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**Shed-DNA, Body Boundaries and Identity Rights
for Argentina's "Living Disappeared"**

a final paper by
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I. Abstract

Shed-DNA, Body Boundaries and Identity Rights for Argentina's "Living Disappeared"

During Argentina's "Dirty War," approximately 500 infants and children were abducted by the regime and given to military families or their associates. In various court cases regarding DNA testing of the "living disappeared," justices have considered them within the context of "crimes against humanity," and as such, Argentina has an international obligation to pursue them. However some suspected children of the disappeared - now adults - have not wanted to have their DNA tested, creating a tension between the individual's rights of identity and privacy, the families' rights to justice, and the public interest for truth. When recent genetic technologies rendered a compulsory extracting of blood unnecessary, the state began collecting and testing shed-DNA to determine the identity of potential victims. Shed, or abandoned DNA, consists of DNA collected from an environment where the individual had been. By affirming the use of shed-DNA for genetic testing, the Argentine court seemingly has identified the harm of compulsory extraction to be the means (the penetration of the body barrier) rather than the ends (namely, forcing someone to confront a biologic identity.) And yet, subsequent shed-DNA cases have shown that in attempting to prevent the seizure of their biological material, what victims hope to protect is a sense of identity drawn from social relations. This calls to mind the questions of "stable identity" and the sex/gender debate that has evolved through feminist theory. Should an identity created through the unlawful action of the state and embraced/perpetuated by an innocent individual be considered a legitimate identity as recognized under human rights protections? By applying a feminist lens - specifically Toril Moi's understanding of the "body as a situation" - to these cases I will argue the hypothesis that *a state forcing an individual to confront unwanted knowledge of an identity can be seen as part of the feminist ideology of "becoming."* As such, the use of shed-DNA – genetic material – does not necessarily translate into a biologically-essentializing assertion of identity. By addressing the foundational assumptions regarding identity in these cases in this way, I aim to recalibrate the perceived tension of competing rights' in these cases, and provide a theoretical justification for state intervention.

II. INTRODUCTION

During Argentina's "Dirty War," approximately 500 infants and children were abducted by the regime and given to military families or their associates. Due in large part to the efforts of their biological grandmothers, Argentina established a National Bank of Genetic Data to help families looking to find these children (often referred to as the "living disappeared") in 1987. Five years later, a National Commission for the Right to Identity was created to investigate possible cases; to date, just over 100 have been identified.

In various court cases regarding DNA testing of the "living disappeared," justices have recognized the state's interest in investigating and resolving these cases: specifically that they occurred within the context of "crimes against humanity" (as recognized in Articles 32 and 33 of the Additional Protocol I to the Geneva Conventions) and as such, Argentina has an international obligation to pursue them. (Relevant court cases include those of Evelyn Vazquez, Claudia Poblete, and Guillermo Gabriel Prieto among others.) However some suspected children of the disappeared - now adults - have not wanted to have their DNA tested, creating a tension between the individual's rights of identity and privacy, the families' rights to justice, and the public interest for truth.

While cases of the children of the missing were a rare exception to the original amnesty laws barring military prosecutions in Argentina, the grandmothers have publicly stated their intent to determine a truth – biological identity – rather than to exact vengeance. Their message underscores the philosophical question at the heart of cases where adult children refuse testing in relation to identity and privacy.

When recent genetic technologies rendered a compulsory extracting of blood unnecessary, the state began collecting and testing shed-DNA to determine the identity of potential victims. Shed, or abandoned DNA, consists of DNA collected from an environment where the individual has been. While shed-DNA has been used in many cases to identify a perpetrator, in these cases, it is being used to identify a potential victim. In a few instances, this has also been done despite the individual's refusal to participate. But in the discourse regarding shed-DNA and human rights, the Senate and the Supreme Court appear to be in agreement. In 2009 the Supreme Court upheld the collecting and testing of shed-DNA against the victim's will, stating that it did not interfere with the individual's right to privacy, intimacy, or most importantly, identity. And, only a few years after siding with Evelyn Vazquez in her refusal to comply with a blood draw for DNA testing, the Supreme Court then reversed the decision when Ms. Vazquez's true biological identity was discovered through the testing of shed-DNA. (Vaisman 398)

When discussing human rights as they apply in these cases, there are inherent paradoxes. First, these cases appear to feature a human rights group (the grandmothers) "arguing for coercive intervention of state power while defenders of the military dictatorship [argue] for a right to privacy and a right to physical and psychological integrity." Secondly, it must be recognized that the conflict emanates from an individual's repudiation of his or her own right, the right to "know thyself." (Gandsman, 2008, 172)

By affirming the use of shed-DNA for genetic testing, the Argentine court seemingly has identified the harm of compulsory extraction to be the means (the penetration of the body barrier) rather than the ends (namely, forcing someone to confront a biologic identity.) And yet, subsequent shed-DNA cases have shown that in attempting to prevent the seizure of their

biological material, what victims hope to protect is a sense of identity drawn from social relations. This calls to mind the questions of “stable identity” and the sex/gender debate that has evolved through feminist theory, and it is through this lens that I intend to examine conceptualizations of identity in these cases.

The purpose of my intended research is to address the question that continues to drive the debate in each of these cases: Should an identity created through the unlawful action of the state and embraced/perpetuated by an innocent individual be considered a legitimate identity as recognized under human rights protections?

I will attempt to answer this question by addressing the questions of identity that the Argentine courts have consistently averted through their focus on the *manner* of DNA extraction, rather than the perceived impact on conceptualizations of self. By applying a feminist lens - specifically Toril Moi’s understanding of the “body as a situation” - to these cases I will argue the hypothesis that *a state forcing an individual to confront unwanted knowledge of an identity can be seen as part of the feminist ideology of “becoming.”* As such, the use of shed-DNA – genetic material – does not necessarily translate into a biologically-essentializing assertion of identity. By addressing the foundational assumptions regarding identity in these cases in this way, I aim to re-calibrate the perceived tension of competing rights’ in these cases, and provide a theoretical justification for state intervention.

Few scholars have attempted to discuss the foundational assumptions regarding identity within this context, with one exception being Noa Vaisman. In an analysis of the dissenting judges opinion regarding the permissibility of shed-DNA testing, Dr. Vaisman appropriates feminist theories to legitimize the victim’s claim and in the process, to further her argument for a re-imagination of human rights as based on the “relational self.”

While I agree with Dr. Vaisman’s application of feminist theory to explore conceptions of identity, I diverge when she extends the ideology to assert that, in allowing the shed-DNA testing, justices in effect disregarded the idea of self as a product of a relational past. Instead I would extend the analytic lens to *include* the relationship to the gleaned biological information, and thus more fully realize the theory of “subject as becoming.” In this way, both the “relational” and “biological” reality can coexist within this “porous” conceptualization of identity.

III. Understanding privacy and identity as protected rights in Human Rights discourse

While the term “privacy” has been specifically mentioned in international human rights doctrine, including the 1948 Universal Declaration of Human Rights and the 1976 International Covenant on Civil and Political Rights, the concept of “identity” as a protected human right did not appear in international doctrine until 1989, as a direct result of the efforts of the Abuelas. To analyze the merits of the claims presented by the now-adult children in pertinent court cases, it is worth considering each term separately within human rights doctrine.

The concept of privacy as a protected human right finds its origins in the 1948 Universal Declaration of Human Rights in Article 12 which stipulates “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor or reputation. Everyone has a right to the protection of the law against such interference or attacks.” The protection, and corresponding language, were influenced by the actions of the Nazi party who’d used personal records to target specific populations.

(Ludwin King 549.)

Article 17 of the ICCPR contains nearly identical wording to the UDHR: “no one shall be subjected to arbitrary or *unlawful* interference with his privacy, family, home or

correspondence...” Ostensibly then, the right to privacy is defined operationally as a *negative* right in regard to state responsibility, and the language suggests privacy must be understood as a sphere beyond the corporeal body.

But given the compelling interest for justice and truth as stipulated by the state and the Abuelas respectively, two questions emerge: 1. to what extent should privacy be understood as an absolute right? and 2. How can the limits of the protected sphere be delineated, or better understood?

The most direct challenge to the idea of privacy as an absolute right is contained in the Human Rights Committee’s interpretation of Article 17 of the ICCPR as expressed in its General Comment 16. The document states: “As all persons live in society, the protection of privacy is necessarily relative.” Accordingly, General Comment 16 recognizes:

The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

And that:

the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society. (Human Rights Committee, General Comment 16)

Collectively, these two paragraphs establish that the State can lawfully interfere with an individual’s privacy, provided that the knowledge gleaned is essential in the interests of society. In the Argentina, the interference by judges to seize and test shed-DNA is supported by domestic law, and deemed by many to be essential to the interest of society given the truth and in some cases, justice it elicits. As one member of Congress argued “the truth is a collective obligation, not an individual decision.” (Richards 2009)

This poses the question at the heart of many of the mandatory DNA testing cases – does a legally innocent individual’s right to control the public dissemination of his her/ personal information supersede societal interests of truth and justice? As will be seen in the following chapter, the developing legislation and relevant case law in Argentina has focused on the *means* of DNA extraction rather than the *ends* – the revelation of biological origins and the impact of that knowledge upon the innocent individual. With this narrow focus, the state has consistently derogated from Article 17 in the cases of the mandatory DNA testing of suspected children of the disappeared.

In comparison, human rights documents directly support a reading of the right to identity as positive right actionable by the state, thus providing a viable basis from which to begin an ideological argument for state DNA testing in this context. As a result of the efforts of the Abuelas in Argentina, a child’s right to identity has been enshrined in the UN Convention on the Rights of the Child (CRC); furthermore, the document also mandates a state’s obligation to procure this right. Article 8 of the CRC, often referred to as the “Argentine Article” states:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection with a view to speedily re-establishing his or her identity.

Thus in this context, and as a direct response to the crimes committed by the former regime, the right to identity is seen as a positive right, a right that requires state intervention.

Moreover, as a response to the use of forced disappearance as a method of regime control in countries like Ecuador and Guatemala, the Inter-American Convention on Forced Disappearance of Persons, (incorporated into the Argentine Constitution by law 24,820) set in Article 12, the obligation of States Parties to provide "reciprocal cooperation in the search, identification, location and return of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians."

But, as articulated by members of the International Human Rights Law Clinic at University of California, Berkeley, when it comes to identity as a right protected by international law, "commenters widely recognize a lack of consensus as to the right identity's meaning and scope..[an] area of concern for many commentators is how a State can formulate policies that protect a dynamic, self-determined identity interest. First, there is the question of how to determine what an individual's 'authentic' identity in cases of dispute. Second, one must wonder how a State can make broad policy around the unique, ever-changing, subjective 'personal truths' of its individual citizens." (McCombs et al 1) Indeed, these concerns have played out over the past decade in Argentina's courts as the questions of mandatory DNA testing of innocent individuals have been contested by those hoping to preserve the identities provided by their "raising parents."

IV. The evolution of mandatory genetic testing among Argentina's "disappeared children" as analyzed through relevant court cases and legislation

Through an analysis of relevant court rulings, I will show how the legal arguments supporting the state's shed-DNA testing avert the key tension in regard to an individual's competing right to identity. In the evolution from forcible extraction to shed-DNA

testing, the court has focused on the “means”, and the protection of the physical body, rather than the “ends” – as argued by the claimants – the destruction of an identity as constructed through social relations through a biologically-essentializing procedure. I will argue that the failure of the courts to address this tension necessitates an ideologically-driven argument to support such state intervention.

The first pivotal court decision involving mandatory extraction of blood occurred in 2000, with the case of Evelyn Vazquez. Prior to the Vazquez case, mandatory extractions had taken place for suspected children of the disappeared, but all were minors at the time, and as such the courts “had the authority to make the decision on their behalf.” (Gandsman 2008, 170)

It is interesting to note that in the Vazquez case, it was the basis for her refusal and not her refusal itself that led the Abuelas to argue for mandatory testing. In a description of Evelyn’s parents’ arrest, Evelyn was quoted as saying “I didn’t do anything!” The Abuelas surmised that guilt over her parents’ legal predicament motivated her refusal: “Her own blood could be used as evidence to send them to prison. For this reason, the Grandmothers argued for judicial intervention. A compulsory extraction would relieve Evelyn of any feelings of guilt.” (Gandsman 2008, 169) In March of 2000 a Federal Court ordered Evelyn to undergo mandatory DNA testing through the forcible extraction of her blood.

But the case was appealed and finally reached the Argentine Supreme Court in 2003, where the court sided for the plaintiff, ruling against a compulsory extraction. In their statement, Vazquez’s representation argued the protection of Evelyn’s “identity” separately from the protection of her right to “privacy.” The word “identity” appears most directly in relation to questions regarding the retention of her identification papers, and the civil rights afforded by these documents (among others, the constitutional rights

to “move freely, and choose residence, education, employment, social security, and voting rights.) In this way, identity is tied closely to an established entity, something fixed and measured by the state to determine valid access to various goods and liberties. (Argentina’s National Supreme Court 356. V. XXXVI Vazquez Ferrá, Evelyn incident appeal. September 30, 2003, hereafter, “Vazquez Ferrá”)

But in contesting the mandatory blood testing, Vazquez’s lawyers asserted: “As for compulsory blood extraction...the representation of Evelyn Vazquez believes that this measure violates the constitutional rights to privacy, physical, mental and moral integrity, dignity...” Here the word “identity” is not specifically recognized by her representation as something at stake in the mandatory blood draw, though clearly the intrusion is seen to extend beyond the bodily understanding of self, with the terms “moral integrity” and “dignity” included as considerations. (Vazquez Ferrá appeal, 8)

As the basis for their ruling, the Court framed the case as a conflict between individual and collective rights, in the end prioritizing an individual’s right to privacy, and what they termed “physical and psychological integrity,” over the interests of the state to investigate crimes and the rights of the victims – the families – to know if she was a biological relative. In their ruling, the judges ostensibly relied first and foremost upon a key principle of natural law: individual sovereignty. In doing so, the justices recognized the body as having a distinct perimeter in determining an individual’s sphere of intimacy and privacy, and established that the physically bounded individual is the bearer of rights. “A person is considered owner of their body, and so long as a person has not infringed upon anyone else’s rights, his or her rights cannot be infringed upon. In such a way, the Court likened a compulsory extraction to an unwarranted seizure of property.” In the ruling the court stipulated: “A person

doesn't have to supply their body or parts thereof to be used to extract elements of proof.”
(Gandesman 2009, 171)

But with the phrase “physical and psychological integrity” the judges clearly distinguished between corporeal and non-corporeal attributes, aligning them as parts of selfhood with penetrable limits. Yet despite this language, they stop short of expressly recognizing the word “identity” as a fundamental right deserving protection in relation to the question of mandatory blood extraction and DNA testing.

This provides a compelling point of comparison – in this, the first case contesting mandatory blood extraction for DNA testing, it is not the blood extraction or DNA testing itself that is seen as a direct threat to “identity”, but the revocation of state documents. This static view of “identity” – literally equating it to documentation, provides a specific starting point from which to view the evolving legislation and judicial case law involving DNA testing and claims of identity rights that would occur over the next decade in Argentina.

In lower courts, other cases involving DNA testing began to emerge, and in 2006, federal judges began to order searches of people's homes in response to the refusal of suspected children of the disappeared to comply with DNA testing. In August of 2009, the Argentine Supreme court considered the case of Guillermo Prieto and Emma Gualtieri, who had falsely registered two children as their own. The children – now young men both refused a judge's order to give blood samples; a judge then ordered items to be seized from their home for DNA testing. In reviewing the case, the Supreme Court decided that judges could not force people to give blood samples for genetic testing to confirm that they were children of the disappeared, but could use less invasive ways to obtain DNA, including the seizure of personal items. (Ludwin King 543.) Both developments served to affirm an idea that a violation of privacy rights could

be incurred through the bodily penetration necessary for a blood draw, but not in the collection of shed DNA, and certainly not in the resulting information gleaned by the testing itself.

Developing legislation seemingly fortified an acceptance of the less-invasive approach – in November of 2009, three months after the Supreme Court’s determination, the Argentine Senate, in an effort to codify a consistent approach to DNA testing, passed a law permitting compulsory DNA testing. (Law No. 26.549, Nov 26, 2009) The Argentine Congress amended the law, stipulating that the a judge’s decision to order a test must be based on the principles of “necessity, reasonableness, and proportionality”, and that the “least intrusive methods of obtaining the DNA must be used.” (Article 218, National Criminal Procedure Code)

But in “A Conflict of Interests: Privacy, Truth and Compulsory DNA Testing for Argentina’s Children of the Disappeared,” law professor Elizabeth B. Ludwin King analyzes the tension between truth, justice and privacy that the law fails to address. She rightly asserts that, “The law as written does not provide any recourse to someone who wants his or her privacy protected and who does not want to provide a DNA sample. Having one’s possessions seized for testing cannot be called a suitable alternative, the right to privacy is still violated in this scenario.” (Ludwin King 545) While she does not tackle the competing right to identity directly, she does at least suggest the implications presented by the loss of privacy in these cases, “Under the DNA law, the adult child suspected of having been illegally adopted is unable to exercise her right to privacy, which in this case, is her ability to control the dissemination of information about herself. It is not the minimal intrusion of a cheek swab that presents the problem: what matters is the information contained in that swab and what happens to it...” (Ludwin King 548.) In her prioritization of the potential “information” discovered versus the cheek swab “intrusion,” as the key “problem,” Ludwin King seemingly attempts to recalibrate the “ends

versus the means” dynamic within the discourse of privacy rights versus competing truth and justice interests.

In the aforementioned August 2009 Supreme Court case, Guillermo Gabriel Prieto became the first individual to challenge the testing of shed-DNA to determine biological origin. In his argument, Prieto asserted that “no substantial difference exists between the test based on shed-DNA and the one based on DNA that is extracted from blood samples because in both the goal is the same – to obtain elements of his body to verify his genetic identity...the violence inflicted upon him through the DNA identity test is not limited to his physical body but rather extends to the moral or spiritual sphere of his personhood and forces him to question his own identity.” (Vaisman 402)

But despite the overall ruling declaring “less invasive” ways permissible in mandatory testing, at least two Supreme Court justices considered the implications beyond privacy infringement in stating: “the right of the biological families to know the truth does not mean that the other victim should shoulder all the emotional and legal consequences of *establishing a new identity*.” (my ital., Ludwin King 544) Similarly, Ludwin King argues “taking this very personal, perhaps life-changing decision out of the adult children’s hands amounts to forcing unwanted knowledge on them” (Ludwin King 546)

But as one of the first to have her genetic identity tested and her biological origins clarified by DNA testing as an adult, Claudia Poblete embraced a more fluid sense of identity, years later asserting: “Who I am is everything that has happened to me. It’s the 21 years that I’ve lived as Mercedes and the 10 years I’ve been living as Claudia. And the eight months that I had with my parents when I was first born.” (Drapkin 2010) Poblete’s characterization captures the version of identity that is both stable yet dynamic, a fluidity that resonates the feminist

concept of “becoming,” employed by Simone de Beauvoir and later reinterpreted by Toril Moi in her theories of bodies and subjectivity. It is through this lens that I intend to explore the tensions presented by compulsory shed-DNA testing in Argentina.

V: The case for analyzing Argentina’s shed-DNA testing through a feminist lens

In 2007, two Human Rights law scholars, Theodore McCombs and Jackie Shull Gonzalez, working with the International Human Rights Law Clinic at the University of California, Berkeley School of Law attempted to create a unifying definition of the right to identity under international law. They began their article by asserting: “Any attempt to define the right to identity must begin with a nuanced understanding of the concept of identity itself. While there is no prevailing legal definition of identity, scholars of law, social science, and philosophy emphasize the importance of an individual’s *personal and social realities* in the formation of a *stable, yet dynamic identity*.” (McCombs et al 10, my ital.) This language echoes the characterization of identity projected by Claudia Poblete in describing her sense of self following her decision to undergo DNA testing and receive confirmation of her genetic origins. Similarly, it implicitly underscores the need for a recalibration of the “ends versus the means” reasoning seen in Argentina’s developing legislation and case law in regards to identity rights.

Thus the struggle over selfhood presented by the cases of those attempting to block shed-DNA testing demands a critical analysis of the foundational assumptions regarding identity asserted by both individual and state. Or, to put it another way, how do the normative conceptions of identity established through these cases either legitimize or fail to legitimize state intervention – namely the testing of shed-DNA? While Ludwin King raises the argument against shed-DNA testing from a privacy rights perspective, she fails to analyze the theoretical

understanding of identity that these adult children presuppose, and therefore aim to protect. To this end I will now look at the language employed in the most recent challenge – the case of Guillermo Gabriel Prieto - to glean, what, if any normative understandings of “identity” presented by either Prieto or the court judges provide a viable alternative to the current “ends versus means” methodology.

Mr. Prieto’s consistent refusal to comply with any genetic testing spans the course of the changing legislation and court rulings involving DNA-extraction. Raised along with a younger brother, Emiliano, by naval officer Antonio Guillermo Prieto and his wife Emma Elidia Gualtieri, both Guillermo and his brother were later believed by the Abuelas to be children of the disappeared. According to complaints brought by the Abuelas, Emiliano was suspected to be the biological son of a disappeared pregnant woman, Blanca Estela, while Guillermo was thought to be the prodigy of disappeared couple María Esther Peralta and Alfredo Oscar Zalazar. (Vaisman 399)

A legal investigation into the Prietos was launched in 1992; at that time, the raising parents refused a court request to provide blood samples. When Guillermo and Emiliano became adults, each continued to resist court attempts for conducting blood testing. For Guillermo, following the initial 1992 investigation, the fight to preserve his “identity” would become a battle fought in the Argentine courts lasting more than a decade and a half. After challenging a lower court order to provide blood, Prieto’s appeal made its way to Argentina’s Supreme Court; during that time technological advances allowed for genetic testing that did not require blood testing, but instead relied upon genetic material detached from the body – shed-DNA. In 2005, before the Supreme Court could rule on Prieto’s appeal of the court order for blood extraction, a lower court judge ordered that his dwelling be raided and objects collected

for genetic testing. Prieto appealed the legality of the testing of the materials; this appeal was debated in the Court of Appeals and eventually reached the Supreme Court. Ultimately, Prieto's became the first shed-DNA case to be considered by the Supreme Court. In August of 2009, the Supreme Court issued two rulings: one in response to Prieto's initial appeal against the court order of blood extraction, and the second in response to the collection and testing of personal belongings. Along with the distinctions made between the corporal and non-corporal conduits to establishing identity through the dual rulings, Prieto's case provides the most relevant and pertinent example from which to discern and analyze normative conceptualizations of identity. (Vaisman 400-401)

In his appeal, Prieto argues that the drawing of blood or the collection of the "remains of his body" lead to "identical studies" that, in essence, "affected his dignity because it forced him to question his identity." That Prieto draws a relationship between his identity and his dignity would earn the interest of any human rights scholar, as the preservation of dignity forms the philosophical bedrock for the human rights in the modern age. The word dignity appears in the first sentence of the preamble of the Universal Declaration of Human Rights, as well as the first article: All human beings are born free and equal in dignity and rights. Though the UDHR does not define dignity in specific terms, the term appears again in Article 22: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his *dignity and the free development of his personality*." (UDHR, my italics) In this way, the UDHR recognizes dignity both as an ontologically-fixed *status* of sorts – a protected entity earned by individuals simply

by the nature of their human existence, as well as an actionable freedom, an ability to determine one's own character.

But in his claim that the study of his biological material impacts his dignity because it forced him to question his identity, it isn't immediately clear if Prieto sees the injury as the genetic knowledge itself, the sense of self lost by the confronted knowledge (or to put it another way, the undermining of his personal history), or the control lost to the state in the decision making and thus self-determination in development of his personality.

Prieto also cites the 2003 ruling in *Vazquez Ferrá*, and introduces the idea that the concept of "violence" against the individual should not be limited to the physical sphere but should be understood to extend to the "moral and spiritual spheres" – areas he alleged would be affected by the non-consensual discovery and disclosure of his genetic history. In this way, Prieto further develops a theory introduced in by Evelyn Vazquez Ferrá's claim regarding the spheres of personhood. In her claim, Vazquez Ferrá alleges that a blood test would not only threaten her physical integrity, but would also interfere with her "sphere of intimacy" and constitute an injury to "mental and moral integrity" that would promote a possible "psychological disorder" (Argentina's National Supreme Court 356. V. XXXVI Vazquez Ferrá, Evelyn incident appeal.)

As previously mentioned, the 2003 Vazquez-Ferrá ruling opposed compulsory blood tests, but rendered permissible identity tests on shed-DNA, creating the ends versus means dynamic that seemingly prioritizes the biological over the relational in considering human rights protections as they pertain to identity.

However, one judge in Vazquez-Ferrá decision provides a more complex understanding of identity. In his assent with the ruling, Justice Adolfo Roberto Vazquez recognized the presence "of three spheres within which people perform their existence: the first public, the second

private, the third intimate...intimacy is not just the right to solitude, but a number of aspects of individual and family life of people.” (Vazquez Ferrá, Justice Adolfo Roberto Vazquez 18)

There are two important distinctions that Justice Vazquez makes in his construction of the spheres: first, he activates and makes fluid the concept of identity in his description of people *performing* their existence. Secondly, he distinguishes privacy from identity, recognizing privacy as a static condition through which identity can be continuously negotiated and developed. In this way, justice’s conceptions of identity philosophically align with Toril Moi’s theory of the “subject as becoming,” to be discussed in more detail later.

In their ruling in Prieto’s case, the justices regularly refer to the Vazquez Ferrá decision, but do not include Justice Vazquez’s descriptions of privacy, intimacy or identity in their arguments. Instead, they return the focus to the *method* of determining genetic markers to justify the denial of Prieto’s appeal. The justices recognize that the “essential purpose” of the shed-DNA testing is to determine the criminal responsibility of Antonio Guillermo Prieto and his wife Emma Elidia Gualtieri; but they also concede that, given the multiple victims’ and rights’ concerns, that “it is necessary to find a balance so you can materialize the truth” and seek the “minimum of collateral damage” to the “unwitting victims of the facts.” (Argentina’s National Supreme Court 291. XLIII Gualtieri Rugnone Prieto, Emma and Elidia other s / abduction 10 years. August 11, 2009, hereafter “Prieto)

In this spirit, they contended that due to the fact that the samples had “been taken without invading the appellant’s body” that the “measure in question” did not encroach upon Prieto’s “fundamental rights such as life, health, physical integrity or privacy...” They continue that the shed-DNA collection “appears appropriate to attain the material truth” in a manner that “could

not be humiliating or degrading treatment” since the DNA traces from his body, when seized, were “detached” from it. In this way, “the justices distinguish between biological material what is part of the body and material that is already detached from it.” (Vaisman 404) Thus while in his claim, Prieto stresses that the focus should be on the *use* of his genetic material, rather than its retrieval, the judges instead continue to reference the physical boundary of the body to be where Prieto’s rights both begin and end.

One key line of reasoning employed by the justices in the Prieto decision revolves around the distinction between the will of the appellant versus “material whose existence is independent of the will of the appellant.” In his concurring opinion, Justice Maqueda addresses the part of Prieto’s claim that the compulsory nature of the state’s actions, which as he put it, impacted his dignity as it *forced* him to question his identity, is unconstitutional. Maqueda clarifies that because the action is conducted upon a sample of material whose existence is independent of the will of the appellant, and who has not been needed for collaboration and collection, that this claim is invalid. More specifically, Maqueda draws the distinction between the protections afforded under Article 18 of the Argentine Constitution and Prieto’s claim. Article 18 concerns self-incrimination in a criminal context: “No one can be compelled to testify against himself...”, but as Maqueda asserts, this protection prohibits “the physical or moral compulsion for issued statements from the accused by force and not the exclusion of his body as material evidence in court.” Citing case law from the United States and the European Court of Human Rights, Maqueda further asserts: ‘the right against self-incrimination...refers primarily to the will of the accused to remain silent.’ Therefore, it does not extend to the use of material...[that has] an existence independent of the will of the subject.” (Prieto, Justice Maqueda 6-7)

In this way, Maqueda again promotes the “end versus means” methodology by recognizing the bounded individual as the bearer of rights, and the limits of these rights as created by the body perimeter. Quite literally, Maqueda acknowledges that while the appellant Prieto does not have to betray his sense of self through a forced expression, (which would thus undermine his dignity), he cannot exert such privilege over the bodily material that has detached from his corporal self. This approach leaves no room to consider the potential impact that might be suffered by Prieto through the testing of his genetic material, and again prioritizes a biological sense of self over the relational. (Vaisman 406)

It is worth noting that in their ruling the judges also consider Prieto’s claim that the use of genetic testing to solve crimes potentially defied protections elucidated in the Universal Declaration on the Human Genome and Human Rights. The judges nullify the merit of the claim by distinguishing that while “manipulation of or discrimination from data of this kind” fall within the scope of the document’s protections, testing for the purposes of “research, detection and prosecution or the determination of parentage” does not apply under the declaration’s mandates. (Prieto, Justice Maqueda 25)

Perhaps the most compelling recognition of the role of the non-corporeal in the development of identity comes from the partial concurring judgement from Justices Lorenzetti and Zaffaroni. In their departure from the overall ruling, the justices argue for an alternate solution: that Prieto’s DNA be tested, but only the biological family be made aware of the findings. In this way, they argue, Prieto would be relieved of having to “bear all of the emotional and legal consequences of the establishment of a new or formal identity.” (Prieto, Justices Lorenzetti and Zaffaroni 19) Through their reasoning, the justices offer two compelling arguments to an understanding identity in a more fluid way.

First, Justices Lorenzetti and Zaffroni contemplate the impetus behind the classification of “disappearing” people as a crime against humanity and incorporate the element of lost social relations within that paradigm. While they acknowledge the deprivation of biological identity within the crime, they also call attention to and appreciate the impact of the human contact impaired as a result of the offense, in one instance comparing the dynamic to that of an infant locked in a tower. Through the analogy they identify the “deprivation of a feature inherent in human nature...the development of a normal psyche through interaction...” which infers a “personality wound, to interfere and suppress a feature of humanity, preventing a primary answer to the question: who am I?” (Prieto, Justices Lorenzetti and Zaffaroni 8-9) With this analogy and reasoning, these justices provide the most cogent and direct alternative to the idea of bounded individual whose identity is defined by the boundaries of his physical body. Here, they provide a normative view of identity through which an individual empirically depends upon social interaction to develop a sense of self. But by connecting this view of selfhood to the damage to rights incurred through this crime against humanity, the justices recognize that Prieto’s right to his “relational identity” suffers twice: first through the deprivation of social bonds to his biological family, then in the pre-supposed disintegration of the social bonds with his raising family developed over the nearly three decades of his life through the imminent genetic testing.

By legitimizing Prieto’s sense of identity in this more porous way, Justices Lorenzetti and Zaffaroni argue that though his social bonds developed under the context of “criminal continuity,” the ties nevertheless must be seen to have “emotional and legal significance.” Moreover they continue to develop this normative view by suggesting that in its ineffectiveness

to put an end to the crime, the state, and more to the point, the state's negligence also contributed to Prieto's developing identity.

Ultimately, and somewhat paradoxically, in attempting to protect the non-corporal elements of his identity, Prieto's strategy in effect elevates the biological to the near sacred. In her essay, "Relational Human Rights: Shed-DNA and the Identification of the 'Living Disappeared in Argentina,'" Noa Vaisman asserts that:

Guillermo argues that the use of his biological material - his genetic patrimony without his consent is an act of subjugation that forces him to question his own identity (here the conflation of DNA and identity is most visible, while other definitions of identity, such as identity based on social relations and environment, are excluded from the argumentation). In other words, Guillermo understands his self as relational, that is, an outcome of his ties with others with whom he was raised, rather than an individual defined by his DNA. (Vaisman 405)

Vaisman rightly notes that in order to protect his "relational" self, Prieto conflates his DNA with his identity, while at the same time excluding from the argument the elements of his identity he wishes to protect – his social relations. But in an attempt to make a broader argument for a reconceptualization of human rights as relational human rights, Vaisman does not acknowledge the seeming illogical nature of Prieto's reasoning. Vaisman argues that Prieto sees himself as relational, that is, "not as an isolated monad but a dividual, a subject that exists through his or her relations." It's an approach that according to Vaisman, focuses on the idea that relations make the individual, rather than the other way around. (Vaisman 397)

However Vaisman does not address that in his attempts to protect this relational self, Prieto suggests that the information contained his DNA poses a legitimate threat to the sense of self created through his relations. In other words, while attempting to elevate his "relational" identity to a protected status under human rights, Prieto must necessarily concede a primacy to

his genetic identity. While Prieto argues that he does not understand his self as an individual defined by his DNA, he simultaneously acknowledges the power it holds to undermine his sense of personhood.

Because she does not address this inconsistent reasoning, Vaisman leaves unresolved the question of the “relational” self’s seeming dependence upon, and therefore subjugation to genetic truths. Part of the issue is that in her analysis, Vaisman conceptualizes the “relational” self as a fixed entity; for Prieto it is, as she states, an *outcome* of his ties with others with whom he was raised. But, as I will argue later, it is by employing a more fluid theory of subjectivity that we can find compatibility between the relational self and biological awareness and establish a “stable yet dynamic” interpretation of identity.

Empirically, then, the language in this case seems to assert that a “relational” self must be considered independently from “biological truths” when considering identity within the realm of human rights. But is this necessarily the case? Feminist theorists have long considered and reconsidered a similar dialectical relationship between “sex” and “gender” – providing analogous and thus instructive analysis from which to approach the mandatory DNA testing cases as they relate to identity and subjectivity. In particular, Toril Moi’s understanding of bodies and subjectivity – specifically, her interpretation of Simone de Beauvoir’s theory of the “body as a situation” – provides a “stable yet dynamic” interpretation of identity that, I will argue, offers a new and relevant lens from which to approach the competing tensions in Argentina’s DNA cases. By applying philosophical conceptions of the “subject as becoming,” I will argue for a theoretically perceived compatibility between the relational self and biological awareness.

VI: Applying Toril Moi's theory of subjectivity to Argentina's shed-DNA testing

The cases of Evelyn Vazquez and Guillermo Gabriel Prieto illustrate the fundamental tensions involving suspected children of the disappeared who are reticent, yet mandated by law to confirm genetic identity. An examination of the reasoning provided by the appellants and the justices involved reveals a grappling between theoretical conceptions of selfhood: specifically between what is suggested to be ostensibly discrete biological and relational identities.

But while sustaining the ends versus means dynamic, the judges fail to provide a foundational basis for justifying the prioritization of the biological over the relational as it pertains to the already-victimized appellant. The aforementioned partially dissenting judges in each case introduce alternative theoretical paradigms but none, I would argue, fully develop a viable alternate option. Judge Vazquez in the Vazquez-Ferrá ruling proposes a more fluid construction of identity, but does so to complicate the public/private paradigm rather than the biological/social binary relationship. In the Prieto case, Justices Lorenzetti and Zaffaroni thoroughly deliberate the emotional and legal significance of social ties in what can be seen as a rejection of a prioritization of the biological over the relational in identity formation. However their proposed solution lacks such careful consideration. By suggesting a disclosure of the results of the DNA testing to the potential biological relatives, they simply transfer the onus of the decision to the other primary victims of the crime.

Through this paper I aim to provide a theoretical justification for state intervention that will provide a compelling alternative to the “ends versus means,” pre-supposed binary biological/social construct. To this end, I return to Claudia Poblete's reflection on her identity: “Who I am is everything that has happened to me. It's the 21 years that I've lived as Mercedes and the 10 years I've been living as Claudia. And the eight months that I had with my parents

when I was first born.” (Drapkin 2010) If Poblete suggests the equanimity that comes with the acceptance of a fluid identity, Victoria Donda exemplifies the dynamic relationship between what the world has made of her and what she has made of the world.

In an essay exploring the right to truth as it pertains to the families of the disappeared in Argentina, Leora Bilsky highlights the story of Victoria Donda, the daughter of two murdered activists who captured her story in a memoir. “When she finds out the truth about her past she refuses to see the choice as a binary one, between her biological and adoptive families. Instead she adopts a more inclusive definition of her family, one that includes both nature and nurture.” Bilsky asserts: “she rejects the need to choose between her two identities. In fact, the solution for her is to find continuity between her past and present through her political identity as a leftist activist.” (Bilsky 463-464) For Victoria Donda, identity comprises the nature (biology), nurture (her adoptive family) as well as her will (her actions, becoming a leftist activist.)

Donda’s sense of identity exemplifies a fluid alternative to the biological/social, nature/nurture foundational constructs assumed within the Vazquez and Prieto rulings. Poblete and Donda also embody the theory of subjectivity that, I will now argue, provides a philosophical justification of state intervention in these cases. It is my contention that by adopting Toril Moi’s theory of subjectivity (developed through her reading of Simone de Beauvoir’s claim that “one is not born, but rather becomes a woman”) as a foundational lens from which to consider these tensions, a new picture of compatibility between the relational self and biological awareness emerges. By applying philosophical conceptions of the “subject as becoming” in this way, I will offer a powerful philosophical alternative to the “ends versus

means” reasoning that has continued to unsatisfactorily drive the debate in the courts as it applies to mandatory DNA testing.

To better understand why Moi’s theories of subjectivity provide an appropriate lens, a brief primer on the evolution of feminist theory prior to Moi offers important context to the relevant tensions regarding biological and relational identities. Feminist theories that emerged in the 1960s and 1970s aimed to dismantle the societal expectations and restraints placed upon women under the pervasive ideology of biological determinism, whereby a woman’s role in society was decided by “nature”, “science” and “biology.” These feminists instead attempted to secure greater freedom for women by creating a distinction between “sex” and “gender,” where sex is understood as a biological category, and gender as a social construct. With this language, they provided a compelling alternative to the idea of biological sex as “pervasive” – or, “something that seeps out from the ovaries and the testicles and into every cell in the body until it has saturated the whole person,” (Moi 11) by suggesting introducing the concept of gender as the performative and psychological “experience of belonging to one sex or another” (Moi 22):

The concept of gender emanated from the complexities brought to the understanding of “biological determinism” by the existence of transsexuals. As Moi stipulates, the challenge stemmed from the ostensible transsexual dilemma – that the sex of their body does not correspond with the sex of their mind. (Moi 115) On a fundamental level the transsexual experience thus complicated the established conception of biology as destiny, and created the need for an understanding of how social expectations influenced performance and identity.

With a new generation of feminist thinkers came a critique and rethinking of the 1960s understanding of these concepts. These post-structuralist theorists criticized the original sex/gender construct for “turning sex into an essence...immobile, stable, coherent, fixed,

prediscursive, natural and ahistorical; the mere surface on which the script of gender is written.” In contrast, post-structuralists “aim to understand ‘sex or the body; as a concrete, historical and social phenomenon,” not as a pervasive essence. (Moi 4-5)

But, as Moi argues, even the term “post-structuralist” is misleading, as these theorists retained sex and gender as “starting points for their theories of subjectivity, identity and bodily sexual difference...” At the core of Moi’s argument is her assertion that “no amount of rethinking of the concepts of sex and gender will produce a good theory of the body or subjectivity. The distinction between sex and gender is simply irrelevant to the task of producing a concrete, historical understanding of what it means to be a woman, (or a man) in a given society.”(Moi 4-5)

The evolution of feminist theory provides a parallel philosophical dilemma from which Argentina’s DNA testing cases can be viewed with a fresh perspective. The anxieties between the biological and the relational seen in the Vazquez and Prieto cases echo the foundational tensions between sex and gender that feminists have grappled with for generations. In both cases, presupposed binary relationships create identity boundaries and, in some instances create a dynamic whereby a prioritization must occur to protect one vision of selfhood over the other. This dynamic has been explored by philosophers from Jacques Derrida to Judith Butler who have argued that identity categories are by nature normative rather than descriptive, and as such, exclusionary.

It is within this discourse that Toril Moi attempts to develop an alternative to the sex/gender construct as a basis for a theory of subjectivity in her essay “What is a Woman?”; to this end, she reinterprets Simone de Beauvoir’s understanding of the “body as a situation.” In both Moi’s approach (to develop an understanding of bodies and subjectivity without relying on

the sex/gender distinction) as well as the material basis of her argument – the concept of a “lived body”, she offers theoretical applications for reconsidering the “ends versus means” approach posited by the Vazquez and Prieto justices. It is from this vantage point that I will re-examine the liminality between nature and meaning in relation to conceptions of identity as depicted in these cases.

Moi asserts that it is because of the tendency of feminist theorists to frame conceptions of subjectivity within the sex/gender dynamic that Simone de Beauvoir’s theory that “one is not born but becomes a woman” has been subject to misinterpretation. “Many contemporary feminists have assumed that this means that Beauvoir is opposing sex to gender, or biological essence to social construction. This is not the case. Anyone who tries to read *The Second Sex* through the lens of the sex/gender distinction is bound to misunderstand Beauvoir.” (Moi 73)

Rather than view *The Second Sex* within this paradigmatic framework, Moi contends that Beauvoir instead understands the body in a more porous and fluid way through her examination of Beauvoir’s quote: “The body is not a thing, it is a situation: it is our grasp on the world and a sketch of our projects.” Rather than the more familiar idea of woman being *in a* situation, Moi asserts that Beauvoir rejects the idea of a woman being a “fixed reality” but rather posits the idea that of a woman that is “a becoming.” In the most basic of terms, identity for Moi is not a state, but a process. In her chief critique of the post-structuralists and the theories posed by Judith Butler, Moi argues that by creating instability in language, terms fall into abstraction. But by considering the body is a situation, Moi is able to retain the meaning in a historically and socially situated understanding the concrete and material body.

Central to Moi’s premise is the concept of “lived experience.” She asserts: “The situation is not coextensive with lived experience, not reducible to it. In many ways, ‘lived experience

designates the whole of a person's subjectivity. More particularly the term describes the way an individual makes sense of her situation and actions." (Moi 57) For Moi, "the concept also comprises my freedom, my lived experience is not wholly determined by the various situations I may be part of. Rather lived experiences as it were, sedimented over time through my interactions with the world, and thus itself becomes part of my situatedness." (Moi 63)

In this way, and perhaps most importantly to my task at hand, Moi's interpretation asserts that Beauvoir's theory, while showing the significance of biological facts, does not proclaim the biological facts to be an individual's destiny. According to Moi, women are always in the process of "making themselves what they are...giv[ing] meaning to our lives by our actions." (Moi 62) Thus for Moi, what Beauvoir ultimately accomplishes is a view of a lived experience as an ongoing, borderless interaction between the individual and his/her world, where each continually *constructs* the other.

"From a Beauvoirean perspective, then, the trouble with the sex/gender distinction is that it upholds the 'objective' or 'scientific' view of the body as the ground on which gender is developed. To consider the body as a situation, on the other hand is to refuse to break it down into an 'objective' and a 'subjective' component; we don't first consider it scientifically, and then add cultural experience." (Moi 73)

This "Beauvoirean perspective" subscribes then with the ideological complaints put forth by Evelyn Vazquez and Guillermo Gabriel Prieto, namely that their social ties must be considered not as corollary to their possible biological origins, but as an active and fundamental factor in their sense of identity. Accepting this porous and therefore egalitarian relationship between the scientific and cultural views of the body thus recognizes the significance of these relational ties without prioritizing them, or creating an artificial either/or binary understating of identity.

Importantly, this perspective does not devalue the biological, or genetic of meaning. As Moi states: “my argument is not that there is nothing in nature, (i.e. that we have to deny the existence of biological facts), but that whatever there is in nature (whatever facts we may discover about human biology and genetic structure) is never going to justify any particular arrangement.” (Moi 114) To be sure, Moi is primarily considering this relationship within the broader, systemic socio-political concerns of the feminist project, but her logic can be seen to extend to other tensions of essence/construction within identity rights’ discourse. As I will discuss later, by consulting the adult children of the disappeared whose DNA was tested about the impact of the findings reveals a diverse and widely-ranging spectrum of life-decisions and reflections regarding identity: some children changed their names to their biological parents’ surnames, while others kept their raising parents’ names and continued developing relationships with those individuals. Some like Claudia Poblete and Victoria Donda rejected an either/or sense of identity, preferring to understand their sense of person as a continuum of lived experiences.

By retaining the meaning of the biological, but not prioritizing it in a foundational sense, this “Beauvoirean perspective” cannot be seen to have prescriptive biologically-essentializing influences. Nor does it undermine a “sphere of personhood” as alluded to in Argentina’s court cases, but instead protects the coexistence of relational and biological realities.

McCombs and Gonzalez draw a philosophically consonant reasoning in their attempts to construct a unifying definition of the right to identity. “Identity is ultimately self-defined, at once subject to dynamic development and rooted in the individual’s need for authenticity. An individual’s identity evolves dynamically as she interacts with her meaningful social ties and fashions herself in response to her socio-cultural context. At the same time, identity provides a

relatively stable and continuous “frame of reference” for this evolution.” (McCombs 11)

Through this language they recognize the stable yet dynamic conception of identity proffered by Moi’s reading of Beauvoir.

Leaning upon the work of Professor Ya’ir Ronen’s, McCombs and Gonzalez cite Ronen’s relationship between the “need to become” and the “need to be.” For Ronen, the need “to become” is comprised of an individual’s (in his case a child’s) fluid interaction with the world around him/her: “Identity should not be seen as developing in a vacuum, but rather always through dialogue and sometimes struggles with significant others-those persons who matter to the individual constructing their identity. Even as the individual outgrows some of these others, the internal dialogue continues with them throughout life and a contribution to the formation of an evolving identity in early childhood continues indefinitely..” (Ronen 149) This conception of identity is not fixed, according to Ronen: “there is no objective immutable link between identity and a specific place, such as say, a place of birth. An assumption of such link is inherent in an abstract, decontextualized, understanding of identity rejected here.” For Ronen, this understanding of identity, however, develops in concert with “the need to be”: “to be his/her authentic self and to be recognized as ‘somebody’ when simply being that self. This ensures the child’s psychological self.” (Ronen 149-150)

Interestingly however, while Ronen uses the word *complementary* to describe the relationship between the “need to become” and the “need to be” (Ronen 150) McCombs and Gonzalez assert them as *dichotomous*: “These two needs can often conflict, in that social pressure hostile to the individual’s authentic identity may beneficially refine, underscore, or even prompt change in that identity.” (McCombs 11) To some extent, in their efforts to better define the right to identity, McCombs and Gonzalez’s attempts highlight the difficulties in

translating theoretical conceptions of identity into operational terms. They posit the question: how can a State “protect a dynamic, self-determined identity interest,” given the “unique, ever-changing, subjective “personal truths” of its individual citizens? (McCombs 14)

Moi offers a similar consideration, asserting that “no theory of bodies and subjectivity is of any use if it does not yield significant understanding of concrete cases.” (Moi 117) Within her context of feminism and the political freedoms of women she considers the application of her theory of subjectivity to transsexuals. So how can one see the operational value in considering Moi’s theory of subjectivity within the context of DNA testing and identity rights? To this end it will be helpful to consider the conceptions of identity revealed by the adult children who have been impacted by DNA testing within the premise of Moi’s understanding of the “body as a situation”. An exploration of these concrete examples, I will argue, supports a broader application of Moi’s theory of subjectivity within the legal framework and cases of state intervention with shed-DNA testing. Ultimately, considering these testimonies with this lens further reinforces the idea that within the context of the shed-DNA testing, the Argentine mandate which compels an individual to confront biological truths can be seen as part of the feminist ideology of “becoming.” As such, the use of shed-DNA – genetic material – does not necessarily translate into a biologically-essentializing assertion of identity.

Five years after discovering that he was a child of the disappeared, Horacio Pietragalla declared, “the state cannot leave in the hands of a young person..whether or not to learn his true identity..[the state] tells you the truth. *After that, you have to decide what you want to do with it.*” (Drapkin 2009, my ital.) In his statement, Pietragalla seems to recognize that even within a state mandate of genetic testing, an individual still retains agency. This sentiment echoes Toril’s Moy’s reading of Beauvoir: “We are continuously making something of what the world

continuously makes of us: our subjectivity is always a becoming that neither precedes nor follows from the encounter with the Other.” (Moi 117) From both Pietragalla’s and Moi’s perspective we see a rejection of the understanding of biology as an essentializing entity, and a conception of identity as an interactive endeavor.

While I do view Pietragalla’s comment as congruous with Moi’s theory of subjectivity, I would suggest a slightly different wording in regard to DNA testing in Argentina, namely that the state tells you *one* truth or *a* truth, not simply *the* truth. In this way, the genetic information retains its meaning without becoming a pervasive entity.

Looking at and listening to the experiences of some of the adult children who discovered their genetic history suggests that Pietragalla’s interpretation is a valid one. The varied sentiments and reflections reveal that genetic discovery cannot be seen as a prescriptive force. For some, including Pietragalla, the information satisfied a gnawing sense of doubt about biological origin; for others, the evidence created only psychological confusion.

Upon discovering that he was not the genetic offspring of his raising parents, Cesar Sebastian Castillo changed his name to the one given to him by his biological parents: Hector Pietragalla. Despite the fact that the evidence suggested that his raising parents were not complicit in any violence against his biological mother and provided, as Pietragalla himself described, a loving and stable home, he cut all contact with them. He self-consciously attempted to switch from calling them his “parents” to the “people who raised me.” He developed a relationship with his biological family and moved away from the town where he had grown up. (Gotkine 2004; Gandsman 2008, 236)

In contrast, Anibel Parodi discovered he was a child of the disappeared at the age of 26. Unlike the vast majority of the cases, Parodi’s biological mother Sara Mendez survived

detention and was able to reunite with her son. But despite his biological mother's pleas, Parodi refused to assume the name she'd given him at birth, Simon. He also continued to live with the family who had raised him. Parodi and his biological mother argued over the name issue and eventually he distanced himself from her. Parodi admitted to thinking at one point, "Why the hell did they have to find me?" but a few years later reflected, "It's ok. That's how things are. This happened to me. That's who I am." (Valente 2008) In his statement, Parodi reveals the stable, yet dynamic nature of his identity. It is both an interaction with the world ("this happened to me") as well as a genetic truth. Even the sentiment "That's who I am" signifies both a biological truth as well as the experience of discovering it. He is both the biological son of Sara Mendez as well as a child of the disappeared navigating social relationships.

One of the most celebrated cases of a recovered grandchild occurred in 2014, when the son of the disappeared Laura Estela Carlotto, named Guido at his birth, was positively identified as a man living by the name Ignacio Hurban. The identification garnered a lot of publicity due to the fact that Laura Carlotto's mother is Estela de Carlotto, one of the founding members and president of the Abuelas and a public figure in Argentina. Ignacio had been raised by humble farmers and had a happy childhood, unaware that he was not their biological offspring. In the summer of 2014, a neighbor who knew the truth of his birth told his wife that the then-36-year-old had been adopted by the Hurbans.

Despite having what he called a "golden childhood," Ignacio decided to have his blood tested and discovered that he was the offspring of Laura Carlotto and Walmir Montoya, both executed. Following his blood test, Ignacio developed relationships with both his maternal and paternal biological grandparents and extended families, but also continued his relationship with the Hurbans. More than a year after his blood test, Ignacio reflected on his thoughts about

identity: “Sometimes we have a concept of identity that’s a bit static, as if identity was nothing more than to know who your biological parents are. That’s important because I can attest that you finish closing a lot of issues, but the identity is something that you construct every day.” (Aranguren and Sarmiento) Ignacio’s language also reflects the stable yet dynamic nature of his identity while simultaneously rejecting the idea of genetic discovery as a biologically-essentializing procedure. For Ignacio, identity is a continual process of construction; in this way his reflections echo Moi’s assertion of subjectivity, that “we are continuously making something of what the world continuously makes of us.” (Moi 117) Ignacio echoes this, in part, when he stated about his ever-changing identity: “sometimes it is more internal, the change is internal and I don’t know how to explain it. I understand who I am, I’m starting to understand that I am what I do and the way I do it.” (Aranguren and Sarmiento)

Ignacio’s actions following the confirmation of his biological origins also reflect this dynamic sense of selfhood. Despite changing his surname from Hurban to Montoya Carlotto, he decided to keep his first name as Ignacio, rather than to be called the name given to him by his biological mother after his grandfather, Guido. “My name is Ignacio and not even a decision, it is a sense and feeling of certainty. Through that name I built my life.” (Aranguren and Sarmiento) This declaration can be seen as a stark contrast to the feelings of another recovered grandchild, Maria Sol Tetzlaff Eduartes, born Victoria Montenegro: “I’m Victoria, I disappeared 13 days after birth. We disappeared. And for 15, 20, 25, 30 years, now 35, 38 years, we lived under another name, we lived other people’s lives, other’s history.” (Goyzman 2015) Thus while for Ignacio, the decision to continue to be Ignacio, to integrate his history as Ignacio Hurban into his identity as Ignacio Montoya Carlotto comes from “a sense and feeling of certainty,” for Victoria, it is as if the life lived by Maria has been lived by another person.

Ignacio and Victoria's contrasting philosophical approaches to their construction of identity reveals the ability to maneuver in different ways despite the genetic knowledge imparted upon them.

This relationship between the sense of self developed through the "raised" or "adopted" identity and the person revealed through genetic testing is discussed in yet another way by Victoria Donda, (who was raised as Analía): "Analía was not condemned to disappear. What would vanish, or in fact, come crashing down, were the structures that had supported her – her place of birth, her parents, even her true age. But Analía would live on in Victoria. Her essence would be redefined, but she would never stop being me." (Donda 136) In this declaration Donda captures an irony of sorts: to be Victoria, she must necessarily also be Analía. Donda's sense of self as Victoria is thus both dependent on knowing her biological origins, as well as recognizing the person she has become while living as Analía: "My life. The life of Victoria Donda, but also Analía's. Because they're one and the same. Both women are me." (Donda 161)

In contrast, in telling the story of a young woman, Juliana, a child of the disappeared who was searching for her kidnapped brother, Ari Gandsman describes a young man's refusal to have his identity confirmed genetically. Despite overwhelming evidence that his raising father had kidnapped him, and admitting his own suspicions that he was a child of the disappeared, Pablo Bianco tells the woman who is possibly his sister that he will not undergo a blood test. "My fear is that the day that I have the results that it's going to change me completely..my life would change." (Gandsman 2008, 248) To Gandsman, Pablo's refusal signifies "the moral authority and power of scientific knowledge. That genetics is imbued with the power of revealing hidden truths...the truth it provides is the truth of who we are as human beings. It is a

genetic truth, a pure and uncontestable [sic] truth held to be of a higher order than other truths.”
(Gandsman 2008, 249)

While scientific and technological advances have undeniably allowed for DNA to prove the genetic composition and origins of individuals with near certainty, Gandsman’s assertion that genetic truth must be held in higher regard than other truths would seem to suggest a biological determinism that would outrank existential factors in the construction of identity. In reality, the varied responses of the suspected and identified children of the disappeared serve to complicate this assertion.

An illuminating example of the existential complexities that surface for these individuals can be seen in cases of kidnapped siblings. Two examples include the abducted offspring of Silvia Daneri and Orlando Ruiz, and María Rosa Ana Tolosa and Juan Enrique Reggiardo. In the first case, the two biological children of Daneri and Ruiz, Marcelo and Victoria, were toddlers at the time of their mother’s abduction and were later abandoned. A third child, Laura was born during her mother’s detainment in ESMA (Escuela Superior de Mecanica de la Armada) - a notorious secret detention center. Laura was later appropriated and renamed Clara by a colonel – Juan Antonio Azic, who would also kidnap another daughter Analía, (who through genetic testing would later be revealed to be Victoria Donda, mentioned earlier) and raise the two girls as siblings.

While Marcelo and Victoria Ruiz forged ties with their biological family after reuniting, Laura rejected her biological identity, despite the proof offered by DNA testing. Her sister Analía also underwent DNA testing; unlike Laura, upon learning the genetic information, she assumed her name given at birth, Victoria Donda. Following the genetic testing Donda continued to live with her raising parents, and continued the relationship with them even after

criminal proceedings took place against her raising father, Azic. As discussed earlier, Donda would eventually become politically active and a member of Congress, during which time she would continue to visit Azic in prison. (Bilsky 2014; Ghitta 2014)

While her biological siblings embraced their genetic origins, and her relational sibling found a way to accept both her biological history as well as her relational ties, Laura continued to live as Clara Azic, despite conclusive evidence that she was born Laura Ortiz. While it is impossible to know precisely the thought process guiding her decisions, Laura's story suggests that neither biology nor relational ties should be seen as an incontestable factor in determining identity in these cases.

Laura's story is also connected to another example of disappeared biological siblings constructing their identities in contrasting ways. Laura's adopted sister, Victoria Donda, did not know she had a biological sister, Eva Daniela, until she was in her twenties. Daniela was raised by the uncle, Adolfo Donda, the man who had betrayed the girls' parents and arranged for their disappearance and executions. The daughters have professed ideologically-opposed beliefs that have affected their relationship. And while Daniela has continued to support Adolfo, Victoria has publicly condemned him. In an autobiography, Victoria Donda reflects:

It's strange in a way, how different Daniela and I turned out, how intangible and almost non-existent the connection between us is: our blood tie. Clara, my younger sister, or the younger sister of Analía will always be much more my sister than Daniela could ever possibly become, or me to her..I can't have pity for the person (Eva) Daniela, has become, nor be too understanding toward her, given what she projects about our birth parents and what differentiates her from me..there would always remain a huge gulf between us in terms of the way we see the person who played the most definitive role in both our lives: Adolfo Donda. To her, I suppose he will always be like her father. To me, he will always be the man behind my parents' murders. (Donda 163)

Similarly, twin brothers Gonzalo and Matías Reggiardo Tolosa also experienced divergent reactions to the discovery of their biological origins. Unlike the cases discussed thus far, the

twins became aware of their biological origins while they were still adolescents, at the age of ten. Born in captivity, they were kidnapped by a police officer, Samuel Miara, and his wife, Beatriz Castillo. Facing a court order to submit to blood tests, Miara and his wife fled to Paraguay and fought extradition to Argentina for four years. As two of the first grandchildren to be identified the process was a tumultuous one: the boys faced a number of psychological tests and were initially misidentified as the offspring of one disappeared couple (and later determined to be the children of another) and were eventually placed in the custody of a biological uncle they had never met. Their case was highly publicized and in 1993 a 15-year old Matías declared: “My identity is now being questioned, but in the bottom of my heart I am sure that I have assumed my identity..they can find my biological family if they want, but they will never be able to change my identity.” (Marx 1993)

But as the boys became adults, they gradually accepted their biological history. In 2008, Matías openly questioned his sense of identity from a psychological perspective in the documentary *Stolen Babies, Stolen Lives*. Speaking about the conditions of his birth in La Cacha, a secret detention center Matías revealed: “I always ask myself what impact those moments of suffering could have had on me as a human being” (Svatek 2008) Eventually, Matías would feel differently about finding out his true genetic origins due to the actions of the Abuelas: “It is invaluable that they found me, and that my identity was recovered.” (Valente 2008)

But despite their identical biological origin and childhood setting with the Miaras, as adults, Matías and Gonzalo expressed their senses of identity in different ways. While Matías continued to call Beatriz Miara “mom” and described her as “a fundamental pillar in my life,”

Gustavo sided more with his biological mother and carried a picture of her in his wallet.
(Valente 2008)

The varied experiences revealed by the suspected and identified “living disappeared” thus can easily be seen through Toril’s Moy’s reading of Beauvoir: “We are continuously making something of what the world continuously makes of us: our subjectivity is always a becoming that neither precedes nor follows from the encounter with the Other.” (Moi 117) The divergent paths taken by these now-adult children illuminate an agency retained through the confrontation of genetic origin; even among those sharing biological or relational ties, the “something” that is made from what the world makes of him or her can be seen to be a unique and personal negotiation. Seen within Moi’s lens, these examples thus dispel the notion that revealing genetic truths through shed-DNA testing equates to a biological-essentializing assertion of identity, and thus supports state intervention in the interest of justice.

Finally, it is worth mentioning that for some scholars, the disputes over DNA testing in Argentina should not be contemplated within the framework of competing rights to identity or privacy, but should be understood in the context of an emerging “right to truth” in international law. Earlier this year, Leora Bilsky wrote about a recent high-profile case involving the forced DNA testing of the adopted children of Ernestina Herrera de Noble, heiress to Argentina’s largest media empire. Comparing the case of the Herrera siblings to the ancient King Oedipus, Bilsky calls the modern story of Argentina’s children a “pathological situation” whereby “politics was reshaped as a biological politics, founded upon the search for genetic and scientific truth, with the expectation that this sort of truth would bring certainty and define a democratic identity for the collective.” (Bilsky 461) Bilsky further argues that “under the banner of scientific truth, important distinctions between legal and political discourse are

erased, and a narrow scientific truth about DNA is taken as a substitute for political and historical investigation, thus undermining the democratic debate.” (Bilsky 446)

However, as Ari Gandsman points out, and I would also argue, in post-dictatorship Argentina, genetic technologies do not reshape or reproduce a cultural order, but attempt to reform a cultural order broken apart by state terror. (Gandsman 2009, 172) Moreover, I would offer the experience of Hector Pietragalla to suggest an alternative to Bilsky’s conception of a “narrow scientific truth about DNA.” For Pietragalla, the discovery of his genetic history did not solidify an fixed understanding so much as begin a process of becoming: “It’s been a year since I discovered my identity. I’m still reconstructing it. It’s something I don’t think will ever end. It’s something eternal.” (Gotkine 2004)

VII. CONCLUSION

The “Dirty War” ended more than 30 years ago, yet within Argentina, perpetrators continue to coexist - alongside their victims – with impunity. From a practical standpoint, the time for justice for the victims is running out, as the voices of the “Abuelas” - the grandmothers of the living disappeared, are aging and soon to be gone. And yet, with the evolution of genetic technologies have come corresponding questions involving identity, privacy, truth, justice and rights. How these matters find legal resolution will hold implications beyond the state.

Regionally, while there are other Latin American countries whose recent histories also include “disappeared” crimes, Argentina has been the most aggressive about investigating them, and many scholars believe that the country could provide a framework for other government leaders. Thus the need for greater clarity regarding the permissibility of a state’s compulsory DNA testing of a victim is both great and complex. But as the legal arguments supporting state

intervention and shed-DNA testing have tended to focused on the “means” (physically invasive versus non-invasive extraction methods) rather than the “ends” (an individual’s confrontation with biological facts), the thorny philosophical questions and tensions are avoided. As such, any resulting intervention can thus be seen to be lacking a firm foundational basis. By considering these tensions within the feminist framework of “becoming”, my aim is to directly address these competing concerns to create an ideological justification for revealing genetic truths.

More broadly however, by extending Moi’s theory of subjectivity beyond the scope of the feminist project I also hope to suggest how this lens could bring a fresh perspective to other situations involving DNA technologies and human rights. As scientific and technological discoveries continue to influence conceptions of self and our relational identities as humans, Moi’s theory can only gain relevance in rights’ discourse. In a similar way, as human scholars attempt to better define identity rights, I hope to have suggested through my analysis, this more fluid understanding could provide both a conceptual and operational basis for understanding the scope of personhood.

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