276</sup> Regulations could also resolve other inherent con-

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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. 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. 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).

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.

273. Chausovsky, *supra* note 23, at 9; interview with Pablo Asa, Director, CELS/CAREF/UBA, *supra* note 215.

274. See Chinese Embassy letter, *supra* note 23.

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).

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].

traditions, 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.<sup>277</sup> 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).<sup>278</sup> The participation of these groups should ensure that the regulations are compatible with the goals of the statute.<sup>279</sup>

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,<sup>280</sup> 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.

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277. Interview with Diego Morales, Director of Litigation, CELS in Buenos Aires, Arg. & Bogotá, Colom. (Jul. 3, 2009).

278. *Id.*; *Llega la reglamentación pendiente hace 4 años*, PERIÓDICO MIGRACIONES (Dirección Nacional de Migraciones, Ministerio del Interior de la Nación, Buenos Aires, Arg.), Nov. 2008 at 1.

279. Interview with Diego Morales, Director of Litigation, CELS in Buenos Aires, Arg. & Bogotá, Colom. (Nov. 14, 2009).

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.<sup>281</sup> 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.<sup>282</sup> 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.<sup>283</sup> The Department is also tasked with guaranteeing immigrants' access to public services and employment.<sup>284</sup> The Ministries of Education, Health and Labor must adopt policies to achieve these goals.<sup>285</sup> In addition, the Immigration Department must provide training for the migration police and other government officials and employees to ensure compliance with new law.<sup>286</sup> 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.<sup>287</sup> 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.<sup>288</sup>

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

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281. Boletín Oficial No. 31.898, Migraciones, Decreto 616/2010, Reglamentación de la ley de Migraciones No. 25.871 y sus modificatorias, Bs. As 3/5/2010.

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.<sup>291</sup> 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.<sup>292</sup>

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.<sup>293</sup> Detention before a final deportation order is permissible only in limited circumstances and likewise, only with a court order.<sup>294</sup> 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.<sup>295</sup> 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.<sup>296</sup> 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.<sup>297</sup> When denying entry to a non-citizen at the border, officials must comply with the provisions of Argentina's refugee law.<sup>298</sup>

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.<sup>299</sup> 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.<sup>300</sup> 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.

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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.

