

**“TO GOVERN IS TO POPULATE”:
ARGENTINE IMMIGRATION LAW AND
WHAT IT CAN SUGGEST FOR THE UNITED
STATES**

*Victoria Slater**

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* J.D. from University of Houston Law Center; B.A. from Barnard College, Columbia University; M. Phil. from Cambridge University. The Author was awarded a 2009 University of Houston Graduate Public Interest Fellowship. The Author would like to thank her fiancé, Michael, her parents, and her sister, Katherine, for their support, interest, and love.

“TO GOVERN IS TO POPULATE”¹

During the recent presidential campaign, it was anticipated that there would be several hot button issues that the candidates would need to focus on.² One of these anticipated issues was immigration and the reform of our current immigration law.³ Yet, amid a floundering economy and intense debate over the war in Iraq, the immigration issue receded into the background.⁴ Immigration reform was such a sensitive and controversial issue that, in a time of national distress, the candidates stayed away from discussing it.⁵ It was an issue easily forgotten, as the immigration laws most devastatingly affect the one group of people in the U.S. who are unable to do anything about it: immigrant non-citizens who are ineligible to vote.

An ongoing debate exists concerning immigration law and undocumented immigrants in the United States.⁶ These debates heated up during 2006 and 2007 when several immigration reform bills were introduced into the House and Senate.⁷ These bills purported to contend with the perceived rise in “illegal” immigration in the United States, and their proposals ranged from building fences to creating guest worker programs and granting partial amnesty.⁸ In contrast, Argentina, arguably the country most similar to the U.S. when it comes to immigration

1. JUAN BAUTISTA ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA ARGENTINA 240 (Julio Noé ed., Ediciones Estrada 1949) (3d ed. 1856). The idea that “to govern is to populate” was expressed in the first edition of this work, which greatly influenced the Argentine Constitution of 1853. *Id.* at XIX.

2. See Michael Luo, *Candidates Walk a Tightrope on Immigration*, N.Y. TIMES, Nov. 18, 2007, at 41 (noting that “there is widespread anxiety . . . about the impact of illegal immigration” among the American public).

3. See *id.*

4. Julia Preston, *Immigration Cools as Campaign Issue*, N.Y. TIMES, Oct. 29, 2008, at A20.

5. *Id.*

6. See *infra* Part I.A.2.

7. See *infra* Part II.D.

8. See *What’s in the Senate Immigration Deal?*, NPR, May 21, 2007. <http://www.npr.org/templates/story/story.php?storyId=10300952>.

flows, has recently passed various immigration laws and resolutions to deal with a similar undocumented population.⁹

The new immigration policy changes in Argentina can serve as a guidepost for immigration reform in the United States, given the similarities between the two countries' immigration history and recent challenges with undocumented immigrants. However, implementing Argentina's very liberal policy, with its focus on human rights,¹⁰ may be a challenge in the United States without some modifications.

This Comment is divided into four parts. Part I traces the history of immigration in both the United States and Argentina, then discusses the legislative histories of both countries, and finally explores the current immigration situation of both countries. Part II describes and analyzes the immigration law that is currently in place in the United States and Argentina. Part III then builds upon the previous analysis of the current law by determining the pitfalls of the recent legislation in Argentina and the plausibility of its implementation in the United States, with Part IV concluding that the Argentine policy is perhaps the most equitable solution for the United States, with some modifications.

I. NATIONS OF IMMIGRANTS—THE AMERICAN AND ARGENTINE EXPERIENCES

A. *A History of United States Immigration*

Historically the United States is a country of immigrants.¹¹ According to the 1790 United States census, there were 3,929,214 people in the territorial United States.¹² Of this

9. See *infra* Part II.A–B.

10. See Maia Jachimowicz, *Argentina: A New Era of Migration and Migration Policy*, MIGRATION POLICY INSTITUTE, Feb. 2006, <http://migrationinformation.org/Profiles/display.cfm?ID=374> (providing an overview of Argentinean immigration and recent influence of human rights concerns).

11. See, e.g., Rachel L. Swarns, *The Immigration Debate: The Context; Split Over Immigration Reflects Nation's Struggle*, N.Y. TIMES, Mar. 29, 2006, at A17.

12. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING: POPULATION AND HOUSING UNIT COUNTS, UNITED STATES tbl. 2 (1990).

population, the majority was immigrants or only one or two generations removed from immigrants.¹³ In 1790, the first immigration statutes were passed in the United States, which regulated naturalization¹⁴ through a two-year residency period and required repudiation of all other national loyalties and any claims to nobility.¹⁵ This liberal policy soon changed in response to turmoil in other parts of the world, with acts in 1795 and 1798 raising the residency requirement for citizenship to five and fourteen years, respectively.¹⁶ In 1819, the United States began requiring ship captains to submit a register of everyone on board when the ship arrived at ports in the United States.¹⁷ Nevertheless, from the founding of the nation until the last few decades of the nineteenth century, very few restrictions existed on who entered the country.¹⁸ However, starting in the 1870s, Congress began to pass acts that restricted immigration, which were usually aimed at groups that were considered undesirable—such as convicts, prostitutes, and migrants from Asia and southern Europe.¹⁹

13. LAWRENCE H. FUCHS & SUSAN FORBES MARTIN, SELECT COMM'N ON IMMIGRATION POLICY & THE NAT'L INTEREST, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT (1981) *in* THOMAS ALEXANDER ALEINIKOFF ET. AL, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 158, 159 (6th ed. 2008).

14. The U.S. Citizenship and Immigration Services website defines naturalization as “the process by which U.S. citizenship is conferred upon a foreign citizen or national after he or she fulfills the requirements established by Congress in the Immigration and Nationality Act (INA).” U.S. Citizenship and Immigration Services, Naturalization, <http://www.uscis.gov/naturalization> (last visited Mar. 29, 2009).

15. FUCHS & MARTIN, *supra* note 13, at 160.

16. *Id.* These heightened restrictions were in response to the French Revolution and were lowered back to five years in 1802. *Id.*

17. FUCHS & MARTIN, *supra* note 13, at 161.

18. *See Plyler v. Doe*, 457 U.S. 202, 205 (1982) (“Since the late 19th century, the United States has restricted immigration into this country.”).

19. *See* Act of Mar. 3, 1875, ch. 141, § 3, 18 Stat. 477 (current version at 43 U.S.C. § 934 (2006)) (prohibiting the importation of women to the United States for prostitution, and forbidding convicts and those with a “lewd and immoral purpose” from immigrating); Act of August 3, 1882, ch. 376, § 2, 22 Stat. 214 (repealed 1974) (prohibiting entrance into the United States by any passengers who may be convicts, lunatics, or likely to become a public charge); Act of May 6, 1882, ch. 126, pmb., 22 Stat. 58, 59 (repealed 1943) (suspending the immigration of Chinese laborers for ten years); Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084 (current version at 8 U.S.C. §§ 1101–1537 (2006)); *see also* *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889) (considering the validity

Even with increased restrictions, from 1850 to 1930, the foreign-born population of the United States increased from 2.2 million to 14.2 million.²⁰ For the first part of the nineteenth century, the U.S. economy was largely agrarian.²¹ America was perceived to be a land with infinite opportunities for settlement and endless possibilities to gain wealth.²² With virtually unrestricted borders and vast prospects, mass immigration was actively encouraged.²³ However, towards the end of the nineteenth century, the economy was turning towards industry and America was becoming an increasingly urban society.²⁴ A shift in the ethnic origins of immigrants to the United States came with this economic change—rather than a continued emigration of farmers from northern and western Europe, more immigrants were unskilled laborers from eastern and southern Europe and Asia.²⁵ These new immigrants spurred a nationalistic and xenophobic reaction in the more established American population, which had a lasting effect on subsequent U.S. immigration policy.²⁶

In 1921, the U.S. government began instituting quotas on the number of immigrants from various countries, a policy that

of the Act of October 1, 1888, which prohibited Chinese laborers from entering the United States who had departed before the Act's passage).

20. Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850-1990* (U.S. Bureau of the Census, Population Div. Working Paper No. 29, 1999), available at <http://www.census.gov/population/www/documentation/twps0029/twps0029.html>.

21. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 2 (1984).

22. *Id.* at 2.

23. *Id.*

24. *Id.*

25. *Id.*; see also ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 29-31 (2d ed. 1996) (discussing the settlement of central and eastern European and Asian immigrants in port of entry cities on the East and West Coasts, as well as the recruitment of immigrants to Midwestern cities to work in the developing "heavy industry.").

26. Schuck, *supra* note 21, at 2-3. The new immigrants sparked fears of a labor surplus and of subsequent economic, political, and social disruptions, which lead to restrictionist policies supported by "pseudoscientific systems of racial categorization." THOMAS J. ARCHDEACON, BECOMING AMERICAN: AN ETHNIC HISTORY 143-44 (1983).

was solidified by the National Origins Act of 1924.²⁷ Despite a series of laws passed during and after World War II dealing with labor shortages and American servicemen returning with war brides, the 1924 legislation on immigration remained in place through the middle of the century.²⁸ In 1952, the first Immigration and Nationality Act (INA) was passed—a comprehensive statute that pulled together all the previous immigration codes put into force by the government and reaffirmed the quota system.²⁹

1. *Immigration Re-formed*

The INA of 1952 is still the basis for immigration law in the United States.³⁰ The Act has been updated frequently, often annually, reflecting current attitudes towards and issues surrounding immigration.³¹ In 1986, the Immigration Reform and Control Act (IRCA)³² was passed, making the most substantial changes in United States immigration policy since

27. National Origins Act, ch. 190, §§ 1–12, 18, 43 Stat. 153, 153–61 (1924); FUCHS & MARTIN, *supra* note 13, at 170. The National Origins Act “provided for an annual limit of 150,000 Europeans, a complete prohibition on Japanese immigration, the issuance and counting of visas against quotas abroad rather than on arrival, and the development of quotas based on the contribution of each nationality to the overall U.S. population rather than on the foreign-born population.” FUCHS & MARTIN, *supra* note 13, at 170.

28. FUCHS & MARTIN, *supra* note 13, at 171–72; *see also* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 417, 1303–05 (6th ed. 2003) (discussing the Mexican Bracero program in place from 1942 to 1964).

29. Immigration and Nationality Act of 1952, Pub. L. 414, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); *see* FUCHS & MARTIN, *supra* note 13, at 173. The 1952 INA was passed over President Truman’s veto and although it repealed the anti-Japanese provisions in place, it reaffirmed the national origin restrictions by using hemispheric quotas that limited Eastern Hemisphere immigration, while Western Hemisphere immigration was unrestricted. Schuck, *supra* note 21, at 13.

30. David Roepcke, “*Should I Stay or Should I Go?: Preventing Illegal Immigration by Creating Opportunity in Mexico Through Microcredit Lending*,” 38 CAL. W. INT’L L.J. 455, 469 (2008).

31. ALEINIKOFF ET AL., *supra* note 28, at 176. In 1965, the INA was amended to remove the national original formulas and replace them with a per-country limitation of 20,000 per country outside the Western Hemisphere, and a total of 120,000 from the Western Hemisphere with no country limitations. FUCHS & MARTIN, *supra* note 13, at 174.

32. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

the original INA.³³ Under the IRCA, for the first time, sanctions were imposed on employers who hired undocumented immigrants, and a one-time amnesty was instituted allowing undocumented immigrants in the country to become documented.³⁴ In 1996, Congress again overhauled the immigration system by passing the Antiterrorism and Effective Death Penalty Act (AEDPA),³⁵ the Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Act),³⁶ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).³⁷ With the exception of the Welfare Act, the 1996 legislation focused on enforcement of immigration laws and border controls, removal of non-citizen criminals, and undocumented immigration.³⁸ These acts were indicative of the mood of the nation at the time: “[g]et tough on immigrants, stop illegal immigration, and blame immigrants for criminal and welfare problems.”³⁹

The face of the immigration debate in the United States changed after the events of 9/11 and the passage of the USA Patriot Act.⁴⁰ After the harsh immigration measures enacted by Congress during the late 1990s, the new millennium began with a promising start: bilateral talks between the United States and Mexico concerning immigration and the introduction of reform

33. ALENIKOFF ET AL., *supra* note 28, at 176.

34. *Id.*

35. *INS v. St. Cyr*, 533 U.S. 289, 292; *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996) (codified, as amended, in scattered sections of 8, 18, 22, 28, 40, 42 U.S.C.).

36. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (codified, as amended, in scattered sections of 42 U.S.C.).

37. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–3546 (1996) (codified in scattered sections of 8 & 18 U.S.C.); ALENIKOFF ET AL., *supra* note 28, at 179. In 1986, Congress also passed the Immigration Marriage Fraud Amendment which changed the way immigrant spouses were admitted to the U.S., in order to prevent marriage fraud. ALENIKOFF ET AL., *supra* note 28, at 179.

38. ALENIKOFF ET AL., *supra* note 28, at 179. The Welfare act removed welfare benefits to permanent residents and caused rush to citizenship. *Id.*

39. Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL’Y 9, 11 (2006) [hereinafter Hines (U.S.)].

40. USA Patriot Act, Pub. L. No. 107–56, 115 Stat. 272 (2001) (codified in scattered titles of the U.S.C.); Hines (U.S.), *supra* note 39, at 10.

legislation in Congress.⁴¹ However, after 2001, concerns about national security and terrorism gained traction and prompted calls for stricter immigration laws and rigorous border controls.⁴²

2. *A Troubled Nation*

Today, the U.S. Census Bureau estimates that there are 37,547,789 foreign-born people residing in the United States.⁴³ During the last half of the twentieth century, immigration patterns changed: immigrants to the United States are no longer predominantly European in origin.⁴⁴ More and more immigrants have been clamoring to enter the U.S. from Asia and from nations neighboring the U.S. to the south.⁴⁵ There is also debate over the exact numbers of undocumented immigrants in the United States, with estimates ranging from 8 to 20 million.⁴⁶

An increasing outcry in the United States has arisen against what has been seen as the rising tide of “illegal” (undocumented) immigrants.⁴⁷ Concerns include undocumented workers taking

41. Hines (U.S.), *supra* note 39, at 11–12; ALEINIKOFF ET AL., *supra* note 28, at 180.

42. *See generally* Hines (U.S.), *supra* note 39, at 10–13; ALEINIKOFF ET AL., *supra* note 28, at 180–81.

43. Department of Commerce, U.S. Census Bureau, Selected Social Characteristics 2006, http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-ds_name=ACS_2006_EST_G00_&-_lang=en&-_caller=geoselect&-format= (last visited Mar. 29, 2009) [hereinafter Characteristics].

44. PANEL ON THE DEMOGRAPHIC & ECON. IMPACTS OF IMMIGRATION, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 36 fig. 2.5 (James P. Smith & Barry Edmonston eds., 1997).

45. *Id.*

46. Ted Robbins, *Getting a Handle on ‘Fuzzy’ Immigration Numbers*, NPR, Apr. 24, 2006, <http://www.npr.org/templates/story/story.php?storyId=5422388>. The phrase “illegal immigrant” is a misnomer, as the person himself cannot be illegal; it is the person’s action of not having the correct documents to legally reside in the United States that is illegal. Lawrence Downes, *What Part of ‘Illegal’ Don’t You Understand?*, N.Y. TIMES, Oct. 28, 2007, at 11. Thus, the term “undocumented” will be used in this Comment instead of “illegal” (although it has been proposed that “unauthorized” is the better term). *Id.*

47. *See* Evan Thomas, *Stopping the Census Clock*, NEWSWEEK, Oct. 10, 2006, <http://www.newsweek.com/id/45281>; *see also* Federation for American Immigration Reform [FAIR], Immigration Issue Centers: Immigration Issues, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenterslist8e20 (last visited Mar. 29, 2009) (purporting to inform about the negative impact of illegal immigration on the United States); Stop the Invasion, <http://stoptheinvasion.blogspot.com/> (last visited Mar.

jobs from U.S. citizens, forcing down wages, and being a drain on the social benefits system.⁴⁸ It has been argued that “[t]he costs of illegal immigration to the [U.S.] taxpayer are numerous, but the largest costs are education of their children, emergency medical care [,] and incarceration for those arrested for crimes.”⁴⁹ In response to these concerns, various reform proposals were introduced in the House and Senate in 2006 and 2007, yet no compromise has been reached and the bills continue to fail.⁵⁰

B. A History of Argentine Immigration

1. Beginnings

Like the U.S., Argentina has also historically been a country of immigrants.⁵¹ The idea of building the country through immigration was enshrined in the Argentine Constitution.⁵²

29, 2009).

48. *Embracing Illegals: Companies Are Getting Hooked on the Buying Power of 11 Million Undocumented Immigrants*, BUS. WK., July 18, 2005, http://www.businessweek.com/magazine/content/05_29/b3943001_mz001.htm.

49. FAIR, What’s Wrong With Illegal Immigration?, http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters7443 (last visited Mar. 29, 2009). However, it can be argued that there is a shortage of unskilled workers in the U.S.; therefore, rather than competing for jobs, immigrants are filling positions Americans do not want as well as paying employment taxes on their earnings, which offsets the cost of any social benefits they receive. See Tamar Jacoby, *Immigration Nation*, 85 FOREIGN AFF. 50, 52–54 (2006).

50. See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); Kennedy-Specter Immigration Reform Bill, S. 1639, 110th Cong. (2007); see also Robert Pear & Carl Hulse, *Immigrant Bill Dies in Senate; Defeat for Bush*, N.Y. TIMES, June 29, 2007, at A1; *Not Criminal, Just Hopeful*, ECONOMIST, Apr. 15, 2006, at 33.

51. See Mugambi Jouet, *The Failed Invigoration of Argentina’s Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History*, 39 U. MIAMI INTER-AM. L. REV. 409, 417 (discussing economic conditions that led to an influx of 6 million immigrants).

52. DAVID ROCK, ARGENTINA 1516–1987: FROM SPANISH COLONIZATION TO ALFONSÍN 124 (2d ed. 1987). The Argentine Constitution of 1853 was very much influenced by Alberdi’s *Bases y Puntos*, in which he declared that “to govern is to populate.” See *supra* note 1 and accompanying text.

The Argentine Constitution of 1853 specifically encouraged European immigration and required that immigrants make efforts towards improving industry, agriculture, or the arts and sciences.⁵³ From 1871 to 1914, Argentina received 5.9 million immigrants, 80% of whom were from southern European countries.⁵⁴ In 1876 the Avellaneda Act was passed, which established an “open door” policy for European immigrants.⁵⁵ However, as was the case in the U.S., Argentines began to fear the new immigrants from southern Europe, and passed legislation to allow for their deportation.⁵⁶ Most notably, this legislation includes the Law of Residence of 1902 and the Law of Social Defense of 1910.⁵⁷

With the First World War and the subsequent worldwide economic downturn, immigration to Argentina slowed considerably.⁵⁸ In addition, Argentina’s immigration policies gradually became more restrictive beginning in the 1920s and 1930s.⁵⁹ Unstable economic conditions and a series of military dictatorships in the 1950s, 60s, and 70s also led to increasingly

53. CONST. ARG., pt. 1, ch. 1, art. 25 (1853); *see also* Barbara Hines, *An Overview of Argentine Immigration Law*, 9 IND. INT’L & COMP. L. REV. 395, 395 (1999) [hereinafter Hines (Arg.)] (stating that the Argentine constitution incorporates the right to immigrate and the protection of immigrants as basic constitutional principles).

54. ROCK, *supra* note 52, at 141. Of these 5.9 million entrants, 3.1 million settled permanently in Argentina. *Id.*

55. SUSANA NOVICK, NAT’L COUNCIL FOR SCIENTIFIC & TECHNOLOGICAL RESEARCH, ARGENTINA’S RECENT POPULATION POLICIES AND POLITICAL CHANGES 2 (2001), *available at* <http://iigg.fsoc.uba.ar/pobmigra/archivos/BahiaS35.pdf> [hereinafter NOVICK (BAHIA)].

56. *See* ROCK, *supra* note 52, at 186–87 (illustrating how the rise of anarchism among immigrants caused the government to pass laws allowing the police to deport those suspected of anarchist affiliations).

57. *Id.* at 187; Jeanne Delaney, *National Identity, Nationhood, and Immigration in Argentina: 1810–1930*, STAN. ELEC. HUMAN. REV., Mar. 15, 1999, <http://www.stanford.edu/group/SHR/5-2/delaney.html>. Immigrants imported and participated in anarchist movements that sparked fears of social unrest in Argentina, resulting in the desire for the government to be able to deport those participating in anarchist activity. Delaney, *supra* note 57.

58. *See* ROCK, *supra* note 52, at 220 (explaining that the proportion of foreign-born persons in the population declined from 40% in 1930 to 26% by 1947); JOSE PANETTIERI, INMIGRACIÓN EN LA ARGENTINA 36 (1970).

59. PANETTIERI, *supra* note 58, at 36 n.4. The original Avellaneda Act was not amended or superseded; rather, there were executive decrees issued on December 31, 1923 and June 28, 1927 that put restrictions on immigration. *Id.*

restrictive immigration policies as the immigration patterns shifted from European migrants to migrants from the surrounding Latin American countries.⁶⁰

2. *From Across Oceans to Across Borders*

As with the United States, the immigrant flow into Argentina, in the latter half of the twentieth century became less European.⁶¹ Indeed, Argentina became a receiving country for immigrants from its surrounding neighbors—Bolivia, Peru, etc.⁶² These immigrants were fleeing their countries' severe economic difficulties and entering Argentina at a time when it was perceived to be one of the most successful countries in Latin America.⁶³ However, in the late 1990s and the start of the twenty-first century, xenophobia began growing in Argentina.⁶⁴ This xenophobia resulted in attacks on immigrants within the country and rising concerns over undocumented immigrants.⁶⁵ This coincided with troubles within the Argentine economy and the severe economic crash in 2001.⁶⁶

60. See generally NOVICK (BAHIA), *supra* note 55 (discussing the beginning of immigration from neighboring countries, as well as the restrictive immigration policies under Perón calling for only productive, healthy Europeans). Susana Novick, Dir., Gino Germani Research Inst., Buenos Aires Univ., Lecture at the XXV International Population Conference, Tours, France: Evolución Reciente de la Política Migratoria Argentina (July 18–23, 2005) [hereinafter Novick (France)] (transcript available at <http://www.iigg.fsoc.uba.ar/pobmigra/archivos/iussp.pdf>) (discussing the change in immigration flows and immigration policies of the military dictatorship that began in 1976).

61. Hines (Arg.), *supra* note 53, at 397–98.

62. *Id.*; ALEJANDRO GRIMSON & GABRIEL KESSLER, ON ARGENTINA AND THE SOUTHERN CONE: NEOLIBERALISM AND NATIONAL IMAGINATIONS 125 (2005).

63. Novick (France), *supra* note 60, at 4.

64. GRIMSON & KESSLER, *supra* note 62, at 117–19.

65. See, e.g., Marcela Valente, *Brutal Attacks on Bolivian Immigrants*, INTERPRESS SERVICE, May 24, 2000, <http://www.1worldcommunication.org/bolivia.htm#On%20Bolivian%20Immigra> (discussing attacks on immigrants in Buenos Aires that appear to be motivated by xenophobia). These fears were perpetuated by public officials, including then-President Carlos Menem and Finance Minister Eduardo Duhalde, who used immigrants as scapegoats for a faltering economy. GRIMSON & KESSLER, *supra* note 62, at 130–32; Clifford Krauss, *Argentina Looks for a Way to Stem Illegal Immigrants*, N.Y. TIMES, Feb. 18, 1999, at A3.

66. See generally Manuel Pastor & Carol Wise, *From Poster Child to Basket Case*, 80 FOREIGN AFFAIRS 60, 60–61 (2001) (discussing the general problems in the Argentine

The restrictive immigration policies put in place by Argentina's military regimes created high numbers of migrants who were in the country illegally.⁶⁷ To alleviate the increasing numbers of undocumented immigrants, various amnesties were implemented whenever the government returned to democratic regimes.⁶⁸ Under the last military government, which lasted from 1976–1983, the General Migration Act was adopted, which denied undocumented migrants the right to work for money, deprived undocumented migrants access to health care and education, and established harsh requirements that prevented these migrants from regularizing their situation.⁶⁹ This act was in place for more than twenty years, until the new Migration Law, based on the MERCOSUR Agreement on Residence, was passed in 2003.⁷⁰

II. THE CURRENT STATE OF THE LAW

A. Argentina—*Human Rights and the National Migration Act*

Human rights issues and policies significantly influence current Argentine immigration law. During the last military regime, under the direction of General Jorge Rafael Videla, the Argentine government began a so-called “dirty war” against people it considered “subversives” or dangerous to the military state.⁷¹ The government detained many people, including

economy in the late 1990s and the crash in 2001).

67. Susana Novick, *Políticas Migratorias en la Argentina*, in INMIGRACIÓN Y DISCRIMINACIÓN: POLÍTICAS Y DISCURSOS (Enrique Oteiza et al. eds.) (2000), available at <http://www.iigg.fsoc.uba.ar/pobmigra/archivos/migrar.pdf>.

68. One of these amnesties was implemented through the General Migration Act. Law No. 22439, Mar. 27, 1981, [24637] B.O. 6; see also Hines (Arg.), *supra* note 53, at 407. The General Migration Act replaced the Avellaneda law, which had been in place unchanged since 1876. Hines (Arg.), *supra* note 53, at 398.

69. Novick (France), *supra* note 60.

70. Law No. 25871, Jan. 21, 2004, [30322] B.O. 2, arts. 3, 28; Law No. 25903, July 16, 2004, [30443] B.O. 1 (ratifying the Agreement Regarding Residency for Nationals of MERCOSUR Party States); see also María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison with Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV. 301, 330–31 (2005) (discussing the provisions of the MERCOSUR immigration agreement).

71. David Weissbrodt & Maria Luisa Bartolomei, *The Effectiveness of International*

foreigners, imprisoned and tortured them, and then caused them to disappear.⁷² The government's actions, as well as high-profile disappearances of several foreigners in Argentina, brought the country into the purview of human rights agencies and organizations such as the Inter-American Commission on Human Rights and the U.N. Commission on Human Rights.⁷³ Some evidence indicates that the U.S. State Department under the Carter administration refused to give its approval for various funding projects to Argentina unless the Argentine government allowed the Inter-American Commission on Human Rights to investigate human rights abuses in Argentina.⁷⁴

Soon after the United Kingdom defeated Argentina's military government in the Falklands/Malvinas War, elections were held to return the country to democracy.⁷⁵ Elected President Raul Alfonsín immediately initiated a series of studies and reforms in the human rights arena, including an initiative to rewrite the constitution—the same constitution that had been in place since 1853.⁷⁶ During the Alfonsín administration, Argentina became a signatory to the U.N. Covenant on Civil and Political Rights⁷⁷, the U.N. Covenant on Economic and Social

Human Rights Pressures: The Case of Argentina, 1976–1983, 75 MINN. L. REV. 1009, 1012 (1991).

72. *Id.* In Argentina, those who disappeared during the military government are now referred to as *los desaparecidos* and it is estimated that anywhere from 10,000 to 30,000 people went missing. *Id.* at 1012–13 n.15; Stephen G. Michaud, *Identifying Argentina's Disappeared*, N.Y. TIMES, Dec. 27, 1987, at 18 (describing the forensic identification of *los desaparecidos*).

73. Weissbrodt & Bartolomei, *supra* note 71, at 1019–26.

74. *Id.* at 1021; *see also* ROCK, *supra* note 52, at 385 (discussing General Ramón J. Camps' involvement in the disappearances, and his statement that the government repressed the truth about the *desaparecidos* so as not to compromise international economic aid to Argentina).

75. Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law*, 18 EMORY INT'L L. REV. 317, 325 (2004).

76. Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 289 (1999); *see also* CONST. ARG., pt. 1, ch. 1, art. 25 (1853); *supra* note 53 and accompanying text.

77. International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6314/49 (Dec. 16, 1966); Schwartz, *supra* note 75, at 327.

Rights⁷⁸, and the U.N. Convention against Torture.⁷⁹ Argentina also decided to become subject to the jurisdiction of the Inter-American Court on Human Rights and ratified the American Convention on Human Rights.⁸⁰ The constitution was finally rewritten in 1994, under the administration of President Carlos Saúl Menem.⁸¹ The new constitution includes language that is almost a “verbatim replica” of the international human rights treaties, and grants the aforementioned treaties constitutional status.⁸²

Argentina is also a signatory to the International Convention for the Protection of Rights of all Migrant Workers and Members of Their Families,⁸³ which has been adopted by the U.N.⁸⁴ Thus, the National Migration Act⁸⁵ that came into effect in January 2004, shifted policy from a “security and border control approach” to a “comprehensive human rights perspective.”⁸⁶ Articles four and five of the National Migration Act guarantee the right of migration and the equal treatment of those who do.⁸⁷ The Act also ensures that no one can deny or

78. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3; Schwartz, *supra* note 75, at 327.

79. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85; Schwartz, *supra* note 75, at 327.

80. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Schwartz, *supra* note 75, at 327.

81. Levit, *supra* note 76, at 290.

82. *Id.* at 291–92.

83. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, Annex, U.N. Doc. A/RES/45/158/Annex (Dec. 18, 1990).

84. U.N. Treaty Collection, Status of Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, <http://www2.ohchr.org/english/bodies/ratification> (last visited Mar. 29, 2009).

85. Law No. 25871, Jan. 21, 2004, [30322] B.O. 2, art. 1.

86. Org. of Am. States, Comm. on Juridical and Political Affairs, *Comments of the Argentine Republic at the OAS Special Meeting on Migrant Workers*, at 2, OAS Doc. CP/CAJP-2454/07 (Feb. 13, 2007) [hereinafter Argentina OAS Report].

87. Law No. 25871, arts. 4–5.

restrict any migrant's access to healthcare, social work, medical attention, or education (from primary through university), regardless of immigration status.⁸⁸

Nevertheless, the Migration Act does not allow immigrants living in Argentina to be "irregular," i.e., without documentation.⁸⁹ Those migrants who enter the country at points without the proper form of migratory control are subject to expulsion.⁹⁰ In addition, those migrants who are living in Argentina "irregularly" are not allowed to work or receive remuneration for their labor.⁹¹ However, rather than punish the immigrant for being in the country illegally, Argentina focuses on those that employ them, imposing sanctions on employers who recruit and hire workers without the proper documentation.⁹² Nevertheless, the Act requires that the employers satisfy their obligations to the migrants under the employment laws, regardless of their immigration status.⁹³ In addition to the rights mentioned above, the Act provides that the state will develop and implement measures that would give migrants the ability to rectify their irregular status.⁹⁴

Argentina's membership in the regional trade agreement known as MERCOSUR also strongly impacted the formulation of the National Migration Act.⁹⁵ MERCOSUR was formed by the Treaty of Asunción in 1990 with the intention of creating a common market between Argentina, Brazil, Paraguay, and Uruguay.⁹⁶ In 1996, Bolivia and Chile became associate members of MERCOSUR.⁹⁷ The purpose of the trade agreement is not only to lift trade restrictions between these countries, but also to allow for the free movement of labor, capital, and

88. *Id.* arts. 7–8.

89. *Id.* arts. 37, 53.

90. *Id.* art. 37.

91. *Id.* arts. 53, 55.

92. *Id.* arts. 56–60.

93. *Id.* art. 56.

94. *Id.* art. 17.

95. See López, *supra* note 70, at 330.

96. Rafael A. Porrata-Doria, Jr., *MERCOSUR: The Common Market for the Twenty-First Century?*, 32 GA. J. INT'L & COMP. L. 1, 1 (2004).

97. *Id.* at 24–25.

resources.⁹⁸ In 2002, the MERCOSUR member states furthered these goals by enacting the Agreement Regarding Residency for Nationals of MERCOSUR Party States.⁹⁹ The Agreement allows nationals of MERCOSUR member states to easily obtain legal residency in another MERCOSUR member country, a proposition that is reflected in Argentina's National Migration Act.¹⁰⁰ Under the Act, a native of a MERCOSUR country has fewer requirements for securing legal residency status in Argentina than nationals of other countries.¹⁰¹

B. *The Plan Patria Grande*

When the National Migration Act was passed, thousands of people were already residing and working in Argentina without the proper documentation.¹⁰² In order to deal with this undocumented population, the government enacted the National Program for Migration Document Regularization, otherwise known as the Plan *Patria Grande*.¹⁰³

98. López, *supra* note 70, at 330; *see also* Argentina OAS Report, *supra* note 86, at 3 (discussing MERCOSUR's objective of increasing the well-being of the people in the member states and the agreements to "adopt consensus-based measures" regarding migration and security).

99. *See* Law No. 25903, July 13, 2004, [30443] B.O. 1 (ratifying the Agreement in Argentina).

100. Argentina OAS Report, *supra* note 86, at 3. Articles 23 and 28 of the Act specifically address the MERCOSUR agreement on Residency. Law No. 25871, Jan. 21, 2004, [30322] B.O. 2, arts. 23, 28.

101. Law No. 25871, arts. 23, 28.

102. *Migrant Laborers Get Legal Status: Kirchner's Government Tries to Stamp Out Foreign Worker Exploitation*, LATIN AM. PRESS (PERU), Sept. 1, 2006 [hereinafter *Migrant Workers*]. Government estimates of the number of undocumented immigrants living in Argentina have been as low as 250,000, while other sources have speculated that the number is as high as a million. *Id.* The Dirección Nacional de Migraciones (National Migration Office) puts the number at 750,000. *Id.*; *Argentina: Buenos Aires Cracks Down in "Slave-Labor" Shops After Fire Kills Six Bolivian Immigrants*, NOTISUR, Apr. 28, 2006.

103. Disposition No. 53253/2005, Dec. 15, 2005, [30802] B.O.; U.N. Secretariat, Dep't of Econ. & Soc. Affairs Statistics Div., *The Argentinean Experience in the Collection and Compilation of Statistics on International Migration*, at 7, U.N. Doc ESA/STAT/AC.119/10 (Nov. 2006). The Plan *Patria Grande* went into effect on April 17, 2006, shortly after a fire in Buenos Aires killed six undocumented Bolivians (two adults and four children) who were locked in an illicit textile factory. *Migrant Workers*, *supra* note 102. Although the government insists the plan was already in motion and the fire

The Plan *Patria Grande* was created for immigrants living in Argentina (and those wishing to live in Argentina) who are nationals of MERCOSUR member states and associated states.¹⁰⁴ The Plan first addresses immigrants who entered prior to the provision date of April 17, 2006.¹⁰⁵ First, the Plan proposes that the provincial governments in Argentina sign an agreement vowing to implement the plan in their jurisdictions.¹⁰⁶ Second, to assist in the implementation of the program, the government will compile a “Registry of Cooperating Social Institutions” (Institutions).¹⁰⁷

In stage 1 of this part of the Plan, the MERCOSUR nationals already residing in Argentina begin the process of obtaining legal residency by going to one of the Institutions in their jurisdiction.¹⁰⁸ At the Institution, the immigrant must present proof of identity, such as a passport or ID card, and complete the Form for Regulating Migration with their personal information and the date and place where they originally entered the country.¹⁰⁹ Once this information is received, processed, and verified by the National Migration Office, a certificate of *Residencia Precaria* is issued to the immigrant.¹¹⁰

did not influence the timing of the enactment, given the light the incident shed on the exploitation of undocumented migrants, the timing was quite convenient. *Id.*; Brian Byrnes, *Making Room: Argentina Finds a Place for Its Local Immigrants*, NEWSWEEK ATLANTIC INT’L ED., Sept. 11, 2006, at 25.

104. Disposition No. 53253/2005, art. 1. These states are Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela. *Id.* art. 3.

105. Disposition No. 53253/2005, art. 2, *amended by* Disposition No. 14949, Apr. 17, 2006, [30886] B.O. 14.

106. *Id.* art. 10.

107. *Id.* art. 12. These Institutions must provide certain documentation to the government ensuring they are a valid institution that has been operating for longer than a year. *Id.* annex I. These institutions are generally churches, unions, organizations representing migrants, and national NGOs that previously had an interest in defending the rights of migrants and now, through the government’s invitation, have become “fundamental stakeholders in the process.” Argentina OAS Report, *supra* note 86, at 4.

108. Disposition No. 53253/2005, art. 13.

109. *Id.*

110. *Id.* art. 14. *Residencia Precaria* literally translates into “precarious residency,” denoting that it is very unstable and only temporary. The Migration Law set out four different types of visas: permanent residency, temporary residency, transitory residency, and precarious residency. Law No. 25871, Jan. 21, 2004, [30322] B.O. 2, art. 20. A temporary residency visa is issued for up to three years to migrant workers, pensioners

In stage 2 of the Plan, after the *Residencia Precaria* has been issued, the migrant is required to present to the National Immigration Office their criminal records from Argentina and their country of origin, a sworn statement regarding any international crimes (checked through INTERPOL), and payment of a fee.¹¹¹ A successful petition will result in permanent residence or temporary residence for no less than two years.¹¹² An immigrant with temporary residence may apply for permanent residence, as long as the immigrant submits the application before the expiration of the temporary residence granted through the program.¹¹³

After April 17, 2006, nationals of MERCOSUR countries that enter the country without a visa will be granted a MERCOSUR tourist visa for ninety days.¹¹⁴ This visa may be extended by petition and may be converted to residency by going to the immigration office and presenting proof of ID, proof of date of entry into the country, established residency, the previously described criminal records, and a sworn statement that the immigrant has a means of subsisting.¹¹⁵

Additionally, Argentina has taken steps to regularize the status of migrants living in the country who are not from MERCOSUR countries.¹¹⁶ Article 17 of the Migration Law does not limit the state's ability to regularize migrants' status only to MERCOSUR nationals.¹¹⁷ Indeed, Decree 1169 gave non-MERCOSUR nationals living in Argentina without the proper documentation the ability to regularize their situation within

or others of self-supporting means, investors, scientists, sports players, artists, religious workers, those getting medical treatment, academics, students, refugees, and those from MERCOSUR countries. *Id.* art. 23. Transitory residency is usually for tourists or people in transit through Argentina. *Id.* art. 24. Until it is determined what category the immigrant falls into, if there is a question, the immigrant is on a precarious residency visa, which lasts for 180 days but can be extended if the immigrant's visa application has not yet been adjudicated. *Id.* art. 20.

111. Disposition No. 53253/2005, art. 15.

112. *Id.* art. 16.

113. *Id.* art. 17.

114. *Id.* art. 19, amended by Disposition No. 14949, Apr. 17, 2006, [30886] B.O. 14.

115. *Id.* art. 20.

116. Decree No. 1169, Sept. 6, 2004, [30483] B.O. 1.

117. Law No. 25871, Jan. 21, 2004, [30322] B.O. 2, art. 17.

180 days of June 30, 2004.¹¹⁸ To begin the regularization process, the government required migrants to present a sworn statement of intent to regularize migration status, proof of identity, proof that the migrant had entered the country before June 20, 2004, criminal records from Argentina and their country of origin, and payment of a fee.¹¹⁹

C. *The U.S.—Immigrants, Non-Immigrants, and “Illegals”*

Despite being passed over forty years ago, the INA, as amended in 1965, is still the controlling law on immigration in the United States.¹²⁰ As such, the U.S. separates foreigners wishing to enter the country into two categories: immigrants and non-immigrants.¹²¹ Immigrants are those who wish to obtain permanent residency in the U.S., while non-immigrants are those who wish to work or reside in the U.S. temporarily (including tourists).¹²² For immigrant visas, the U.S. uses a per-country quota system and places more weight on family relationship, although immigrants who have certain skill sets are also favored.¹²³ Generally, the U.S. admits non-immigrants for a specific purpose—such as business travel, tourism, work, or education—and for a specific length of time.¹²⁴ The IRCA,

118. Decree No. 1169, arts. 1, 3. This decree only applied to non-MERCOSUR nationals living in Argentina prior to June 30, 2004. *Id.* art. 1.

119. *Id.* art. 4.

120. *See supra* Part I.A.1.

121. Davon M. Collins, *Toward a More Federalist Employment-Based Immigration System*, 25 YALE L. & POL'Y REV. 349, 351 (2007).

122. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 818 (2007).

123. *Id.* at 816; Charles Morrow, *The Plight of the Highly Educated: Immigration Reform in the United States Post-September 11th*, 39 ARIZ. ST. L.J. 993, 998 (2007).

124. Morrow, *supra* note 123, at 1000. The types of visas available are separated into categories designated with letters from A–V, with each letter often representing more than one kind of visa. U.S. Citizenship and Immigration Services, Immigration Classifications and Visa Categories, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e6c08875d714d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=ea408875d714d010VgnVCM10000048f3d6a1RCRD> (last visited Mar. 29, 2009).

IIRIRA, and AEDPA did not change the basic structure for legal immigration.¹²⁵ Rather, these laws were intended to help control illegal immigration into the U.S.¹²⁶

As discussed above, the IRCA amendments to the INA imposed sanctions on employers who hired undocumented workers, declared an amnesty for undocumented immigrants who were continuously present in the country prior to January 1982, and increased the INS budget for border patrol and enforcing sanctions.¹²⁷ The AEDPA and the IIRIRA limited judicial review, expanded the crimes for which immigrants could be deported (often retroactively), allowed for expedited removal, and limited immigrant access to public benefits.¹²⁸ However, regardless of which side of the political aisle one subscribes to, it is universally agreed that these laws have failed in their purposes and have actually made the situation worse.¹²⁹ This failure is evidenced by the growth of the number of

125. Morrow, *supra* note 123, at 1001. The availability of non-immigrant visas for workers under this regime has been widely criticized as unrealistic given the reality of America's economy, the government's slowness in identifying labor shortages, and the slow processing times. Collins, *supra* note 121, at 356–58.

126. See Richard A. Johnson, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 244 (2007) (explaining that the purpose of the IRCA is to diminish the growth rate of the undocumented population residing within U.S. borders).

127. *Id.* at 244–45.

128. Hines (U.S.), *supra* note 39, at 11; Gabrielle M. Buckley, *Immigration and Nationality*, 32 INT'L LAW. 471, 471 (1998).

129. See Senator Sam Brownback, *Structural Immigration Reform Is Needed*, http://brownback.senate.gov/public/legissues/bsi_immigration.cfm (last visited Mar. 29, 2009) (stating that “visa reform must take place in order to fix the U.S. immigration system”); Senator Edward M. Kennedy, *Statement of Senator Edward M. Kennedy on Comprehensive Immigration Reform*, (last visited Mar. 29, 2009) (arguing that the U.S. immigration system is “adrift and urgently needs an overhaul from top to bottom”); White House, *The Agenda: Immigration*, <http://www.whitehouse.gov/agenda/immigration/> (last visited Mar. 29, 2009) (describing the White House's agenda to “[f]ix the dysfunctional immigration bureaucracy”); Senator John Cornyn, *Cornyn Addresses Immigration Summit with East Texas Business Leaders*, http://cornyn.senate.gov/public/index.cfm?FuseAction=ForPress.NewsReleases&ContentRecord_id=871ebd9c-802a-23ad-405e-9bdd3ab63209&Region_id=&Issue_id= (last visited Mar. 29, 2009) (“Congress should return to immigration reform without delay and address this problem in a comprehensive way.”).

undocumented immigrants in the U.S. and the inflexibility of the system for those who wish to reside in the U.S. legally.¹³⁰

The original idea and purpose behind employer sanctions was to discourage employers from hiring undocumented workers by outweighing the economic benefit with the risk of substantial monetary and legal penalties.¹³¹ If there were no more jobs for undocumented workers, the economic incentive for illegal immigration would consequently be eliminated.¹³² However, this theory never came to fruition, as the benefits of hiring undocumented workers were never outweighed by the penalties.¹³³

Undocumented workers are generally willing to work longer hours for much less money than their American counterparts.¹³⁴ Also, despite increased requirements for employers to verify legal work documents, many workers obtain false documents that the employers are unable (or unwilling) to detect.¹³⁵ Complicating the problem further is the lack of enforcement of the employer sanctions.¹³⁶ The lack of enforcement may be due to the allocation of resources to border patrol and not to worksite investigations.¹³⁷

While the IRCA imposes employer sanctions, the framers of the IRCA did not intend to strip undocumented immigrants of the protections provided to them by labor and employment laws.¹³⁸ However, the actual statutory text of the IRCA did not

130. WALTER EWING, IMMIGR. POL'Y CTR., THE POLITICS OF CONTRADICTION: IMMIGRATION ENFORCEMENT VS. ECONOMIC INTEGRATION (2008), <http://www.immigrationpolicy.org/images/File/factcheck/ImmigrationEnforcementEconomicIntegration05-08.pdf>.

131. Johnson, *supra* note 126, at 247–48.

132. *Id.* at 248.

133. *Id.* at 253.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 254.

138. See Dennise A. Calderon-Barrera, Hoffman v. NLRB: *Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119, 122 (2003) (referencing reports from the House Judiciary Committee and the Committee on Education and Labor concerning IRCA's amendments to the INA).

make this intention clear.¹³⁹ Indeed, a recent Supreme Court ruling concluded that the IRCA did not allow certain labor law remedies for undocumented immigrants, as they had never had legal authorization to work in the U.S.¹⁴⁰ Since this decision, there have been more challenges to the applicability of other employment laws to undocumented workers.¹⁴¹ These challenges, coupled with both the increasing number of undocumented workers and the dependence of the U.S. economy on these workers, indicate that additional or different legislation is needed.¹⁴² The Court itself said that the deficiencies of the IRCA as it concerns labor and employment rights for undocumented workers should be “addressed by congressional action.”¹⁴³

D. At an Impasse—The Proposed U.S. Immigration Reforms

Since 2005, the House and Senate have been debating various forms of immigration reform bills.¹⁴⁴ In December 2005, the U.S. House of Representatives passed a bill that would have made being present in the U.S. without documentation a

139. *Id.*

140. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); López, *supra* note 70, at 305; Johnson, *supra* note 126, at 258. In *Hoffman Plastics*, an undocumented worker was fired for participating in union organizing activities. *Hoffman Plastic Compounds*, 535 U.S. at 140. The National Labor Relations Board ordered the company to cease and desist, offer reinstatement and backpay to the fired employees, and post notice of the requirements in the workplace. *Id.* at 140–41. However, during his testimony, the undocumented worker revealed his status and the ALJ refused to grant him backpay. *Id.* at 141. The Supreme Court affirmed this decision after it had been reversed by the D.C. Court of Appeals, stating that “allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.” *Id.* at 151–52.

141. López, *supra* note 70, at 314–26 (giving an overview of statutory regimes and case law regarding undocumented workers since *Hoffman Plastics*).

142. Johnson, *supra* note 126, at 242–43; see also Jennifer Adkins & Ali Karaouni, *Rethinking the Gains from Immigration: Theory and Evidence from the U.S.—An Interview with Economics Professor Giovanni Peri of U.C. Davis*, 6 U.C. DAVIS BUS. L.J. 20 (2006) (stating that the immigration boom between 1980 and 2000 had an overall positive effect on the wages of native-born workers).

143. *Hoffman Plastic Compounds*, 535 U.S. at 152.

144. See Richard W. Stevenson, *Bush Renews Push to Overhaul Immigration*, N.Y. TIMES, Nov. 29, 2005, at A18 (describing President Bush’s 2005 push for an overhaul of immigration laws amidst Congressional debate).

felony.¹⁴⁵ The bill also expanded the definition of “aggravated felony” to include: smuggling, illegal entry, and reentry, and defined smuggling as including any act of assistance to an undocumented immigrant where the actor has knowledge or reckless disregard of the immigrant’s legal status.¹⁴⁶ The expedited removal concept, introduced in the 1996 immigration reforms, would have been expanded to undocumented immigrants found within fourteen days of entry and 100 miles of an international land border.¹⁴⁷

H.R. 4437 would have put into full effect the Employment Eligibility Verification System, which previously has only been a pilot program.¹⁴⁸ Under this program, employers would be required to use the computerized verification system within three days of hiring, and the government would respond to the employer, with at least a provisional answer, within three days.¹⁴⁹ The bill also severely limited the amount of litigation allowed for reviewing immigration decisions and allowed for the construction of a 700 mile fence along the U.S.-Mexico border.¹⁵⁰

In May 2006, after lengthy debate, the Senate passed the Comprehensive Immigration Reform Act of 2006.¹⁵¹ Many of the provisions of S. 2611 were the same or similar to those of H.R.

145. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 203 (2005); *see also* Manual D. Vargas, *House of Representatives Passes Bill that Would Severely Impact On Rights of Immigrants Who are Undocumented or Have Criminal Records*, PUB. DEF. BACKUP CTR. REP., Nov.–Dec. 2005, at 7, http://www.nysda.org/05_NovemberDecemberReport.pdf (providing an overview of the bill’s potential impact).

146. H.R. 4437 §§ 201–202.

147. *Id.* § 407(a)(2); *see also* Human Rights First, H.R. 4437—Border Protection, Antiterrorism, and Illegal Immigration Control Act: An Overview of Provisions that Harm Refugees and Asylum Seekers, <http://www.humanrightsfirst.info/pdf/06301-asy-hrf-analysis-hr4437.pdf> (last visited Mar. 29, 2009) (“[S]ection 407 mandates the use of expedited removal against any immigrant . . . who is from any country other than Canada, Mexico[,] or Cuba, and who is encountered within 100 miles of a U.S. land border and within two weeks of the person’s entry in to the U.S.”).

148. Ediberto Román, *Alien Invasion?*, 45 HOUS. L. REV. 841, 883 n.281 (2008) (reviewing the bill’s major points).

149. H.R. 4437, §§ 701–702.

150. *Id.* §§ 101, 802.

151. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

4437.¹⁵² In addition, the Senate's bill would have required immigrants to have their biometric data collected upon entering and leaving the country, and would have prohibited any immigrant refusing to do so from gaining access into the country unless the DHS Secretary waived the biometric data requirement.¹⁵³ The Senate bill would also have reduced the size of the proposed border fence to 370 miles.¹⁵⁴ The bill increased the enforcement and amount of sanctions and penalties for those employing undocumented workers.¹⁵⁵ However, the Senate bill allowed employers to bring foreign workers into the country for six years, after which the workers would be required to return to their home country for one year and would have increased the number of available H-1B visas for skilled foreign workers.¹⁵⁶

Finally, S. 2611 intended to give illegal immigrants who had lived and worked continuously in the United States since January 7, 2004 a chance to apply for citizenship after paying fines and taxes.¹⁵⁷

However, the House and the Senate failed to come to a compromise on this bill and the measure was not passed into law.¹⁵⁸ Instead, Congress passed the Secure Fence Act in October 2006, which authorized, among other things, the construction of a 700 mile fence along the U.S.-Mexico border.¹⁵⁹

In 2007, the House and Senate again tried to compromise on immigration reform.¹⁶⁰ S. 1639 would have allowed undocumented immigrants to come forward immediately and receive probationary legal status under a four-year,

152. Cf. Román, *supra* note 148, at 882 (noting that the "primary distinguishing factor between H.R. 4437 and S. 2611 is a citizenship path proposed in S. 2611").

153. H.R. 4437, § 128.

154. S. 2611, § 106.

155. *Id.* § 301.

156. *Id.* § 403, sec. 218A(f)(5), § 508.

157. *Id.* tit. VI.

158. See Robert McMahon, *The 110th Congress and Immigration Reform*, COUNCIL ON FOREIGN REL., Feb. 13, 2007, http://www.cfr.org/publication/12628/110th_congress_and_immigration_reform.html.

159. Secure Fence Act of 2006, H.R. 6061, 109th Cong. (2006); see Jonathan Weisman, *With Senate Vote, Congress Passes Border Fence Bill: Barrier Trumps Immigration Overhaul*, WASH. POST, Sept. 30, 2006, at A1.

160. See Kennedy-Specter Immigration Reform Bill, S. 1639, 110th Cong. (2007).

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renewable Z visa for those present within the United States unlawfully before January 1, 2007.¹⁶¹ The immigrants would be required to be employed and to pay an initial processing fee of no more than \$1,500 per applicant, along with a penalty fee of \$1,000, a \$500 State Impact Assistance Fee, and a \$500 penalty per derivative.¹⁶² Under the bill, after an immigrant received the Z visa they could apply for permanent residency, but the head of household would be required to return to their home country.¹⁶³ The bill allowed undocumented farm workers to apply for green cards if they could demonstrate they had worked at least three years in agriculture for at least 150 days per year.¹⁶⁴

The law would have also strengthened workplace enforcement by requiring employers to use an electronic database to verify the identity of new employees and their work eligibility, and by increasing penalties for unlawful hiring, employment, and record-keeping violations.¹⁶⁵ Once the undocumented immigrants already in the country were regularized and certain border security restrictions and plans were implemented, the law called for a new, temporary guest worker program.¹⁶⁶ The law would also have changed the current quota-based system for visas and permanent residency into a “merit-based evaluation system” centered around a point system.¹⁶⁷ However, as with the previous attempts, this bill failed and was not entered into law.¹⁶⁸

161. *Id.* § 601.

162. *Id.*

163. *Id.* § 602; *Immigration Breakthrough Could Pave Way for Citizenship*, CNN, May 18, 2007, <http://www.cnn.com/2007/POLITICS/05/17/senate.immigration/index.html>.

164. S. 1639, § 622, sec. 214A(j)(1)(A)(i)(II).

165. *Id.* § 301.

166. *Id.* tit. IV.

167. *Id.* § 502.

168. Pear & Hulse, *supra* note 50, at A1.

III. GETTING TO YES—ARGENTINE IDEAS AND U.S. POLICY

A. *Why the Immigration Reform Bills Did Not Pass*

Congress has failed to reach a compromise on immigration reform, despite the urgency created by the perceived rise in and problems with undocumented immigration in the U.S.¹⁶⁹ The United States remains deeply divided on the issue of undocumented immigrants, and the most recent immigration reform bills failed in direct response to the specific proposals for rectifying the undocumented immigrant problem.¹⁷⁰ While many of the political and business leaders, as well as the liberal elite, advocate for the regularization of these immigrants, many average American citizens see the provisions in the bill relating to undocumented immigrants as another amnesty.¹⁷¹ They feel strongly that these immigrants are taking American jobs and abusing the American system while flouting American laws, and that those unlawful actions should not go unpunished.¹⁷²

1. *Do Immigrants Take Jobs and Lower Wages?*

One of the popular arguments in favor of harsher treatment of undocumented immigrants is that they take jobs away from and lower the wages of the native-born American population.¹⁷³ Well-known Harvard Professor of Economics and Social Policy,

169. See Monica Davey, *Immigration, and Its Politics, Shake Rural Iowa*, N.Y. TIMES, Dec. 13, 2007, at A1 (discussing the movement of immigrants into middle America and how it has affected views on immigration and created the sense of urgency for immigration reform). Although many people seem to perceive that illegal immigration has increased dramatically, in actuality, the difference is that immigrants are moving into more areas of the country, rather than being concentrated in cities or certain states. The Borjas Blog, <http://borjas.typepad.com/> (Dec. 13, 2007, 08:19 AM); see Davey, *supra* note 169 (noting the spread of Mexican immigrants to rural communities in Iowa).

170. See Pear & Hulse, *supra* note 50 (“The vote reflected the degree to which Congress and the nation are polarized over immigration.”).

171. See *id.*

172. See *id.*; Adkins & Karaouni, *supra* note 142; Davey, *supra* note 169.

173. See generally George J. Borjas, *The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q. J. ECON. 1335 (2003) (analyzing the effect of immigration on wages in a competitive labor market).

George J. Borjas, estimated that from 1980 to 2000, immigration decreased the wages of the average U.S.-born laborer by 3.2%.¹⁷⁴ Borjas also contends that undocumented immigrants do not contribute enormously to the U.S. economy.¹⁷⁵ However, there are other economists who disagree with this analysis, theorizing that immigrants (even undocumented ones) are good for the U.S. economy.¹⁷⁶

The U.S. population is approximately 305 million people,¹⁷⁷ which includes approximately 37 million foreign-born people,¹⁷⁸ of which an estimated 11.1 to 12 million are undocumented immigrants.¹⁷⁹ Thus, undocumented immigrants account for anywhere from 3.6–3.9% of the U.S. population.¹⁸⁰ However, of the total U.S. work force of 146 million people, 4.9% of the work force is undocumented, or 7.2 million people.¹⁸¹ This indicates that undocumented workers are more likely to be employed than native workers.¹⁸²

While the general population of foreign-born workers in the U.S. population has a higher tendency to work in “management, professional, and related occupations,”¹⁸³ undocumented

174. *Id.* at 1368. Professor Borjas does not seem to have differentiated between legal and illegal immigrants in arriving at this number. *See id.* (indicating that he based his calculations on the “overall” immigration influx).

175. The Borjas Blog, *supra* note 169 (Sept. 6, 2007, 11:02 A.M.).

176. *E.g.*, Adkins & Karaoui, *supra* note 142.

177. U.S. Census Bureau, U.S. and World Population Clocks, U.S. Census Bureau, <http://www.census.gov/main/www/popclock.html> (last visited Mar. 29, 2009).

178. Characteristics, *supra* note 43.

179. JEFFREY S. PASSEL, PEW HISPANIC. CTR, SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1–2 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>. The Migration Policy Institute estimated that there were 11.6 million undocumented immigrants in the United States in 2006. Migration Information Source, Frequently Requested Statistics on Immigrants in the United States, <http://www.migrationinformation.org/USFocus/display.cfm?ID=649> (last visited Mar. 29, 2009).

180. *See also* Population Estimates of Undocumented Immigrants in the U.S., <http://immigration.procon.org/viewresource.asp?resourceID=000844> (last visited Mar. 29, 2009).

181. PASSEL, *supra* note 179, at 9.

182. *See id.* (comparing the employment rates of male immigrants and natives).

183. Migration Information Source, *supra* note 179.

workers tend to work in areas that require little education and have no licensing requirements.¹⁸⁴ Indeed, unauthorized workers account for 24% of all workers employed in farming occupations, 17% of those working in cleaning occupations, and 14% and 12% of the working population in construction and food preparation, respectively.¹⁸⁵ These numbers are well above their percentage presence in the overall labor force.¹⁸⁶

The reality in the United States is that the majority of our native-born population has a high school diploma and the majority of those who graduate from high school go on to college.¹⁸⁷ As the U.S. economy has turned from a production and industry-based economy to more of a service-based economy, Americans have also become more educated and less interested in filling the more basic occupations.¹⁸⁸ This has left openings

184. PASSEL, *supra* note 179, at 10–11; accord Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 233, 241 (2007).

185. PASSEL, *supra* note 179, at ii.

186. *Id.*

187. See Jacoby, *supra* note 49, at 52. Government statistics indicate that as of March 2006, 85.5% of people in the U.S. graduated high school and 28% have a bachelor's degree or higher, as compared to 1980, when 68.6% graduated high school and 17% had a bachelor's degree or higher. THOMAS D. SNYDER ET AL., U.S. DEPT OF EDUC., DIGEST OF EDUCATION STATISTICS 2006 22 (2007); see also U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, COLLEGE ENROLLMENT AND WORK ACTIVITY OF 2007 HIGH SCHOOL GRADUATES' (2008), available at <http://www.bls.gov/news.release/pdf/hsgec.pdf> (reporting that "67.2% of high school graduates from the class of 2007 were enrolled in colleges or universities").

188. See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 11–12 (2006); Jacoby, *supra* note 49, at 52; Jeneanne Rae, *IT's Star Turn*, BUS. WK., July 18, 2007, http://www.businessweek.com/innovate/content/jul2007/id20070718_340679.htm?chan=innovation_innovation+%2B+design_top+stories (describing the shift in the U.S. economy from industry-based to service-based). This problem is further complicated by the impending retirement of the workers in the baby boom generation. Johnson, *supra* note 126, at 257.

for undocumented immigrants to fill.¹⁸⁹ However, that does not mean that there are not native-born workers without a high school diploma that need to fill the basic jobs as well.¹⁹⁰

Many undocumented immigrants compete with the least educated workers in American society for jobs.¹⁹¹ Nevertheless, it is possible that undocumented immigrants do not compete directly for jobs with native-born workers.¹⁹² U.S. workers with the lowest educational levels tend to work in manufacturing jobs, whereas undocumented immigrants tend to work in agriculture or the service industry.¹⁹³

Geographic location is another factor to consider.¹⁹⁴ Through informal immigrant networks, workers looking to come to the United States often receive information concerning what areas of the country have shortages of labor in certain industries.¹⁹⁵ The immigrants then head to those areas when they arrive in the U.S., thereby avoiding direct competition with native-born workers who are in the same industry but different geographic location.¹⁹⁶

Evidence exists demonstrating that, in the industries in which undocumented workers participate and are directly competing with native-born workers, wages are driven down.¹⁹⁷

189. Lipman, *supra* note 188, at 11–12; *see also* Johnson, *supra* note 126, at 257 (stating that without undocumented immigrants, many industries would be experiencing shortages of labor). Many undocumented immigrants do not have a high school education and lack proficiency in English. Lipman, *supra* note 188, at 16.

190. *Cf. Jacoby, supra* note 49, at 57 (noting that immigrants compete with native-born high school dropouts).

191. *Id.*

192. *See id.* at 57–58 (“[I]mmigrants often create jobs where none existed before”); Adkins & Karaouni, *supra* note 142 (“[E]ven within the same education group, U.S. born workers tend to be employed in different occupations than their foreign-born counterparts.”).

193. Adkins & Karaouni, *supra* note 142.

194. Shoba Sivaprasad Wadhia, *Immigration: Mind over Matter*, 5 MD. L.J. RACE, RELIGION, GENDER, & CLASS 201, 204 (2005).

195. *See Jacoby, supra* note 49, at 53.

196. *See id.* Immigrants, having already made the decision to leave their home country, are more likely to relocate for work than native workers. Adam Roberts, *Open Up: A Special Report on Migration*, ECONOMIST, Jan. 5, 2008, at 3, 6.

197. *See* Adkins & Karaouni, *supra* note 142. However, this makes an interesting argument for amnesty because if undocumented workers were legalized, employers

Even so, lower wages in manufacturing and agriculture provide businesses with lower overhead and lower general costs.¹⁹⁸ These savings are passed down to the consumer, with products placed in the market at a lower rate.¹⁹⁹ Cheaper products mean that the population as a whole can either buy or save more with their salaries, which helps spur the economy.²⁰⁰

2. *Draining the Economy and Social Services?*

It is a popularly held belief that undocumented immigrants are costing the U.S. billions of dollars in social services and benefits use.²⁰¹ However, in reality very few immigrants, even legal ones, have access to government services.²⁰² Currently, undocumented immigrants are not allowed to access Social Security, Medicare, Medicaid, food stamps, temporary assistance for needy families, HUD Programs, or unemployment insurance, among other benefits.²⁰³ The services that undocumented

would no longer be able to pay them wages below the minimum wage, and would probably be prevented from paying below the market wage.

198. See Johnson, *supra* note 126, at 257 (explaining that immigrant labor allows employers to devote more money to capital investment); Adkins & Karaoui, *supra* note 142 (arguing that investment attracts investment).

199. Michael Van Hoof, *Will the New European Union Competition Regulation Increase Private Litigation? An International Comparison*, 19 CONN. J. INT'L. L. 659, 666 (2004) (stating that overhead cost savings result in lower consumer prices).

200. See generally Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Gains from Immigration: Theory and Evidence from the U.S.* (Nat'l Bureau of Econ. Research, Working Paper No. 11672, 2005) (discussing the role immigration has on wages and the economy).

201. Lipman, *supra* note 188, at 1–2; see *Illegal Immigration Counters*, <http://immigrationcounters.com> (last visited Mar. 29, 2009) (listing supposed costs of

immigrants to the United States, including \$397 billion that have been spent on social services for illegal immigrants since 1996).

202. See NAT'L IMMIGRATION LAW CTR., TABLE 1: OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS tbl.1 (2005), available at http://www.nilc.org/pubs/guideupdates/tbl1_ovrvw_fed_pgms_032505.pdf [hereinafter Table 1] (detailing the prerequisites for immigrant eligibility for federal programs); Lipman, *supra* note 188, at 5–6; see also *supra* note 38 and accompanying text (discussing the Welfare Act's removal of access to public services for many immigrants).

203. 8 U.S.C. § 1611 (2006); Lipman, *supra* note 188, at 5–6; Table 1, *supra* note 202. There are usually exceptions made for victims of trafficking. Table 1, *supra* note 202.

immigrants legally have access to are emergency health care and public education for children.²⁰⁴ The highest toll on government services from undocumented workers seems to come from the use of the public education system.²⁰⁵

Nevertheless, despite their limited access to government benefits, undocumented immigrants pay into the system every day.²⁰⁶ The costs associated with undocumented immigrants using public services can be offset by their contributions to social security and taxes.²⁰⁷ In order to obtain employment in the United States, many undocumented workers use false documents including false social security numbers.²⁰⁸

The employer uses this number when configuring the payroll, so the immigrant has social security payments deducted from his wages and ends up paying into an account that will never be used.²⁰⁹ It has actually been hypothesized that contributions from undocumented immigrants is keeping the Social Security system from going bankrupt.²¹⁰

204. *Plyler v. Doe*, 457 U.S. 202, 203 (1982) (holding that children with illegal immigration status could not be denied public education); Lipman, *supra* note 188, at 6; Table 1, *supra* note 202. It should be noted that undocumented immigrants often do not even use what services they are able to access, for fear of their illegal status being discovered. Lipman, *supra* note 188, at 6. There is also compelling evidence that many undocumented immigrants are also prevented from getting emergency medical care. See Marcela X. Berdion, *The Right to Health Care in the United States: Local Answers to Global Responsibilities*, 60 SMU L. REV. 1633, 1647 (2007) (noting that while documented immigrants' access to emergency healthcare has increased, there is still no universal guarantee to emergency medical treatment in the U.S.).

205. Jaelyn Brickman, *Educating Undocumented Children in the United States: Codification of Plyler v. Doe Through Federal Legislation*, 20 GEO. IMMIGR. L.J. 385, 389 (2006) (discussing the fact that evidence of the increased cost of educating undocumented immigrants for states could cause the Supreme Court to overturn *Plyler v. Doe*).

206. Lipman, *supra* note 188, at 3–4.

207. Johnson, *supra* note 126, at 255–56; Lipman, *supra* note 188, at 3–4.

208. Lipman, *supra* note 188, at 21.

209. Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595, 599–601 (2007).

210. Johnson, *supra* note 126, at 256 (“Given recent concerns for the viability of Social Security with the retirement of the baby boom generation, the ability of the undocumented immigrant community to keep the system solvent has become critical to the program’s future sustainability.”). Sales taxes and property taxes are how the majority of states support their schools and other social benefit programs. Jacoby, *supra*

Additionally, many Americans are under the impression that undocumented immigrants do not pay taxes.²¹¹ However, if undocumented workers use social security numbers in the manner described above, employers will also deduct all of the employment taxes they would take out for any other employee.²¹² As with any other consumer in the United States, undocumented immigrants pay sales tax on most purchases they make.²¹³ They also pay property taxes, either through buying a house or when renting a dwelling, as most property owners pass on the cost of property taxes to their lessees through rent.²¹⁴

Another argument can be made that undocumented immigrants do not pay income tax, to either the federal or state governments.²¹⁵ While this is apparently not always true,²¹⁶ it is more than likely that many of the undocumented workers make such low wages that they would be below the minimum salary level for federal income tax regardless.²¹⁷

3. *The Illegality Problem*

The most difficult issue to resolve in the immigration debate is whether those immigrants who are here without the proper documentation have done something that is expressly prohibited by the laws of the United States.²¹⁸ It is unbelievable to say that

note 49, at 54.

211. Blum, *supra* note 209, at 603.

212. *Id.* at 600–01. These taxes include Social Security, Medicare, and unemployment taxes. Lipman, *supra* note 188, at 5.

213. See Matthew C. Wilson, *The Economic Causes and Consequences of Mexican Immigration to the United States*, 84 *DENV. U. L. REV.* 1099, 1117 (2007).

214. *Id.*

215. See K.B. Mosley, Letter to the Editor, *Illegal Immigrants, Duty and Law*, *N.Y. TIMES*, Mar. 27, 2006, at A18.

216. See Lipman, *supra* note 188, at 5 (“Hundreds of thousands of undocumented immigrants go out of their way to file annual federal and state income tax returns.”); Blum, *supra* note 209, at 602–04 (discussing the fact that many undocumented immigrants file 1040 forms with the IRS using an individual taxpayer identification number, often hoping it will help helping them regularize their immigration status).

217. Blum, *supra* note 209, at 601–02.

218. See 8 U.S.C. § 1101(a)(13)(A) (2006); Hiroshi Motomura, *Immigration Outside the Law*, 108 *COLUM. L. REV.* 2037, 2054 (2008) (“[M]uch of today’s immigration debate reflects a conflict between these two views of unlawful presence: The unlawfully present are either ‘illegal’ or ‘undocumented.’”).

those who knowingly arranged to cross the border without inspection, procured false documents to get through inspection, or overstayed their visa after having gone through the proper legal process in the first place did not know that what they were doing was illegal. According to most statistical sources, about 40% of undocumented immigrants simply overstayed the permitted time on their visa, while about 60% crossed the border without proper inspection, either by procuring the services of a people smuggler or buying false documents.²¹⁹

The illegality of the undocumented immigrants' actions has created one of the biggest sticking points for immigration reform.²²⁰ Many people feel that a person who has knowingly performed an illegal act in order to stay in the United States and take advantage of the country's prosperity should be punished.²²¹ However, an argument can be made that the outdated and inefficient immigration laws that are currently in place have exacerbated the problem.²²² The number of visas available for low-skilled workers is unrealistically low, given the large demand for these workers that is unfilled by their native-born counterparts.²²³ The number of work opportunities available at wages that, although low for U.S. standards, are much higher than they could earn in their country of origin gives an incentive to undocumented workers to flout the immigration laws.²²⁴ Thus, this illegality issue is actually one of the strongest reasons we need immigration reform.

219. New Mexico State University, New Immigration Studies Released, http://www.nmsu.edu/~frontera/old_1997/mar97/397ins.htm (last visited Mar. 29, 2009).

220. See Downes, *supra* note 46.

221. See Merav Lichtenstein, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 689, 717 (2007).

222. See Jacoby, *supra* note 49, at 59 (arguing that "unrealistic" laws cannot be enforced, which leads to significant numbers of immigrants overstaying their visas).

223. Johnson, *supra* note 126, at 256–57.

224. Jacoby, *supra* note 49, at 52–53; Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, The Treaty Gave to Me . . . What, Exactly?: An Assessment of Economic, Social, and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 119 (2007).

B. Could the Argentine Plan work in the U.S.?

There are already an estimated 11 to 12 million immigrants in the United States illegally.²²⁵ As a practical matter, it would be physically and administratively impossible to find and deport all of these people.²²⁶ Perhaps a better solution would be to document everyone so that we know who they are, that they are paying taxes, and are not being exploited by unscrupulous employers and thereby driving down the wages in the unskilled job market. This plan appears to have worked in the case of Argentina,²²⁷ but there is some question as to whether the Argentina plan could work in the United States.

Argentina's new migration policy, both the National Migration Act and the *Patria Grande*, are based upon a fundamental policy of human rights.²²⁸ The United States, on the other hand, has been accused of having a somewhat ambivalent policy towards human rights, at least as concerns various international protocols.²²⁹ The reasoning that

225. See Migration Information Source, *supra* note 179.

226. Hing, *supra* note 183, at 144–45.

227. See Ministerio del Interior, Programa Nacional de Normalización Migratoria, <http://www.patriagrande.gov.ar/html/home.htm> (last visited Mar. 29, 2009) (announcing nationwide implementation of *Patria Grande* and providing information and guidelines for aliens residing in Argentina to obtain documentation).

228. See *supra* Part II.A.

229. Natasha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607, 607–08 (2003). Some examples of human rights treaties not ratified by the U.S. are the International Covenant on Economic, Social, and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. HUMAN RIGHTS WATCH, SELECTED INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES 304–05 (2006) [hereinafter H.R. Watch Treaties]. The United States has “disengaged” from institutions, such as the United Nations Human Rights Council (which replaced the United Nations Commission on Human Rights) and the International Criminal Court, that promote human rights. Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 CORNELL INT'L L.J. 635, 655–57 (2007). The U.S. considers that its own human rights measures are sufficient, and that international laws are often unnecessary. See Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT'L L. 169, 205–06 (2007) (discussing the United States' view of itself as a “moral beacon” and its limited ratification or disobedience of international human rights treaties and rulings).

undocumented workers should be granted legal status for human rights reasons is unlikely to gain much credence in the U.S., especially given the tendency of the U.S. courts to disregard international laws.²³⁰ In the wake of *Hoffman Plastics*,²³¹ the Inter-American Court of Human Rights,²³² at Mexico's request, released an advisory opinion determining that under international law, undocumented workers are entitled to the same labor and employment rights as other workers.²³³ However, the United States, despite being a member of the Organization of American States, is not subject to the jurisdiction of the Inter-American Court of Human Rights, as it has not ratified the American Convention on Human Rights.²³⁴ So far, the advisory opinion has had little impact on U.S. policy.²³⁵

An argument could also be made that Argentina was able to implement the *Patria Grande* because they are in a different economic situation than the United States vis-à-vis their neighboring countries.²³⁶ The U.S. GDP is \$13.2 trillion,²³⁷ while the economies of their nearest neighbors, Canada and

230. See Lyon, *supra* note 229, at 205–06.

231. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

232. The Inter-American Court of Human Rights is a judicial body of the Organization of American States (OAS) that is established by the American Convention on Human Rights. Inter-American Court of Human Rights, History, <http://www.corteidh.or.cr/historia.cfm> (last visited Mar. 29, 2009).

233. Inter-Am. Ct. of H.R., Judicial Condition and Rights of the Undocumented Migrants, Advisory Opinion, OC-18/03 (Sept. 2003); Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & S. CHANGE 547, 586 (2004).

234. Sarah H. Cleveland, *Legal Status and Rights of Undocumented Workers: Advisory Opinion OC-18/03*, 99 AM. J. INT'L L. 460, 464 (2005); H.R. Watch Treaties, *supra* note 229, at 308.

235. See Cleveland, *supra* note 234, at 464 (noting that the practical policy implications of the decision on the United States are unclear).

236. See *infra* notes 237–42 (describing the different GDPs between the U.S. and its neighboring countries and comparing them to Argentina and its neighboring countries).

237. The World Development Indicators Database, United States Data Profile, <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20535285~menuPK:1192694~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited Mar. 29, 2009).

Mexico, yield a GDP of \$1.3 trillion²³⁸ and \$839.2 billion respectively.²³⁹ Argentina's GDP is \$214.1 billion,²⁴⁰ which is significantly smaller than the \$1.1 trillion GDP economy of Brazil,²⁴¹ but greater than Bolivia, whose GDP is \$11.2 billion.²⁴² As there is an agreement of freedom of movement between MERCOSUR countries,²⁴³ it is possible that Argentina could implement a liberal policy regarding regularization because the majority of immigrants would go to the more economically prosperous country, Brazil, especially given Argentina's recent economic problems.²⁴⁴ However, the data on immigration to these countries refutes this theory.²⁴⁵ In Argentina, immigrants make up 3.6% of the population, whereas immigrants are only 0.3% of the Brazilian population, indicating that Argentina receives many more immigrants than Brazil does.²⁴⁶

238. World Development Indicators Database, Canada Data Profile, <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20535285~menuPK:1192694~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited Mar. 29, 2009).

239. World Development Indicators Database, Mexico Data Profile, <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20535285~menuPK:1192694~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited Mar. 29, 2009).

240. World Development Indicators Database, Argentina Data Profile, <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20535285~menuPK:1192694~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited Mar. 29, 2009).

241. World Development Indicators Database, Brazil Data Profile, <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20535285~menuPK:1192694~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited Mar. 29, 2009).

242. World Development Indicators Database, Bolivia Data Profile, <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20535285~menuPK:1192694~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html> (last visited Mar. 29, 2009).

243. *See supra* Part II.A.

244. *See* U.N. Secretariat, *supra* note 103, at 7.

245. *See* United Nations, DEP'T OF ECON. AND SOC. AFF., INTERNATIONAL MIGRATION 2006 (2006), available at http://www.un.org/esa/population/publications/2006Migration_Chart/Migration2006.pdf.

246. *Cf. id.*

However, the number of immigrants as a percentage of the population is quite small when compared to the United States, which has an immigrant population accounting for 12.9% of its population.²⁴⁷ This indicates that the sheer number of immigrants in the United States could be a problem if a plan similar to Argentina's was adopted, as the volume of people to document is enormous.²⁴⁸ However, this is the same reasoning behind the argument that general deportation would not work,²⁴⁹ and thus one must choose the lesser of two evils.

The *Patria Grande* is centered heavily around Argentina's very active participation in MERCOSUR.²⁵⁰ The North American Free Trade Agreement (NAFTA) is a free trade agreement in which the U.S., Canada, and Mexico participate.²⁵¹ The NAFTA charter currently includes a provision for immigration, but it only covers business people who wish to engage in business activity, trade, investment, or inter-company transfers.²⁵² Nevertheless, it is speculated that NAFTA has been one of the greatest reasons for illegal immigration from Mexico.²⁵³ It has been estimated that as of January 2006, 57% of the undocumented immigrants in the United States were from Mexico.²⁵⁴ It appears that the situation parallels the Argentine experience with undocumented immigration from surrounding countries.²⁵⁵ Legalizing undocumented immigrants who originate from Mexico under the guise of NAFTA would allow for more than half of the undocumented population to become regularized, leaving a smaller and more manageable number of

247. *Cf. id.*

248. *See* Hing, *supra* note 183, at 240–41 (noting, for example, that the U.S. undocumented immigrant population increases by 300,000 to 500,000 per year).

249. *See supra* Part III.B.

250. *See supra* Part II.B.

251. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057.

252. *Id.* annex 1603.

253. *See* Oliver, *supra* note 224, at 118–19 (“To the degree that the implementation of NAFTA, in particular its free trade and foreign investment provisions, has caused dislocations in important sectors of the Mexican economy, NAFTA has been an important contributor to Mexican immigration.”).

254. Migration Information Source, *supra* note 179.

255. *See supra* Part I.B.1.

people who could possibly be deported or legalized, with greater restrictions.²⁵⁶ A plan like Argentina's would also help foster greater involvement of the U.S. in its current free trade agreements, and encourage it to form other agreements, such as the proposed North American Community and the Free Trade Area of the Americas.

Perhaps the biggest hurdle for implementing an immigration policy similar to the *Patria Grande* in the U.S. is the possibility that the plan would be seen as an amnesty, which has been one of the major obstacles of the previous immigration proposals in Congress.²⁵⁷ Despite Argentina's protests, the *Patria Grande* in many ways evokes the idea of an amnesty, such as the one included in the IRCA in 1986.²⁵⁸ However, the significant difference between the *Patria Grande* and the IRCA amnesty is that the *Patria Grande* "seeks to be state policy and will henceforth be in force for MERCOSUR nationals now in Argentine territory and those to enter in the future."²⁵⁹

IV. CONCLUSION

The problems of undocumented immigrants in the U.S. and inadequate immigration policies are not going away; they are just compounding. A compromise must be reached in the Senate. The Argentine plan is probably too liberal for the United States; however, the general concepts and ideas are sound. With modifications, the plan could be adopted in the United States. However, the biggest obstacle will be the attitude of the general citizenry in the U.S., and their already-present mistaken perceptions and unfounded fears of the undocumented population.

256. This is not ideal and also ignores the fact that Argentina legalized undocumented immigrants from non-MERCOSUR countries, but required more documentation from them upfront. *See supra* Part II.B.

257. Downes, *supra* note 46.

258. *Compare* Argentina OAS Report, *supra* note 86, at 4 (stating that the *Patria Grande* does not confer amnesty), *with* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

259. Argentina OAS Report, *supra* note 86, at 4.

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It is also imperative that whatever legislation is passed does not just amount to an amnesty. The legislation needs to also reform the current laws for legal immigrants so that they are more realistic. The number of visas currently available for temporary workers is too low and is disproportionate to the type of workers the U.S. economy requires. The dominance of “family reunification” in the immigration policy should also be reconsidered, as it gives family relationships priority over the need for workers. If the immigration laws are reformed so that more people can come to work legally in the U.S. in industries in which they are desperately needed, the necessity of undocumented workers will slowly disappear.