

Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina

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I. INTRODUCTION

Martha Fineman has said that family law decisions are "inescapably political."¹ Nowhere is this better and more literally illustrated than in Argentina, where, in the aftermath of the dictatorship from 1976 to 1983, courts considered the fate of the kidnapped children of the *disappeared*. The politics of the "Dirty War" conducted by the juntas included disappearing perceived opponents of the military regime and systematically kidnapping their young children, often selling or giving them for adoption to military and police families. When the biological families of these children finally located them, sometimes years later, the relatives attempted to reclaim them. Courts then faced the troubling question of what to do: whether to return the children to the families of origin from which they were stolen, or to leave them with the "parents" who were raising them illegally. In order to understand this dilemma and the disputed solutions proposed "in the best interest of the child," it is necessary to consider the entire context of what happened in Argentina during the nightmare years of the dictatorship.

Between 1976 and 1983, Argentine military and police forces *disappeared* as many as 30,000² of their own people, whom they perceived as "subver-

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1. Martha Albertson Fineman, *Legal Stories, Change, and Incentives—Reinforcing the Law of the Father*, 37 N.Y.L. SCH. L. REV. 227, 229 (1992).

2. In 1984, NUNCA MÁS, the official report of the Commission on the Disappeared (CONADEP) conservatively estimated the *disappearances* at 9000. NUNCA MÁS: THE REPORT OF THE ARGENTINE NA-

sive" to national security. These victims were kidnapped, tortured, and killed; their fate was hidden from their families and the world by burying their bodies in mass graves or throwing them into the sea.³ Many of these *disappeared* had young children when they were abducted or were pregnant women who gave birth to infants while held in captivity.⁴ It is estimated that as many as 450⁵ children of the *desaparecidos*, or *disappeared*, were given or sold to childless military or police families, or otherwise wrongfully adopted by families whose knowledge of their origins ranged from innocence to willful ignorance to guilt. An organization called *Abuelas de Plaza de Mayo* (*Grandmothers of the Plaza de Mayo*) organized a large part of the efforts of the biological families of the children of the *disappeared* to locate and reclaim those children. The *Abuelas* played an integral role in the politics of resistance that helped bring down the military regime in 1983.⁶ Today, some of the now grown children are politically active themselves.⁷ Moreover, when General Jorge Videla, *de facto* head of the military government from 1976 to 1979 and alleged orchestrator of the systematic kidnapping, was arrested in June 1998, the fate of the children of the *disappeared* erupted again into Ar-

TIONAL COMMISSION ON THE DISAPPEARED 5 (1986) (explaining why they believe the true figure is much higher) [hereinafter NUNCA MÁS]. See also ALISON BRYSK, *THE POLITICS OF HUMAN RIGHTS IN ARGENTINA: PROTEST, CHANGE, AND DEMOCRATIZATION* 71–72 (1994) (detailing the controversy over underrepresentation of *disappeared* numbers in NUNCA MÁS). For figures estimating the number of *disappeared* up to 30,000, see RITA ARDITTI, *SEARCHING FOR LIFE: THE GRANDMOTHERS OF THE PLAZA DE MAYO AND THE DISAPPEARED CHILDREN OF ARGENTINA* 44 (1999); MARGUERITE GUZMAN BOUVARD, *REVOLUTIONIZING MOTHERHOOD: THE MOTHERS OF THE PLAZA DE MAYO* 31 (1994) (claiming the number of *disappeared* to be as many as 45,000).

3. Ronald Dworkin, *Introduction to NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED*, xvi–xvii (1986).

4. NUNCA MÁS, *supra* note 2, at 285–318.

5. Lawyers associated with the *Abuelas* estimated that of the 450 children born in captivity or kidnapped about whom information was received, only 10% were located, identified, and had some kind of reintegration. MIRTA BOKSER & MIRTA GUARINO, *DERECHOS DE NIÑOS O LEGITIMACIÓN DE DELITOS* 23 (Ediciones Colihue 1992). Mirta Guarino coordinated the judicial section of the *Abuelas* organization. See MATILDE HERRERA & ERNESTO TENEMBAUM, *IDENTIDAD: DESPOJO Y RESTITUCIÓN* 174 (*Abuelas de Plaza de Mayo* 1990) (identification of Guarino). This book was published by the *Abuelas de Plaza de Mayo*, the primary organization seeking the return of the children of the *disappeared* and is, therefore, based on their own archives and information.

6. See ARDITTI, *supra* note 2, at 35–37; BRYSK, *supra* note 2, at 48–49, 55–56.

7. See JUAN GELMAN & MARA LA MADRID, *NI EL FALCO PERDÓ DE DIOS: HIJOS DE DESAPARECIDOS* (Editorial Planeta Argentina S.A.I.C.1997). The "HIJOS" in the title are the children of the *disappeared*, including both children who were and were never kidnapped. See also Michael S. Serrill, "Dirty War" Crimes; A Resolute Spanish Judge Seeks Justice for the Victims of a Shameful Episode in Argentina's Past, *TIME*, Oct. 21, 1996, at 46. See also Michael McCaughan, "HIJOS" Expose Argentina Tormentors; Protest: Children of Those Who Disappeared During the Dictatorship Don't Let Misdeeds Lie, *ORANGE COUNTY REG.*, Sept. 20, 1998, at A35.

gentine politics.⁸ Other arrests have followed, leaving leading figures of the dictatorship either under house arrest or in prison.⁹

Just as in United States law,¹⁰ Argentine courts subscribe to a “best interest of the child” standard in making custody decisions. While never easy, the application of that yardstick is particularly troublesome when the original placement of a child is faulty or illegal, and years may have elapsed before a court finally orders a remedy. The claims of justice in the individual case or the interest in deterring bad behavior in general may militate in favor of the court ordering a change in custody. Any change in the status quo designed to right the original wrong, however, has potentially serious consequences for a child removed from the psychological family which raised her in order to be returned to the biological family from which she was stolen. At first blush, this might seem like a question of “justice” *versus* the “best interest of the child.” In these cases, however, both parties to the dispute claimed to be concerned with the “best interest of the child.” An overly simplistic view of “politics” *versus* “best interests” does not take into account the nuanced cooperative solutions arrived at between families who were legally entitled to recover children and innocent adoptive families.

Moreover, the very definition of “the best interest of the child” is inevitably a “political” question itself. The *Abuelas* and the biological families, on the one hand, and the pseudo-adoptive, “psychological,” or “raising” families, on the other, had very different ideas about the content of that standard. They disagreed about questions such as: Which is more important for children—stability at all costs or truthful knowledge about their origins? The answers, moreover, may depend on a variety of circumstances, ranging from the age of the child at the time of kidnapping and recovery to the seriousness of the “lies” that were told. Competing social values were at stake in the controversy over the children of the *disappeared*. In that sense, too, these family law matters were indeed inescapably political.

The context of family law disputes shapes substance and procedure. As the Argentinean case represents an extreme of the righting child custody wrongs dilemma, the political context is even more important. Part II of this Article, “Background: ‘The Nightmare Years’ in Argentina,” begins by

8. See Former Dictator Jorge Rafael Videla Detained for Stealing Children During Repression, NOTISUR-LATIN AM. POL. AFF. (U.N.M. Latin Am. Inst., Albuquerque, N.M.) June 12, 1998. General Videla was arrested June 9, 1998. See, e.g., “Gov’t to Leave Human Rights Cases to Court,” INTER PRESS SERVICE Jan. 4, 2000 (new center-left government of de la Rúa distancing itself from position of former president Carlos Menem).

9. See, e.g., Former Argentine Soldiers Arrested For Alleged Child Theft, AGENCE FRANCE PRESSE, Jan. 8, 2000, available at LEXIS, Nexis Library, Agence Fr. Presse File (at least six non-commissioned officers were arrested on charges of kidnapping of children born at the Mar de Plata Naval base, some of whom adopted the children of the murdered detainees themselves).

10. For the nineteenth-century development of the “best interest of the child” standard in the United States, see Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 FEMINIST STUD. 235, 235–60 (1983). See also MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH CENTURY AMERICA* (1985).

explaining some of that context and examining the background of the nightmare years in Argentina. Part III, "Searching for the Children of the *Disappeared*: The *Abuelas de Plaza de Mayo*," takes a closer look at the grandmothers' organization, the *Abuelas de Plaza de Mayo*, which has been so instrumental in shaping the search for the missing children of the *disappeared*. The next Part, "Proving Blood Ties: Paula Logares and Laura Scaccheri," examines the scientific advances and legal changes with respect to the probative value of blood and other genetic testing used to establish the true identity of located children. As the cases proceeded, the *Abuelas* shaped their own theory and practice of the "best interest" of the kidnapped children. Part V of the Article, "Extra-Judicial Versus Judicial Recovery," examines two modes of restoration, extrajudicial and judicial, in a family that lost both of its children and recovered them both, but in strikingly different ways. The next Part, "Worse than Slavery?: The Best Interest of Kidnapped Children," examines this development, through consideration of a dramatic case involving the recovery of a child born in captivity in one of the detention centers maintained by the regime. After the passage of time and after one more well-known restitution, however, it became increasingly difficult to recover any of the remaining children. This is the subject of the next Part of the Article, "Ximena Vicario: The Last Restitution?" After this case, the *Abuelas* increasingly turned to international law, which they had helped shape, in order to right the wrongful retention of the kidnapped children. This is addressed in the next Part, "Developing International Norms to Right Wrongs." Part VIII, "Impunity under Attack: Recent Developments in Proving a Systemic Plan," provides an update on the political background in light of recent events. Finally, the Article concludes with the lessons learned from Argentina: the competing interpretations of the "best interest of the child" and the procedural doctrines used to decide the custody cases reflect the social and political context in Argentina.

II. BACKGROUND: "THE NIGHTMARE YEARS"¹¹ IN ARGENTINA

Argentina's nightmare years began when former President Juan Perón, subject of a cult-like following from both right-wing and left-wing supporters, was recalled from his exile in Spain in June of 1973. As he landed in the airport, a struggle between factions broke out in the massive crowds gathered to greet him, and two hundred young people met their death.¹² Shortly, it became clear that Perón sided with the right, giving tacit support to right-wing paramilitary operations that kidnapped leftists. On their part, some left-wing terrorist groups engaged in assassinations and were assassi-

11. See IRENE BARKI, *POUR CES YEUX-LA: LA FACE CACHÉE DU DRAME ARGENTIN: LES ENFANTS DISPARUS* 13 (Editions La Decouverte 1988).

12. DWORKIN, *supra* note 3, at xii.

nated in turn, beginning an undeclared civil war in the streets of Argentina.¹³ After his death in 1974, Perón was succeeded by his wife, Isabel. When she proved herself unable to control the incipient civil war or runaway inflation, the military (as they had so many times before) took control of the Argentine government. After the military junta, led by General Jorge Videla as de facto President, took over on March 24, 1976, however, the era that followed was unprecedented in its political repression and human rights violations.¹⁴

The newly installed military dictatorship adopted a statute called "The Argentine Process of National Reorganization" or the *Proceso de Reorganización Nacional* (*Proceso*), which abolished constitutional government and sought a comprehensive transformation of Argentine society. It gave itself the power to govern, replaced the Supreme Court and over 400 judges with its own appointees, and took over the universities.¹⁵ The new regime initiated a brutal campaign of repression, justified by the United States' doctrine of "National Security" and by the alleged necessity to fight a "dirty war" against terrorism. But the "dirty war" soon extended far beyond any conceivable terrorist targets to anyone suspected of "subversive" thought—journalists, young *peronistas*, trades unionists, nuns, and anyone else who happened to get in the way.¹⁶

The operations were carried out in secrecy and added new words to the lexicon of international human rights violations.¹⁷ Under the direction of the military and the police, students, workers, and professionals, who were considered too leftist or subversive by the regime, were *disappeared*. They were abducted by anonymous men in plain clothes driving unmarked Ford Falcons. The victims were often never to be heard from again. Many thousands were *disappeared* in this fashion.¹⁸ The secrecy permitted the regime to carry on daily life with surface normality, while operating hundreds of concentration camps or detention centers where many of the abducted were tortured and finally killed. The junta continued to deny reports of the *disappearances* publicly and to the international community. The security forces went to great lengths to conceal the fate of the *disappeared* and to demoralize and silence the population by the secret terror.¹⁹ It was later remarked that

13. The right-wing death squad *Alianza Anti-Comunista Argentina* ("AAA") killed thousands of leftists. BRYSK, *supra* note 2, at 30.

14. *See id.* at 26–27, 30–36.

15. *See id.* at 34. *See also* Tim Dockery, Note, *The Rule of Law Over the Law of Rulers: The Treatment of De Facto Laws in Argentina*, 19 *FORDHAM INT'L L.J.* 1578, 1604 (1996); DWORKIN, *supra* note 3, at xiii; Serrill, *supra* note 7, at 46 (more than 400 judges still in office in 1996 who were appointed by the military dictatorship).

16. DWORKIN, *supra* note 3, at xiii–iv, and NUNCA MÁ S, *supra* note 2, at 442–45.

17. IAN GUEST, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* 31 (1990). (The word *desaparecido*, originally coined in Guatemala in the 1960s, "became synonymous with Argentina").

18. DWORKIN, *supra* note 3, at xiii–xiv.

19. NUNCA MÁ S, *supra* note 2, at 28–29, 33–35, 42–43. *See id.* at 447 for the number of secret detention centers documented. The efforts to conceal and demoralize included burning the corpses and cutting

the "intention [of the regime] was to make all the Argentineans *disappear* as persons and as citizens. That is to say, they meant to disappear our national identity."²⁰

There was another facet of the "dirty war"—kidnapping of the young children of the *disappeared*, and often putting them in the hands of families of the very military or police forces implicated in the torture and death of their parents. Later, an official report issued by the Argentine National Commission on the Disappeared (CONADEP) condemned:

[t]he repressors who took the disappeared children from their homes, or who seized mothers on the point of giving birth . . . [They] were making decisions about people's lives in the same cold-blooded way that booty is distributed in war. Deprived of their identity and taken away from their parents, the disappeared children constitute, and will continue to constitute, a deep blemish on our society.²¹

The term *botín de guerra*, or war booty, came to represent the wrongs inflicted on the kidnapped children.²² Some children were taken by the abductors with their parents or left behind in the sweeps and ended up in orphanages or with neighbors or strangers.²³ Sometimes the families were clearly guilty of complicity, and sometimes they were only guilty of taking in a child without searching for her remaining blood relatives and preserving her identity. Some babies were actually born in captivity, in places like the notorious Navy Mechanics' School detention center (ESMA) or the Campo de Mayo Military Hospital, before their mothers were *disappeared* forever. Witnesses told CONADEP that at the Navy Mechanics School there was a list of childless married couples in the Navy who were seeking a child born in captivity to raise. Whether born in captivity or not, the children of the *disappeared* might be falsely registered as born to the families who took them to raise, or might be adopted based on falsified documents. In some cases, however, the raising families were friends or neighbors who actually preserved the identities of the children.²⁴

After 1977, human rights groups protesting the *disappearances* and the related kidnappings of the children of the *disappeared* played a critical role in

off identifying characteristics. See BOUVARD, *supra* note 2, at 42 (quoting the Mothers of the Plaza de Mayo, Madres, *Boletín*, no. 12, December 1983).

20. BOUVARD, *supra* note 2, at 43 (quoting the Mothers of the Plaza de Mayo, Madres, *Boletín*, no. 12, December 1983). For a summary of events, see Joseph A. Page, *Argentina's dilemma of conscience; punishing the guilty; resolution of human-rights violations by the Argentine military*, 239 *NATION* 369 (Oct. 20, 1984). Alison Brysk says that the repression was most intense from 1976 to 1979 and peaked by 1980 and 1981, although new *disappearances* were reported as late as 1983. BRYSK, *supra* note 2, at 36.

21. NUNCA MÁS, *supra* note 2, at 286.

22. JULIO E. NOSIGLIA, *BOTÍN DE GUERRA*, 8 (1985).

23. NUNCA MÁS, *supra* note 2, at 14.

24. *Id.* at 14, 286–90. For the varieties of circumstances, see BOKSER & GUARINO, *supra* note 5, at 245–72 (Anexo 2, "Situaciones Observadas," a study of 27 cases).

civilian opposition to state terror.²⁵ Among these were the courageous *Madres de Plaza de Mayo* (*Madres* or Mothers). The *Madres* created a domestic political movement and an international human rights institution out of their demands for the return of their missing children *disappeared* by the anonymous forces of the regime. They first began meeting in public at the Plaza de Mayo in front of the Casa Rosa on April 30, 1977 in order to demand information. They continued this tactic for years, forging a political movement in the process that ultimately sought the return of democracy to Argentina.²⁶ In the same year, another organization arose called the *Abuelas de Plazo de Mayo* (the *Abuelas* or Grandmothers), an offshoot of the *Madres*. The *Abuelas* received denunciations,²⁷ documented files, and initiated searches for the children kidnapped during the abductions or born in the secret detention camps, whom they believed had been appropriated as "war booty" by minions of the regime.²⁸ In 1980, the *Abuelas* had their first success finding stolen children when they located seven-year-old Tatiana Britos and her sister Laura, who had been adopted by a military family.²⁹

In 1981, the *Abuelas* took their stories to the international arena, presenting seventy-seven carefully documented cases of missing children, either born in captivity or kidnapped along with their parents.³⁰ The *Abuelas* also sought assistance from the international scientific community. In the absence of their *disappeared* parents, the children's identity could only be established by genetic tests for the biological links between the children and their grandparents or other, more remote family members. The *Abuelas* enlisted the American Association for the Advancement of Science and geneticist, Dr. Mary-Claire King, in their cause. Dr. King's work broke new ground in establishing genetic links between children and kin other than their parents.³¹

25. See BRYSK, *supra* note 2, at 42–45. When the courts and church failed to respond and trade unions collapsed as centers of resistance, the human rights movement emerged as the critical center of resistance.

26. See BOUVARD, *supra* note 2, at 65–89.

27. For a definition of these *denuncias*, see BRYSK, *supra* note 2, at 176.

28. See ARDITTI, *supra* note 2, at 37. See also Rita Arditti & M. Brinton Lykes, *The Disappeared Children of Argentina: The Work of the Grandmothers of Plaza de Mayo*, in *SURVIVING BEYOND FEAR: WOMEN, CHILDREN, AND HUMAN RIGHTS IN LATIN AMERICA* 169 (Marjorie Agosin ed., 1993). The children were called "human spoils of war" by Argentinean newspapers. Isabel Vincent, *Argentina Copes with "Human Spoils of War," Rights Groups Fight to Return Children of "Disappeared" to Natural Families*, S.F. EXAM'R, Mar. 6, 1994, at A9. One hundred forty women were kept alive just long enough to give birth while in captivity. *Id.* See also NUNCA MÁAS, *supra* note 2, at 288–300.

29. GUEST, *supra* note 17, at 212.

30. *Id.* at 304–05, 363–65. The Grandmothers ultimately were disappointed with the meager response from the United Nations.

31. See Simon L. Garfinkel, *Genetic Trails lead to Argentina's missing children*, BOSTON GLOBE, June 12, 1989, at 25 (quoting Christian Orrego, then a member of the American Association for the Advancement of Science's (AAAS) Committee on Scientific Freedom and Responsibility; *Mary-Claire King: Geneticist; Interview*, 15 OMNI 68 (July 1993); Jared M. Diamond, *Abducted orphans identified by grandpaternity testing*, 327 NATURE 552–53 (June 13, 1987). The grandpaternity index used initially was based on the probability of the child sharing alleles with the putative grandparents. However, Drs. Mary-Claire King and Christian Orrego were already at work on DNA techniques such as the one based on mitochondrial DNA which is transmitted only by the mother, is identically shared by siblings, and is therefore useful in cases

By 1980 and 1981, the activities of human rights groups, including the *Madres* and the *Abuelas*, and their growing ability to reach international audiences were serious problems for the military regime. Economic crisis on top of that further eroded support for the government. Already before the military's disastrous decision to undertake a war with Britain over the *Malvinas*/Falkland Islands, there were mass strikes and multiparty calls for a return to constitutional government. The humiliating defeat in that war may have merely accelerated the military's loss of power.³² But even on the way out, the juntas tried to ensure impunity for their abuses. After its efforts at self-justification were resoundingly rejected by mass human rights demonstrations, the military issued an amnesty that purported to include actions by both sides during the "dirty war."³³ The military also systematically destroyed documents and archives pertaining to the "dirty war."³⁴

The military did not succeed in its quest for impunity at this time. Raúl Alfonsín, the candidate of the Radical Civic Union party, won the democratic elections in October, in large part on the strength of his human rights stance. The military's self-amnesty was voided and the new government appointed a Commission on the Disappeared with full powers to investigate and report, although not to prosecute, the late abuses. CONADEP, which was headed by the respected writer Ernesto Sábato, took testimony from thousands of witnesses, visited the secret detention centers, and produced a frightening picture of the *disappearances* in a report called *Nunca Más* ("Never Again!").³⁵ This report was widely publicized, however, the trials that followed were highly controversial.³⁶ In the end, government-sponsored trials of nine military commanders resulted in the December 9, 1985 conviction of five of them. Jorge Videla and Emilio Massera, the commanders of the Army and Navy, received life sentences, while three others received shorter sentences, and four were acquitted. The government lost control of the prosecutions when thousands of cases were filed against these and other officers by individuals, human rights organizations, and others.³⁷

where the mother is dead but putative maternal aunts or uncles survive.

32. See BRYSK, *supra* note 2, at 45–56, 56–58. See also DWORKIN, *supra* note 3, at xv.

33. See DWORKIN, *supra* note 3, at xv.

34. BARKI, *supra* note 11, at 246.

35. See DWORKIN, *supra* note 3, at xvii; DECREE NO. 158, Dec. 13, 1983, [XLIV-A] A.D.L.A. 132 (law voiding the self-amnesty), DECREE NO. 187, Dec. 15, 1983, [LIV-A] 137 (law establishing CONADEP).

36. See BRYSK, *supra* note 2, at 71–72. Over 250,000 copies were sold in Argentina alone to readers from remote farmhouses and the elite alike. There was a televised version viewed by over a million people on the first showing; 2000 copies of the report were distributed to government officials, national and international human rights organizations, and embassies. A march of 70,000 people accompanied the submission of the report.

37. See DWORKIN, *supra* note 3, at xx–xxii. Ronald Dworkin attended the trials as an observer along with a delegation of British and American philosophers and lawyers. *Id.* at xxi–xxii.

For excerpts from the judgment, see Enrique Dahl & Alejandro M. Garro, Note, *Argentina: National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders (Excerpts)*, 26 INT'L LEGAL MATERIALS 317 (Mar. 1987).

For an explanation of the "plaintiff-prosecutor" or *querellante* system of private parties bringing crimi-

Just as the trials of the former military leaders were starting in 1984, a film called *Official Story* opened in Argentina. The acclaimed film, which later won an Academy Award, further focused international attention on the children of the *disappeared*. The film is a fictionalized account of a child of *disappeared* parents who was "adopted" by a father who was complicit in the abuses of the regime, and a mother who only slowly came to realize the tainted origins of her apparently happy family life.³⁸

In real life, the first disputed custody court case in which genetic evidence was critical came to conclusion in 1984.³⁹ The *Abuelas* subsequently pressured Alfonsín's government into establishing a National Genetic Data Bank to store and preserve blood samples that could be used to identify the origins of children even after the deaths of their grandparents.⁴⁰ In 1988, the *Abuelas* extracted a further concession—the government named a four-person commission to determine the whereabouts of the children.⁴¹ Continued frustration with the slow and politicized process of restoring children led to renewed international pressure in 1993. President Menem met with the *Abuelas* and agreed to set up the National Commission for Identity Rights "with broad powers of subpoena and investigation."⁴²

Even after the return of democratic government in 1983, however, the military remained a powerful force in Argentine political life. In the face of continued military unrest and three outright uprisings,⁴³ the government equivocated about enforcing accountability. Two laws, the *Punto Final* of December 1986 and the Law of *Obediencia Debida* (Law of Due Obedience) of 1987, granted significant amnesty to those responsible.⁴⁴ The net result was an end to future charges, recognition of a defense for junior officers who could claim they were "just following orders," and, in 1989 and 1990, pardons from the next President for those already serving time for human rights violations, including Videla and Massera.⁴⁵

This impunity, however, came with a significant exception. Article 5 of Law 23.492, the *Punto Final*, provided that the legislation would have no

nal prosecutions, see Emilio Fermin Mignone, Cynthia L. Estlund, & Samuel Issacharoff, *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118, 123–25 (1984).

38. Ceasar A. Chelala, *Grandmothers of the "Disappeared,"* CHRISTIAN SCI. MONITOR, Oct. 6, 1986, at 37 (*Official Story* won the award for Best Foreign Film).

39. For a discussion of the Paula Logares case, see *infra* at notes 70–117 and accompanying text.

40. Andrew A. Skolnik, *Mitochondrial DNA Studies Help Identify Lost Victims of Human Rights Abuses*, 269 JAMA, Apr. 21, 1993, at 1911. John Barham, *Mothers Who Mourn Their Lost Innocents: Argentina's "Disappeared" Children*, FIN. TIMES, May 9, 1992, at 1, available at LEXIS.

41. *Argentina: Names Commission to Search for Children of Disappeared*, INTER PRESS SERVICE, Dec. 15, 1988, at 1, available at LEXIS.

42. Brook Larmer, *The Lost Generation*, NEWSWEEK, Feb. 8, 1993, at 39.

43. See BRYSK, *supra* note 2, at 98.

44. LAW NO. 23.492, Dec. 24, 1986, [XLVII-A] A.D.L.A. 192 (*Punto Final*); LAW NO. 23.521, June 8, 1987, [XLVII-B] A.D.L.A. 1548 (*Obediencia Debida*).

45. See BRYSK, *supra* note 2, at 80–84. Menem's pardon of General Videla in 1990 was an apparent trade-off with the military, which agreed to let him cut military budgets as one means to curb overspending and hyperinflation. See ARDITTI, *supra* note 2, at 48–49 (on presidential pardons). See also *An Enemy of Argentina's People*, BOSTON GLOBE, June 14, 1998, at F6.

effect on criminal cases involving alteration in civil status or kidnapping and concealment of children. Article 2 of Law 23.521 (Due Obedience) exempted certain crimes from the “just following orders” presumption, otherwise afforded junior officers. This included rape, kidnapping and concealment of children, and substitution or misrepresentation of the children’s identity.⁴⁶ However, little could be done at this time to pursue those responsible for these kinds of crimes; the military apparently destroyed archives containing evidence about the children’s kidnapping, making it extremely difficult to put together a case against the commanders for an organized plan.⁴⁷

III. SEARCHING FOR THE CHILDREN OF THE DISAPPEARED: THE ABUELAS DE PLAZA DE MAYO

The organization of the *Abuelas* and the tactics the *Abuelas* originally employed in an effort to obtain information about their family members grew out of the horrific events that occurred during “the nightmare years” and the difficulty these women had in obtaining information under such circumstances. The Argentine National Commission on the Disappeared (CONADEP) reported later that the typical sequence of events during the “dirty war” was “abduction–disappearance–torture.”⁴⁸ In this fashion thousands of

46. LAW NO. 23.492 (Punto Final), Artículo 5, “La presente ley no extingue las acciones penales en los casos de delitos de sustitución de estado civil y de sustracción y ocultación de menores”; LAW NO. 23.521 (Obediencia Debida), Artículo 2, “La presunción establecida en el artículo anterior no será aplicable respecto de los delitos de violación, sustracción y ocultación de menores o sustitución de su estado civil y apropiación extorsiva de inmuebles.”

In its evaluation of the *Abuelas*’ grant application, the Ford Foundation emphasized the law’s exemption for “misrepresentation of another person’s identity.” See Inter-Office Memorandum to Franklin A. Thomas from Michael Shifter, 575 (July 16, 1987) (PA 855-0381, Ford Foundation Archives) [hereinafter Inter-Office Memorandum]. Mr. Shifter commented that despite the demoralizing impact of the *Punto Final* (Full Stop) and Due Obedience laws, the exception for the missing children and forging of documents about their identity at least gave promise of generating judicial proceedings which might reveal some of what happened and start the healing process. *Id.* at 575–76.

The *Abuelas de Plaza de Mayo* were unhappy about the child kidnappings being singled out as an exception to a general grant of impunity. See ARDITTI, *supra* note 2, at 47.

47. In a telegram dated November 3, 1983, General Bignone ordered all chiefs of police to return records to be burned. See BARKI, *supra* note 11, at 246. The purging may also have included documents about the children of the *disappeared* and what happened to them. *Id.* at 246–47. This instruction also told them to follow normal procedures concerning children of subversives who have *disappeared*, procedures that apparently were promulgated on April 19, 1977 at the outset of the repression. *Id.* at 246–47. When confronted with this suggestive evidence years later, even a judge with a good reputation, such as Andres D’Alessio, president of the federal court in Buenos Aires, nonetheless maintained there was no proof of a systematic plan to kidnap the children. *Id.* at 242–43.

General Martin Balza told the troops at an army day celebration in 1999 that the military currently has no records of *disappeared* persons, if such lists ever existed. *No lists of Argentine Disappeared—Army Chief*, AGENCE FRANCE PRESSE, (May 30, 1999, LEXIS, Nexis Library, Agence France Presse File. In March 2000, Balza’s successor, Gen. Ricardo Brinzoni, ordered the army’s 300 sections to institute a search for any documents that might exist. Marcela Valente, *Army Chief Condemns ‘Baby Stealing,’* INTER PRESS SERVICE, Mar. 13, 2000, LEXIS, Nexis Library, Inter Press Service File.

48. NUNCA MÁS, *supra* note 2, at 9.

mostly young people were *disappeared*. The Commission found it striking that women were included on a large scale, representing over thirty percent of the *disappeared*. Three percent of the total was pregnant women.⁴⁹

When a family that was to be *chupada* (slang for sucked up or swallowed) had young children, certain methods were followed. The children might be left with neighbors until a relative came for them or sent to children's institutions that either held them until they were turned over to relatives or adopted by strangers. The children themselves might be abducted and adopted by a member of the armed services. They might be taken directly to a relative's house, maybe even in the same vehicle used to abduct their parents, or left abandoned wherever the kidnapping of their parents occurred. Finally, some children were taken to secret detention centers where they witnessed the torture of their parents, or were tortured themselves in front of their parents.⁵⁰ Many babies were born in these detention centers, often joining other children of the *disappeared* in *disappearing* themselves.⁵¹

The relatives of these young children found obtaining information from the authorities about the children's whereabouts very difficult and risky. For example, Señora María Isabel Ch. De Mariani, who became the president of the *Abuelas*, knew that her granddaughter Clara Anahi Mariani was taken up at the same time that her daughter-in-law was killed in La Plata in November of 1976. The grandmother waited fruitlessly outside the army headquarters for the three-month-old to be handed over to her, waited at home every night, and even was bold enough to enter a police detention center. Although an inspector told her that the child was alive, he said he would deny ever having said so. Following a suggestion to carry on her search (*búsqueda*) at the Minors' Court, Mariani was directed to another grandmother with a *disappeared* grandchild, Alicia de la Cuandra. Hearing about the early meetings of *Madres*, their first marches in the Plaza de Mayo, and their collective *habeas corpus* petitions for 158 of the *disappeared*, the two grandmothers decided to go to the federal capital in October of 1977.⁵² There the *Madres* themselves were experiencing repression⁵³ and were trying to appeal to international opinion through the visit of the United States' Secretary of State, Cyrus Vance. The incipient *Abuelas* organization decided to present their case through a letter to the Pope. They also visited all the civil courts in the capital and Minors' Courts in the province of Buenos Aires and wrote to courts throughout the rest of the country. In April of 1978, a motion was filed in the Supreme Court of Argentina (*Corte Suprema de la Nación*) to reclaim one of the children of the *disappeared*.⁵⁴ The Supreme Court, however,

49. See *id.* at 285.

50. See *id.* at 14.

51. See *id.* at 288–300.

52. See *id.* at 302. See also HERRERA & TENEMBAUM, *supra* note 5, at 13–14.

53. HERRERA & TENEMBAUM, *supra* note 5, at 17 (For example, *Madres'* founder Era Azucena Villaflor herself *disappeared*).

54. *Id.* at 17–25.

ruled that under the separation of powers of the Argentine system of government, it was without power to decide such a case.⁵⁵

The failure of judges and functionaries to respond to the *Abuelas'* petitions persuaded them to change tactics. They created case files with photos of their missing children and grandchildren, displayed with a history of each case. Copies were sent to the United Nations, the Organization of American States (OAS), and the Vatican. In August 1978, the *Abuelas* sought the attention of the Argentine press, publishing the first collective advertisement soliciting information on their missing grandchildren. The *Abuelas* persuaded the OAS to open a case and traveled to Europe to carry their story to a wider public. Information began to accumulate about clandestine detention camps, kidnappings, and births in captivity in the infamous Navy School of Mechanics and Hospital of the Campo de Mayo.⁵⁶ Amazingly, all this activity continued in the middle of the terror, with *disappearances* intense between 1976 and 1979 and peaking by 1980 and 1981.⁵⁷

In August of 1979, some children were located in Chile by a Brazilian rights organization,⁵⁸ and in March of 1980, the *Abuelas* had their first success: they located two sisters, Tatiana Ruarte Britos and Laura Malena Jotar Britos.⁵⁹ In October 1977 in the province of Buenos Aires, two girls named Tatiana and Laura had *disappeared* with their mother and with Laura's father. Tatiana's father had been *disappeared* the previous year.

55. *Id.* at 25 (Opinion by judges Adolfo Gabrielli, Abelardo Rossi, Pedro Frias, Emilio Daireaux, & Elias Gustavino).

Argentina is a federal republic. It consists of the Federal Capital and 22 provinces. Federal rules are valid in the whole of the country's territory, but there are also local rules for each of the 22 provinces. Although the provinces retain all powers not delegated by the Federal Constitution to the federal government, the system is actually more centralized than this sounds. Humberto Quiroga Lavie, "Argentine," NAT'L REPORTS at A-33. The court system is divided between federal and provincial courts. The federal court system is capped by the Supreme Federal Court of Justice, and each province also has its own judicial system. *Id.*

For the federal system, see also THOMAS A. REYNOLDS & ARTURO FLORES, FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD 1-7 (1999). Of four Latin American nations modeled on a federal system, Argentina and Mexico are the only ones with historically developed judicial and legislative structures that resemble the North American concept of a dual or federal form of government. There is a national Supreme Court in Buenos Aires with lower federal courts in the provinces and the Federal Capital, supported by a range of administrative courts and tribunals. Each of the provinces has a supreme court and courts of the first instance. Decisions of Argentine courts have precedential value, but, as in the civil law tradition, are not binding until a whole series of similar precedents can be isolated and described and only then applied. Although legal codes are so extensive that opinions might seem to have little precedential value, "well-reasoned decisions tend to be followed in later cases." *Id.*

56. HERRERA & TENEMBAUM, *supra* note 5, at 26-33.

57. See BRYSK, *supra* note 2, at 36. *But see* DWORKIN, *supra* note 3, at xv (the *disappearances* largely ceased after 1979).

58. See ARDITTI, *supra* note 2, at 67-69 (interview with Chicha Mariani regarding CLAMOR). The *Abuelas* recounted how the organization CLAMOR opened their files to them. See GRANDMOTHERS OF PLAZA DE MAYO, MISSING CHILDREN WHO DISAPPEARED IN ARGENTINA, BETWEEN 1976 AND 1983 26 (Ricardo Couch trans., 1988) [hereinafter GRANDMOTHERS].

59. HERRERA & TENEMBAUM, *supra* note 5, at 47, 245. See also NOSIGLIA, *supra* note 22, at 171; BARKI, *supra* note 11, at 268-75.

In this case, the raising parents were "innocent" in that they were not involved with the military regime. Inés Sfilgoy and her husband Carlos were a childless couple trying to adopt a newborn baby in the Juvenile Court in San Martín (*Juzgado de Menores de San Martín*). In this same court, after a police officer reported finding the two children, (a three-year-old in good health and a sickly four-month-old baby), a judge had committed them to the keeping of separate children's institutions. When Inés saw the sickly infant in the arms of a court employee, she asked if she could have that child instead of the healthy newborn whose papers she had already received. Inés said she felt that something was wrong and then saw the older girl behind some furniture. Upon learning that the two girls were sisters, the couple asked to take them both, but the court said the older one was meant for another family. Several days later, however, an employee of the court called to offer her to them as well. The adoptive parents apparently grew suspicious about the circumstances and decided not to go back to that court anymore.⁶⁰

Little by little, the adoptive parents learned pieces of the children's story. Tatiana knew her own name and also that the baby (from whom she had been separated for six months) was called Laura. Tatiana had some emotional problems; she did not want to talk about her past, and she seemed afraid of going out. Eventually, the Sfilgoys became suspicious enough to see the judge to ask if these children were from people who had been detained or who no longer existed. Inés recounted later that they were uncomfortable using the word "disappeared" in front of the judge and did not believe that their children's case was related to all of the horrible things that were going on at the time. When the court seemed to deny any connection, they were put at ease.

After time passed and the court determined that they adequately cared for the children, Inés and Carlos Sfilgoy were granted permanent custody. But in 1980 they received notification from the court that informed them that the grandmothers of the children were claiming them, with the help of the *Abuelas de Plaza de Mayo*. The Sfilgoys were required to present the children to the court for these grandmothers to see.⁶¹

Then vice-president of the *Abuelas*, Estela de Carlotto, recalled how one of the missing children's grandmothers, María Laura de Jotar, had come to them for help. From information on the baby's birth certificate, they located neighbors of the *disappeared* family who told them what happened. That led them to the local court of San Martín where the *Abuelas* left copies of the birth certificate, pictures, and a request to search for the missing children. The judge took a personal interest in the case, assigning a social worker to help, and apparently became convinced that she had located the right children. By this time Tatiana was eight years old and Laura was three. Before going into the court for the face-to-face meeting with the grandmothers,

60. HERRERA & TENENBAUM, *supra* note 5, at 245-49.

61. *Id.* at 252-54.

Inés and Carlos consulted a psychologist, who advised them to say something to the older girl about trying to recognize the woman she would see, but Tatiana hung back and did not admit to recognizing her grandmother. Inés commented later that she thought Tatiana did not want to recognize her grandmother because she was afraid of the changes this might bring, but that eventually she was happy to know her family.⁶²

The adoptive parents made a direct plea to the court and to the grandmothers; Carlos proposed that they be able to keep the children, but to include the grandparents in their lives, as a kind of emergency situation until the children's biological parents appeared. This was agreed. The initial visitations, however, evoked trepidation on the part of the Sfiligoys, who feared that the children might even be snatched from them. Eventually, they came to cooperate with the children's blood relatives. Inés explained that it was reassuring to Tatiana to learn that her mother had not abandoned her, but that they were separated for other reasons. The child was relieved when Inés promised to look for the answers together. In the end, the Sfiligoys persuaded the grandmothers that they were better equipped to raise the sisters. They never obtained what is called an *adopción plena*, or full adoption.⁶³ Instead, they were confirmed in an *adopción simple*.⁶⁴ The ability to reconstruct their identity was a positive change for the children. Inés told a story about the younger girl, at age four, joining in a patriotic celebration in school by telling the story of her parents being taken away by uniformed men. While the other children said her parents must have been bad to have been taken in this fashion, she insisted this was not so.

Although the adoptive parents shielded their children as much as they could from media attention and publicity, in the end, they all became an integral part of the *Abuelas* organization. They felt that even without blood ties, they were a family, united by the ties of love. At the same time, they responded to the message of the *Abuelas*, which was about the children's reality. It was only natural for them to be involved. Although they recognized that they were in a different position and might not be accepted by families

62. *Id.* at 255–58. See also ARDITI, *supra* note 2, at 109 (recounting an interview with Tatiana explaining why she did not want to recognize her grandmother at first and suffer another uprooting).

63. HERRERA & TENEMBAUM, *supra* note 5, at 259–62. A full adoption substitutes a new relationship or *filiación* entirely for that of the original family. It extinguishes all the rights of the blood family, with the sole exception of the restriction on incestuous marriage. The adoptee acquires all the rights and obligations of a legitimate child. See LAW NO. 19.134, July 21, 1971, [XXXI-B] A.D.L.A.1408 (Capitulo II).

64. HERRERA & TENEMBAUM, *supra* note 5, at 262. For *adopción simple*, see LAW NO. 19.134, July 21, 1971, [XXXI-B] A.D.L.A. 1408 (Capitulo III). This legal status confers on the adopted child the position of a legitimate child, but does not destroy the rights of the blood relatives except to the extent expressly determined in this law. See also ARDITI, *supra* note 2, at 210–11 n.27: ("Simple' adoption confers rights to the adoptee as a member of the adoptive family but does not extinguish the rights and responsibilities of her or his family of origin. Adoptees are allowed to add the last name of their original family to their names, and the adoption is revocable. 'Full' adoption results in the adoptee no longer being a member of her or his family of origin. It is irrevocable, and the adoptee cannot recover affiliation with her or his family of origin").

seeking to recover their missing children, they came to the conclusion that they had a lot in common with them and that there was not a single correct model for resolution of these tragic cases.⁶⁵

In some ways, the story of the Britos children was uncomplicated. Once they were located, there seems to have been little doubt or dispute about their identity. The blood family of the girls did not have the resources to raise the girls and did not seek to take full responsibility for the children. The Sfilgoys were "innocent" of the terrible crimes of the regime and had never lied to the girls about being adopted. In line with the ideology of the *Abuelas* and the wishes of the biological family, Inés and Carlos recognized how important it was for the sisters psychologically to know the truth about their origins. They were willing to enfold the blood relatives into a larger family, and the blood relatives were willing to let them do this. The parents and children ultimately became an active part of the *Abuelas'* organization. This is not to say that the course of this resolution ran smoothly; the families negotiated over a period of years, with confusion and fear on all sides. The location of the Britos children, however, constituted the first success attained by the *Abuelas*.

IV. PROVING BLOOD TIES: PAULA LOGARES AND LAURA SCACCHERI

The recoveries of two other children located by the *Abuelas*, Paula Logares and Laura Scaccheri, were not so simple. In each case, the parents who were raising the children denied the identity of the child and refused to reach any accommodation with the biological family. As a result, the establishment of identity in court through blood tests and other genetic proofs became a central issue for each case. Little legal precedent existed for reclaiming the children or punishing their kidnappers,⁶⁶ and there was no accepted scientific test for establishing the affiliation between grandchildren and grandparents in the absence of the *disappeared* parents. Although issues such as the nullification of fraudulent adoptions were civil matters to be heard in civil courts,⁶⁷ many of the disputes over blood testing and the critical decisions on custody were heard in the first instance in federal criminal courts, which exercised a kind of auxiliary jurisdiction over minors alleged to be victims.⁶⁸

65. HERRARA & TENEMBAUM, *supra* note 5, at 264–67. For additional information on the Britos case, see ARDITTI, *supra* note 2, at 109 (interviewed child at age 20).

66. HERRARA & TENEMBAUM, *supra* note 5, at 153.

67. See, e.g., "Mónaco de Gallicchio, Darwina Rosa contra Siciliano, Susana. Nulidad de adopción," en la causa Ac. 51.831, CJ [slip op.] (Sept. 20, 1994) [hereinafter Mónaco de Gallicchio]. My gratitude to Dr. Rolando E. Gialdino of the Argentine Supreme Court (*Secretaría de Investigación de Derecho Comparado de la Corte Suprema de Justicia de la Nación*) and to Maria Silvia Galindez for providing me with a copy of this opinion.

68. *But see* BOKSER & GUARINO, *supra* note 5, at 245–72 (appendix describing 27 cases studied by authors and listing all the legal proceedings, criminal and civil, that related to each child).

In 1984, the same year that CONADEP was taking testimony and proclaiming *Nunca Más* ("Never Again!"),⁶⁹ blood tests were decisive for the first time in a case involving a child of *disappeared* parents, Paula Logares. The *Abuelas* recruited an American geneticist to develop an "index of grand-paternity" and also gained the support of the Ford Foundation to establish a genetic data bank at the Durand Hospital in Buenos Aires, where testing could take place and data could be stored for the eventuality of locating more children. In 1987, the Supreme Court of Argentina definitively declared the probative value of blood testing in the Laura Scaccheri case. In the same year, the Argentine National Congress passed a law which gave the Durand data bank official standing, while also dictating the legal effect of blood tests in cases involving the children of the *disappeared*.

The resolution of the question of the legal effect of blood tests, however, did not provide the entire answer to these difficult cases. Although one instance involved raising parents whom the *Abuelas* considered to be "repressors" and the other did not, both Paula and Laura became the subject of custody disputes in which courts had to determine not only identity, but the placement of a somewhat older child after her true identity was confirmed. This made some judges feel like they were being asked to make King Solomon's decision and posed questions about the "best interest of the child" in the strongest possible terms.

Paula Eva Logares was twenty-three months old when she was abducted in Uruguay on May 18, 1978, along with her parents who were in exile for their activities in the peronist youth movement. Her parents were never seen again.⁷⁰ Paula's grandmother Elsa Pavon had searched fruitlessly for the child on her own in Uruguay and in Argentina until she was asked by the *Abuelas* to work with them.⁷¹ During the dictatorship years the child was spotted briefly in 1980. She was in the hands of Ruben Lavallén, a police officer, and his common law wife Raquel Leiro.⁷² Paula's grandparents received photos of the girl sent by suspicious neighbors who overheard the Lavallens arguing one night. The adoptive mother was heard to say: "You killed the parents of this little girl and then you bring her to my house and expect me to care for her."⁷³ But the child soon vanished from sight. Three

69. See *NUNCA MÁS*, *supra* note 2.

70. James F. Smith, *Sought by Argentina; Children of 'Dirty War': Sad Legacy*, L.A. TIMES, Apr. 20, 1988, part I, at 5. See also "Paula Eva Logares Grinson," (sentence by Federal Judge Juan Edgardo Fegoli against Raquel Teresa Leiro Mediondo and Ruben Luis Lavallen for kidnapping of a minor) en la causa Ac. 202/83 (Feb. 19, 1988), reprinted in *LOS NIÑOS DESAPARECIDOS Y LA JUSTICA: ALGUNOS FALLOS Y RESOLUCIONES 43* (María Teresa Pinero ed., ABUELAS DE PLAZA DE MAYO 1988) [hereinafter Paula Eva Logares Grinson]. My gratitude to the *Abuelas de Plaza de Mayo* for sending me a copy of this publication.

71. BARKI, *supra* note 11, at 255.

72. HERRERA & TENEMBAUM, *supra* note 5, at 58-59, 154; James F. Smith, *Sought by Argentina*, *supra* note 70.

73. Vincent J. Schodolski, *Legacy of Argentina's 'Dirty War': Search for a Stolen Child*, CHI. TRIB., Sept. 22, 1985, at 3, zone c.; HERRERA & TENEMBAUM, *supra* note 5, at 58.

years later, when her grandparents located her again, the girl was seven years old and registered in kindergarten as the biological child of the Lavallén couple. She had a false birthdate and looked younger than her years.⁷⁴

Little by little, the grandmothers built a case for the child's true identity. They appealed for political intervention in the middle of 1983 without any success, but on December 13, 1983, three days after the investiture of the democratic government of Raúl Alfonsín, grandmother Elsa, the *Abuelas* and their lawyers went to court. However, it was a full year before she was restored to her biological family. One difficulty was that x-rays seemed to indicate the frame of a six-year-old, as claimed by the Lavallén couple, and not the now seven-year-old, who had been kidnapped years before.⁷⁵ The Lavalléns took the position that they did not have to offer evidence because they had nothing to prove. The "parents" refused to take a blood test.⁷⁶ Judge Fegoli was reluctant to act, but due to the unceasing pressure of the *Abuelas* and its expert teams, he ultimately ordered blood tests of the child.⁷⁷ The genetic test, which was the inaugural effort of the team that had been trained in the new techniques at the Durand Hospital, established that the child inscribed as Paula Luisa Lavallén was in fact born as Paula Eva Logares.⁷⁸

Before the Logares case, the legal precedents about blood tests were at best uncertain.⁷⁹ The legal recognition of the probative value of genetic testing developed side by side with the scientific advancements growing out of the Durand Hospital project. Even before the fall of the dictatorship, the *Abuelas* recognized the need for international aid in establishing scientific proof of the missing children's identities.⁸⁰ Afterwards, members of the American Association for the Advancement of Science sent a forensic team

74. HERRERA & TENEMBAUM, *supra* note 5, at 59–60. See also "Paula Eva Logares Grinspon," (Feb. 19, 1988), *supra* note 70, at 44–46 (girl born Paula Logares and kidnapped in Uruguay was enrolled by the Lavalléns as their own child with a false birth certificate provided by a police doctor).

75. HERRERA & TENEMBAUM, *supra* note 5, at 61–67, 154. A team of pediatricians and other professionals explained that there might be delayed growth in a child subject to such trauma. BARKI, *supra* note 11, at 260.

76. HERRERA & TENEMBAUM, *supra* note 5, at 154. The Lavalléns at first insisted that Paula was their biological child. Schodolski, *supra* note 73, at 3, zone c. The federal court stated that the Lavalléns refused to submit to the blood test, no doubt because they expected an adverse result. See "Paula Eva Logares Grinspon," *supra* note 70, at 58.

77. BARKI, *supra* note 11, at 260–62.

78. The genetic testing established the relationship between the grandmother and Paula with a probability of 99.8%. See "Paula Eva Logares Grinspon," *supra* note 70, at 58.

79. For a history of the treatment of blood tests under European and Argentine law, see Dr. Torres Molina, Appendix to *ABUELAS DE PLAZA DE MAYO, LOS NIÑOS DESPARACIDOS Y LA JUSTICIA: ALGUNOS FALLOS Y RESOLUCIONES* (Maria Teresa Pinero ed., 1988).

80. See GRANDMOTHERS, *supra* note 58, at 10. The *Abuelas* reported that they had traveled to scientific centers all over the world, including the University of Upsala in Sweden, the Hospital of the Piete in Paris, and the Hospital for the Advancement of the Sciences and The Blood Center in the United States. In these last places, they "found what we were seeking: the certainty of being able to prove with 99.95% accuracy that a child belongs to a given family, through very specific blood analyses which are carried out on the grandparents, the siblings and the aunts and uncles of the little victims." *Id.*

to help identify the bodies of the *disappeared* found in mass graves.⁸¹ In June 1984, another team of experts led by Dr. Mary-Claire King of Berkeley flew to Argentina to help with the identification of the children of the *disappeared*.⁸² Dr. King (who was a geneticist from the School of Public Health at Berkeley) and the team of experts met with the *Abuelas* and with Argentine medical professionals to demonstrate a technique that "uses laboratory analysis of genetic markers in human blood to calculate an index of grandpaternity."⁸³ This method compares the probability that a child shares genes with a specified set of grandparents because of a familial relationship with the probability that the genes are similar only by chance. The approach "can prove a child's identity with a probability exceeding 95 percent."⁸⁴

Genetic testing for "inclusion" is procedurally simpler than testing for "exclusion." Testing for *inclusion*, as in Dr. King's index of grandpaternity, only requires blood samples from the children and from those who are claiming to be their biological grandparents. Testing for *exclusion*, however, requires a blood sample from the raising parents to determine whether or not they could be related to the child they claimed as their own. Often faced with criminal charges, the parents in possession generally would not agree to be tested themselves.⁸⁵ In the years following the introduction of the "index of grandpaternity," the *Abuelas* found that Argentine judges often were unfamiliar with the testing methodology and refused to afford it the importance it deserved. In one instance, court forensic experts confused basic concepts of "inclusion" versus "exclusion," as a result artificially lowering the percentage figure for the index of grandpaternity.⁸⁶

The American Ford Foundation became involved with the *Abuelas'* genetic identification project. On March 27, 1984, Ford Foundation representatives met with the then-president and vice-president of the *Abuelas*. The

81. See Eric Stover, *Scientists Aid Search for Argentina's 'Desaparecidos'*, 230 AM. ASSOC. FOR ADVANCEMENT SCI. & POLICY, Oct. 4, 1985, at 57.

82. Inter-Office Memorandum, *supra* note 46, at 574.

83. *Id.* At the request of the *Abuelas*, a symposium organized by the AAAS was held in New York City on May 27, 1984, at which geneticists and hematologists presented their views. The *Abuelas* were aware that advanced centers existed in their own country for dealing with these matters, but "given the magnitude of the spoilation which the armed forces here have carried out among us, we could not carry out these analyses here since we presumed interference would take place. At stake were our grandchildren." GRANDMOTHERS, *supra* note 58, at 11. The *Abuelas* established their own "filial determination committee" consisting of two doctors and a biochemist. Four types of analyses were carried out: blood groups, HLA or histocompatibility, seric proteins and blood cell enzymes. *Id.* at 11.

84. Inter-Office Memorandum, *supra* note 46, at 574.

85. Jorge Berra, et al., *Genetic Identification of Missing Children in Argentina* 3 (PA 855-0381, Ford Foundation Archives). The authors were members of the *Equipo de Filiaci3n Abuelas de Plaza de Mayo*, i.e., the *Abuelas'* filiation team of experts. This 1984 report describes the methodology of genetic markers and the index of grandpaternity developed by the *Abuelas'* team. It noted that in the cases studied so far, none of the parents who had possession of the children and claimed to be their biological parents would agree to be tested themselves. Court orders for testing six children had not been executed yet due to the objections of the claimed parents. In two of the cases, the court order had been upheld by the Court of Appeals, in one instance authorizing the compulsory taking of blood from the minor regardless of opposition from the parents in possession.

86. *Id.* at 5.

Ford Foundation field representative reported that the *Abuelas* had documented 142 cases of *disappeared* children and had already located twenty-five of them.⁸⁷ The Ford Foundation gave an initial grant to the *Abuelas* in 1985 to enable the organization to develop a systematic data bank containing the genetic records of all living family members of kidnapped children⁸⁸ and renewed the grant several times until finally closing it in 1990.⁸⁹

There are two interesting features of this Ford Foundation involvement. First, although there were a number of other human rights organizations that courageously fought the dictatorship and were struggling to reestablish democracy in Argentina, the Ford Foundation seemed to prefer the *Abuelas*. Foundation officials viewed the *Abuelas* as less politicized and more practical and realistic than other groups.⁹⁰ A Ford Foundation field representative noted a significant distinction between the *Abuelas* and other human rights organizations such as the *Madres* group from which they sprang: "The *Abuelas* seem far less politicized and more concerned with finding children than seeking retribution."⁹¹ This was particularly important in an otherwise discouraging climate in which the "democratic" regimes that followed the juntas seemed bent on pardoning them for their crimes of state terror without ever coming to terms with what happened during the nightmare years.⁹² There was more than a little *realpolitik* in this assessment. While the increasing legal impunity blocked human rights' efforts generally, the exemp-

87. Inter-Office Memorandum to Files from A. Gridley Hall 850 (Mar. 27, 1984) (PA 855-0381, Ford Foundation Archives) [hereinafter Inter-Office Hall Memorandum].

88. Inter-Office Memorandum, *supra* note 46, at 574.

89. Inter-Office Memorandum to Raymond Offenheiser from Michael Shifter 639-40 (Sept. 6, 1990) (PA 855-0381, Ford Foundation Archives) [hereinafter Inter-Office Offenheiser Memorandum].

90. *Id.* Mr. Shifter noted that unlike some of the other human rights organizations that were too steeped in the past, the *Abuelas* offered hopes of moving forward under the new circumstances. He also praised the *Abuelas'* approach, which combined human rights advocacy and scientific expertise, thus strengthening their credibility. They had clear objectives and managed to work with two otherwise mutually antagonistic groups: human rights organizations, on the one hand, and the national government, on the other. *Id.*

Even before their final grant, the Ford Foundation evaluators made it clear why they preferred the *Abuelas* to other groups; the *Abuelas* were less "politicized" than, for example, the *Madres de Plaza de Mayo*. See Inter-Office Hall Memorandum, *supra* note 87, at 850. The Ford Foundation felt that the *Madres* and other human rights organizations like CELS had lost some of their potential, but that the *Abuelas* could still play a political role and could get the children back. See Notes of discussion with Juan Mendez of Americas Watch, Washington, D.C. on Argentina and a bit on Peru, 848 (June 30, 1987) (PA 855-0381, Ford Foundation Archives). In a changing political climate, in which some of the human rights groups were demoralized by the pardons and impunity granted by the national government to ex-dictators and the military, different organizations had made different kinds of adjustments; CELS, for example, broadened its mission to include civil rights, while the *Madres*, Mr. Shifter felt, clung to an increasingly unrealistic demand for the return of their *disappeared* children. Inter-Office Memorandum, *supra* note 46, at 574. The *Abuelas*, on the other hand, still had hopes of moving forward with their agenda. *Id.*

91. Inter-Office Hall Memorandum, *supra* note 87, at 850.

92. See Inter-Office Memorandum, *supra* note 46, at 573 (noting the Laws of *Punto Final*, or Full Stop, and Due Obedience, as well as the call for a complete end to trials and prison sentences).

tions in the pardon laws permitted the grandmothers to continue unabated in their pursuit of the missing children.⁹³

Second, in addition to serving its general political goals, the Ford Foundation also showed concern about the impact on individual children of being returned to biological families they may never have known. Foundation officials required and received reassurances from the *Abuelas* that the psychological and emotional interests of the children were being taken into account in their work.⁹⁴ The *Abuelas* supplied this reassurance by assembling a mental health team to provide transitional services and also by displaying flexibility in the resolutions that they demanded. Given the right set of circumstances and adoptive parents who were relatively free of guilt, the *Abuelas* were willing to accept arrangements that left the child with the adoptive family, while restoring her name and identity and the opportunity to interact with her biological family.⁹⁵ The Ford Foundation was convinced that in other circumstances, the children would experience less psychological trauma by being separated from their "adoptive" parents than they would from later learning that those people were directly or indirectly involved in the murder of their biological parents.⁹⁶

In Paula's case the *Abuelas* considered the Lavalléns to be repressors and, therefore, sought her immediate return. However, the lower level federal criminal court left the Lavalléns at liberty and the child with them temporarily.⁹⁷ Paula's grandmother Elsa appealed the lower court's refusal to grant her custody while the criminal case proceeded. She questioned the safety of the girl under the present circumstances, asking whether there was anyone who could grow up healthy without knowing her real history.⁹⁸ The defense raised two arguments in opposition. The Lavelléns first challenged the ve-

93. *See id.* at 575.

94. *See id.* at 575-76.

95. Inter-Office Memorandum to William D. Carmichael from A. Gridley Hall 578-79 (Mar. 7, 1985) (PA 855-0381, Ford Foundation Archives) [hereinafter Inter-Office Carmichael Memorandum].

96. Inter-Office Memorandum, *supra* note 46, at 576.

97. HERRARA & TENEMBAUM, *supra* note 5, at 154. When the judge still hesitated, the Lavelléns took the girl and fled toward Uruguay. BARKI, *supra* note 11, at 262.

98. HERRARA & TENEMBAUM, *supra* note 5, at 154.

Although, as an organization, the *Abuelas* were not without their qualms about the impact of uprooting on the children, *see, e.g., id.* at 95, they generally believed that the impact of restitution would be salutary for the children. Paula's grandmother Elsa said that it was wrong to focus on the trauma of separation by force from the adoptive family, when "the worst damage was when [the children] were seized the first time from their real parents, from the warmth of their mother, when they cried and cried, maybe for days. This must have made a terrible mark on them, they will never forget this, subconsciously at least . . . But the people want to forget this initial damage." Smith, *supra* note 70. The Grandmothers maintained that children who had been subjected to furtive lives may be withdrawn at first, but they opened up subsequently. Officials from the government department in charge of minors claimed that, except for the families who had adopted in good faith, the stolen children suffered from all kinds of physical ailments which cleared up after they were restored to their true families. Dr. Liwski, the child psychiatrist employed to help the Grandmothers' organization, insisted that knowledge of the truth and the natural familial bonds would be enough to produce a healthy adjustment. Schodolski, *supra* note 73, at 3; Edward Schumacher, *Children of the Disappeared: Argentine Doctors Find a Syndrome of Pain*, N.Y. TIMES Feb. 21, 1984, at C1.

racity of the genetic tests and continued to insist that Paula was their child. They also made an argument based on the best interest of the child (*al interés de la niña (favur minoris)*). They cited many cases in which courts granted permanent custody ("*guarda definitiva*") of a child to someone who took care of her after her parents abandoned her. They called these guardians "*padres de crianza*," or raising parents.⁹⁹ According to the lawyers, these cases emphasized the interests of the child rather than the criminal conduct of their protectors.¹⁰⁰ In these decisions, there was an effort to protect the children from disturbance, trauma, or custody changes solely in the interests of third persons, even if these third persons were the blood parents. The Levalléns' lawyers thus argued that the child should remain with the persons who raised her.

Despite the defense's arguments, on December 13, 1984, (a full year after the *Abuelas* first filed), in the first legal decision to restore one of the children of the *disappeared*,¹⁰¹ the appellate court decided to return Paula to her biological family.¹⁰² There are three aspects of Paula's case that are worthy of note, two of which have been discussed already. First, the *Abuelas* in effect had the burden of proof in order to persuade a court to order compulsory blood tests of the children alleged to have been kidnapped.¹⁰³ They had to meet a kind of probable cause standard that the child in question was not the child of its apparent parents but instead was most likely a child of *disappeared* parents and also related to the grandparents who filed the complaint. To a certain extent, the *social* predicate for this probable cause was created by the revelations about the nightmare years through the work of human rights groups such as the *Abuelas* and of CONADEP's 1984 report, *Nunca Más*. The *Abuelas* established the predicate for going into court on an *individual* case through the meticulous accumulation of pictures and reports gathered from informants and from their own observations.¹⁰⁴ Once the judge was persuaded to order the tests, however, the second issue was the question of their legal effect. Paula's case was the first in which genetic analysis was a significant element of proof of the child's identity. However, it was legislation and another child's case that finally established the legal effect of those tests.¹⁰⁵ The third and last question in Paula's case was that of the remedy.

99. HERRERA & TENEMBAUM, *supra* note 5, at 155–56.

100. *Id.* Psychological experts employed by the defense emphasized the trauma of separation from the adoptive parents. See Schodolski, *supra* note 73, at 3 (Dr. Harold Visorsky questioned the long-run fate of the restored children, observing that the children knew the adoptive families as their parents, regardless of what they were doing politically). See also Smith, *supra* note 70. The Paraguayan psychiatrist that had been employed by families fighting extradition to Argentina warned that separation by force would have "traumatic consequences" that would "prejudice the child's whole life."

101. Karen Robert & Rodrigo Guierrez Hermelo, *The Unofficial Story: A Family Reunited*, 27 NACLA REPORT ON THE AMERICAS 13 (1994).

102. HERRERA & TENEMBAUM, *supra* note 5, at 155.

103. See *supra* notes 75–78 and accompanying text.

104. This initial individual burden was later incorporated into law. See *infra* note 139 and accompanying text.

105. See *infra* notes 116–133 and accompanying text.

One of the appellate judges who made the decision to return Paula to her grandmother later gave an interview explaining the debate that went on in the court and the rationale behind the court's decision.¹⁰⁶ He explained that the court was convinced from the beginning that the best interest of the child ("*favur minoris*") had to be foremost. But that did not imply acceptance of the arguments of the defense. The court consulted with psychologists who warned them that concealing the truth from Paula would precipitate a serious crisis when she reached puberty. Thus, their beginning principle was that it was in Paula's best interest to learn the truth.

That still left the judges facing three alternatives. First, they could allow Paula to remain with the Lavalléns, who had not been convicted of anything yet, but insist that the girl be told of her origins. The judges discarded this alternative because they felt it would give the girl double messages and generate too many contradictions for her. A majority of the court seemed to like a second alternative, which was to place Paula with a substitute family until there was a definite verdict on the charges against the Lavalléns. This was attractive in part because they worried about the grandmother's reaction—how balanced she could be in communicating to the girl in view of the dramatic events and losses she had suffered. But the appeals court discarded this seemingly neutral alternative because they feared it would force Paula to experience two uprootings. They doubted, moreover, that a truly neutral family could even be found. Judge D'Allessio himself believed that placing Paula with a substitute family would have been just like King Solomon's decision to cut the baby in half.¹⁰⁷ Instead, they opted for a third alternative, which was to restore Paula to her legitimate family. Judge D'Allessio concluded that time would show the wisdom of this decision.

Even with the *Abuelas'* medical team on hand to help with the transition, the restitution was difficult at first. Interviewed nine years later at age seventeen, Paula remembered trying to run away from her grandmother around a big table in the courthouse on the day that the court ruled on her custody.¹⁰⁸ At the time, the girl accused her grandmother Elsa of lying to her, insisting "Rubén is my father; Raquel is my mother."¹⁰⁹ But the then eight-year-old was also fascinated by the photographs of herself as a baby with her missing parents that Elsa had brought to show her.¹¹⁰ Elsa Pavon, an *Abuela* and

106. HERRERA & TENEMBAUM, *supra* note 5, at 176–81 (interview with Judge Andrés D'Allessio). Judge D'Allessio was a former member of the federal court that judged the military dictatorship and also had been a federal prosecutor. *Id.* at 176. He was president of the federal court in Buenos Aires. BARRI, *supra* note 11, at 242.

107. HERRERA AND TENEMBAUM, *supra* note 5, at 176–79. An expert on adoption who was interviewed on the McNeil-Lehrer show, however, used the King Solomon story in a strikingly different way, saying that the true mother was the one who would give up her child rather than see him suffer. *McNeil-Lehrer News Hour: Los Desaparecidos: The Vigil Continues* (Educational Broadcasting and GWETA, Aug. 14, 1984).

108. Robert & Hermelo, *supra* note 101, at 13.

109. HERRERA & TENEMBAUM, *supra* note 5, at 69.

110. *Id.* at 69–71, 75. Paula clearly was shocked when she saw the picture. *Id.* at 179. A court social

Paula's maternal grandmother, subsequently reported that the child "cried for two or three hours after the court ruling" forcibly returning her to her family of origin. But Pavon said that the child "never cried again over those people. When Paula refers to them now, it is as Rubén and Raquel, not as 'mama' and 'papa' as at first. She is a very happy, talkative, studious, and energetic child. She is an absolutely normal 11-year old."¹¹¹

In an interview Judge D'Alessio noted that Paula was sent home with her grandmother on a Thursday and the judges visited her the following Monday, finding her remarkably well integrated with her family, although reluctant to be touched by any adult.¹¹² Fifteen days later the psychologist reported that she had finally relaxed. A full year later, the court decided that it would be a good idea to arrange a meeting between Paula and the Lavalléns. Their reasoning was that she needed time to assimilate her true identity, but that there were still missing pieces if the years she spent being raised by the Lavalléns were simply ignored. The court took this course apparently even in the face of contrary advice by psychologists and opposition from the *Abuelas*. Paula, however, was not interested in talking to the Lavalléns.

Paula became incorporated into a family quite different than the one she had left behind; instead of the six years she spent with the Lavalléns in a wealthy neighborhood, attending private Catholic school and imbibing conservative values, she was reintegrated into a lower middle-class Jewish family of left-leaning sympathies. Although not that talkative when she was interviewed in 1994 at age seventeen, Paula was emphatic that she never wanted to go back to her pseudo-adoptive parents.¹¹³ The struggle to regain Paula's identity continued even after her restitution to her grandparental home; although the court recognized that her identity papers were forgeries in the 1984 proceeding, it refused to issue new ones.¹¹⁴ For the next four years she remained Paula Lavallén until the family finally obtained new identity documents.¹¹⁵

Paula's case against the "repressor" Lavallén family was the first instance where the new genetic tests established a child's identity in court. The case of Laura Ernestina Scaccheri was the *only* instance in which the issue of the legal effect of blood tests reached the Argentine Supreme Court.¹¹⁶ It estab-

worker gave her a small mirror, and the girl could not stop looking at it and the picture. *Id.*

111. Smith, *supra* note 70.

112. HERRARA & TENEMBAUM, *supra* note 5, at 180. For another account of the restitution of Paula based on interviews, see BARKI, *supra* note 11, at 262–68. Barki's account, based on an interview with the grandmother, states that when they returned from court to the family's house, Paula went without hesitation to the room which she had occupied as a toddler, as if she remembered it. Even so, the girl was unwilling to call Elsa "Grandmother" at first. *Id.* at 264.

113. Robert & Hermelo, *supra* note 101, at 13.

114. Kathy King Wouk, *Argentina's Missing Kids; Grandmothers Must Search*, RECORD, Mar. 22, 1988, at B11. Pavon, however, refused to comply with the order to call Paula by the old name and was cited for contempt. *Id.*

115. HERRARA & TENEMBAUM, *supra* note 5, at 77–78.

116. *Scaccheri de López, María Cristina sl su denuncia*, CSJN, Provincia de Buenos Aires (Oct. 29, 1987) in LOS NIÑOS DESAPARECIDOS Y LA JUSTICIA: ALGUNOS FALLOS Y RESOLUCIONES 72 (María Teresa

lished at the highest level the credibility of blood tests.¹¹⁷ Laura's case also made an important jurisdictional ruling, confirming the authority of the federal criminal courts over the custodial placement of minor children who were victims of federal crimes, such as falsification of official birth records.

Laura's parents were kidnapped in July 1977, and their three-month old baby was left behind.¹¹⁸ The Cacaces, neighbors of the family, took the baby in and raised her for eight years until the *Abuelas* located her in 1985.¹¹⁹ The Cacaces were not minions of the dictatorship like the Lavalléns, but their hands were not entirely clean either; instead of attempting to adopt the infant, they registered her as their own. Laura's paternal aunt brought a denunciation in a federal criminal court. The court verified the child's identity with a blood test and, without hearing from the parties or considering the wishes of the girl, awarded immediate custody to the aunt on March 13, 1986 with no visitation rights to the Cacaces. The Cacaces, however, appealed, and the next level ruled that there was no jurisdiction in the federal criminal court to decide custody of this child.¹²⁰ Rather, the aunt must go to civil court, and the girl was to be returned to the Cacaces.¹²¹

Federal courts in Argentina have exclusive jurisdiction over crimes that include a federal issue.¹²² Like many other *disappeared* children, Laura's case involved charges not only of kidnapping, but of falsification of public documents, a typical federal crime creating jurisdiction.¹²³

Pinero ed., *Abuelas De Plaza De Mayo* 1988) [hereinafter *Scaccheri de López*]. The Argentine Supreme Court acts as an extraordinary Court of Appeals to decide on the constitutionality of all legal rules applied in a final judgment in any provincial or federal court; it rules on jurisdictional conflicts of inferior courts; it reviews its own rulings and explains them; and it acts on direct appeals following denial of leave to appeal. Lavie, *supra* note 55, at A-36.

117. See "Paula Eva Logares Grinson," *supra* note 70, at 61-62 (explaining that the courts of Argentina have accepted the scientific proofs of blood tests since the Scaccheri case in 1987).

118. HERRERA & TENEMBAUM, *supra* note 5, at 162. *Scaccheri de López*, *supra* note 116, at 78.

119. HERRERA & TENEMBAUM, *supra* note 5, at 162.

120. *Scaccheri de López*, *supra* note 116, at 72-73. Laura was registered as Laura Daniela Cacace. *Id.*

121. HERRERA & TENEMBAUM, *supra* note 5, at 162-63.

122. MIGUEL A. EKMEKDJIAN, *MANUAL DE LA CONSTITUCION ARGENTINA* 386, 395 (Ed Depalma 1991) (Manual of Argentina's Constitution). There are three different types of law in Argentina: The first is Federal law, which is enacted by the federal Congress and is applicable throughout the nation. Federal courts, distributed in federal circuits very similar to the system in the United States, have exclusive jurisdiction to enforce these laws. The second is provincial (like a state) law, which is enacted by the provincial Congress. The provincial courts have exclusive jurisdiction in this domain. The third category of law, however, is "Ordinary Law," consisting of the substantive legal codes such as Civil, Criminal, Commercial, Mining and Labor. These laws were enacted by the federal congress and are applicable throughout the country in provincial courts. If an issue of "Ordinary Law" is connected with a federal question, however, then it falls under the exclusive jurisdiction of the federal courts. For example, a simple murder may be within the jurisdiction of a state court, but if the victim is a senator, then it becomes a federal crime, subject to the exclusive jurisdiction of a federal criminal court. The federal court will apply "Ordinary Law" where appropriate in that case. My thanks to my research assistant (and former federal criminal prosecutor in Argentina), Arturo Fernandez, for his clear explanation of these jurisdictional issues. See also Lavie, *supra* note 55, at A-35.

123. See, e.g., *Scaccheri de López*, *supra* note 116, at 73.

For the criminal framework for these cases, see COD. PEN., Article 146, "Sustracción de un menor de diez años," (kidnapping of a child under 10); Article 138, "Supresión y suposición del estado civil," (falsifying someone's civil status or identity); Article 139, "Supresión y suposición del estado civil agravado,"

Once the federal court takes on the case, however, it also may incur obligations that seem quite foreign to those who are familiar with the procedures for child welfare under United States' law. Law 10.903 specifies under which circumstances a court must act in lieu of parents to exercise its *patronato*, i.e., to secure the well-being of a minor.¹²⁴ Where a federal crime is involved, this provision of the "Ordinary Law" is the source of the federal criminal court's power to make a custody disposition.¹²⁵ Under the articles of Law 10.903, a court with a case that involves a minor under 18 (either as author or victim of a crime) who has been materially or morally abandoned or is in moral danger, may make a temporary custody disposition to a guardian, with or without supervision by the court. Furthermore, upon reaching a final sentence, the court may make a permanent decision.¹²⁶ The question in Laura's case was whether or not the moral danger that triggers this responsibility includes the risk of mental or psychological injury.¹²⁷

The *Abuelas'* legal team helped the aunt to appeal the jurisdictional decision. They sought a *Recurso Extraordinario*, or extraordinary appeal from the Supreme Court of Argentina. While the Court was still considering its decision, a draft resolution by one of the judges, which he circulated as an internal memo, was leaked.¹²⁸ The draft by the respected family law expert and Radical Party sympathizer, Judge Belluscio,¹²⁹ acknowledged that the blood tests proved that the Cacaces were not Laura's parents and that she was a member of the Scaccheri family. But the judge saw the issue as a question of whether it is best for Laura to remain with her supposed parents with whom she had lived her entire life or to be placed with blood relatives? He opted for the first solution for several reasons. There was no conflict in this case between the Cacaces and Laura's legitimate parents, who were dead. Furthermore, real parental ties are not so much procreational as founded on how parents treat their children. Laura had no memory of the parents she lost at three months. For all intents and purposes, the Cacaces were her parents. Finally, on the jurisdictional point, Judge Belluscio could not see how the child could be considered either abandoned or in moral danger, as was re-

(aggravated falsification of identity); Article 293, "Falsedad ideológica de instrumento público," (falsifying public documents).

124. LAW NO. 10.903, Oct. 27, 1919, [XXVII] B.O. 781.

In the United States, a family or juvenile court appeals to a similar doctrine of *parens patriae*. For the nineteenth-century development of what he calls "judicial patriarchy" (i.e., the court's authority replacing the father's authority) through the doctrine of *parens patriae* and the device of habeas corpus, see Grossberg, *supra* note 10.

125. Nullification of the fraudulent adoption, on the other hand, must be accomplished through the civil courts. See, e.g., "Mónaco de Gallicchio," *supra* note 67.

126. LAW NO. 10.903, Oct. 27, 1919, [XXVII] B.O. 781 (articles 14 & 15). Article 21 provides that material or moral abandonment or moral danger includes acts prejudicial to the physical or moral health of the minor. *Id.*

127. See, *Scaccheri de López*, *supra* note 116, at 76-77.

128. HERRARA & TENEMBAUM, *supra* note 5, at 162-63.

129. Judge Belluscio was a renowned expert in family law and author of a leading treatise, as well as a figure in the Radical Party, i.e., Alfonsín's party. He could not be characterized as a rightist.

quired for the federal criminal court to have jurisdiction. He simply did not see that the single fact of having her origin hidden from her constituted such a moral danger as to trigger the provisions of the law. Indeed, he accused the lower court judge who initially restored Laura to her aunt of subjecting the child to a brain-washing worthy of the Soviet psychiatric establishment.¹³⁰

It is worth recalling what was happening politically in 1987 when the leak of this memo caused such a storm. The elected civilian government of Raúl Alfonsín had shown a strong desire to make its peace with still-threatening military forces. Two significant amnesty laws had already been passed, the *Punto Final* (Full Stop) of 1986 and the Law of Due Obedience of 1987. The watchwords of the day were putting an end to the chapter of the dirty war and moving on from there. Like many other human rights groups who were struggling to defend a shaky democracy, however, the *Abuelas* did not accept the notion of impunity.

When the Supreme Court rendered its decision on October 29, 1987, Judge Belluscio was out of the country and did not participate. The result was quite different than he proposed. Four judges of the Argentine Supreme Court agreed that the federal criminal court did indeed have jurisdiction to determine the custody of Laura.¹³¹ The controlling statute, Law 10,903, required evidence of abandonment or moral risk, and the statute applied either in state court or where, as here, a federal crime vested jurisdiction in the federal court. The President of the Court stated that two crimes were committed: suppression of civil status (an ordinary crime) and falsification of public records (a federal crime). The appellate briefs had argued that the alleged altruistic intent of the Cacace family had not been proven and that the interests of all of society were affected by the problem of the missing children. Judges Fayt and Bacque concluded that there was irreparable damage to the psychological health of the child involved. While affirming the right of a federal court to provide for the custody of a child who had been the victim of a crime, they also recognized the risks to her psychological health. The judicial function to protect the child's health, they opined, cannot be separated from the historical and social transformations of the country or its living reality. The problems of the family and the child must be taken in their cultural context. While vacating the appellate court's ruling on jurisdiction, these judges were mindful of the special care owed to children by judges and society to ensure that they would always be subjects and not just objects of the rights of third parties.¹³²

The fourth judge, Doctor Petracchi, wrote eloquently about the harm from fraudulent suppression of a legal relationship and concealment of the actual situation. Social tolerance for this practice, he wrote, derives from a

130. *Id.* HERRERA & TENENBAUM, *supra* note 5, at 163–64

131. *Id.* at 166.

132. *Scaccheri de López*, *supra* note 116, at 77.

conception of children as property. Of all the judges, Doctor Petracchi insisted most rigorously on coming to terms with the nightmare years. He also was the least sympathetic to the Cacaces, mentioning that they had not made the transition any easier on Laura. Although psychologists advised a gradual introduction of the truth to avoid causing the girl any harm, the Cacaces abruptly dumped the truth of her identity on her. As a result, the girl was confused and anxious. The initial kidnapping of Laura's biological parents and the lying by her raising parents contributed to the trauma. Doctor Petracchi argued that with the blood tests, there was no doubt about Laura's identity. Consequently, she should be restored to her biological relations unless it was otherwise shown that for the good of the child she should continue to live with the Cacaces. However, the considerations he previously listed persuaded him that Laura's psychological health and social and cultural development would be served best by the stable reconstruction of her identity and relationships with her biological family (not excluding regular contacts with the Cacace family). It was thus the ruling of the Court that Laura's identity was declared and that she was placed in the permanent custody of her biological family.¹³³

Paula's and Laura's cases established powerful, albeit nonbinding,¹³⁴ legal precedent in disputes involving children of the *disappeared*. Meanwhile, the Ford Foundation continued its support for the scientific work on which proof of identity rested. The last Ford Foundation grant to the *Abuelas* was designed to help them put the final touches on a national genetic data bank that had been officially sanctioned by the Argentine Congress.¹³⁵ In a race against time, as the grandmothers and their grandchildren aged, the Data Bank sought to complete testing at Durand Hospital in Buenos Aires of all the missing children's relatives, including those living in the provinces of Argentina or abroad.¹³⁶

In 1987, after intense lobbying by the *Abuelas*, the Argentine Congress passed a law,¹³⁷ which created a National Genetic Data Bank (BNDG) based on the *Abuelas'* project at Durand Hospital.¹³⁸ Its purpose was to create an archive of genetic data and to produce reports and technical opinions by experts, as required by the judiciary. Families of *disappeared* children or those thought to be born in captivity could resort to the BNDG to register their own genetic data. In a civil action to establish filiation, a court could order genetic tests on behalf of someone with a reasonable claim (*"la pretension . . .*

133. *Id.* at 81–85.

134. *See supra*, note 55.

135. Inter-Office Offenhesier Memorandum, *supra* note 89, at 639.

136. Inter-Office Memorandum, *supra* note 46, at 575. *See also* ARDITTI, *supra* note 2, at 72–74 (on the National Genetic Data Bank).

137. LAW NO. 23.511, June 1, 1987, [XLVII-B] A.D.L.A. 1529.

138. *See* ARDITTI, *supra* note 2, at 72.

verosimil o razonable"). Refusal to take the tests could be counted as evidence against the person who resisted.¹³⁹

With the National Data Bank legislation, establishment of the ties of blood and the true identity of the children of the *disappeared* through scientific analysis became an institutionalized part of the Argentine legal system. Correspondingly, it appeared that "truth," the accurate determination of a disputed child's real identity, was accepted as a guiding principle in these cases.¹⁴⁰ This *verdad* or truth was not conceptualized as competing with and in tension to the best interest of the child. Rather, although the course of acceptance did not run smoothly,¹⁴¹ judges and the national Congress seemingly embraced the *Abuelas'* argument that knowing the reality of one's identity was in itself *in* the best interest of the child. On the other hand, it was also clear that the actual custodial arrangement might vary, depending on individual circumstances.¹⁴²

V. EXTRA-JUDICIAL VERSUS JUDICIAL RECOVERY: THE GATICA CHILDREN

Ana Maria and Oscar Gatica lost both of their small children at different times.¹⁴³ They also recovered both of their children, but in strikingly different ways. The contrast between voluntary, or extra-judicial, recovery from a relatively innocent adoptive mother and involuntary, or judicial, restitution from a police commissioner implicated in the crimes of the regime, illustrates the political character of the competing versions of the "best interest of the child."

The Gatica's oldest child, Maria Eugenia was *disappeared* along with the friends of her parents who were caring for her while her parents took the baby, Felipe, for a doctor's visit. A military officer later took Felipe and his mother, but returned Felipe to a neighbor. Both parents were exiled to Brazil shortly thereafter, where they survived the "nightmare years," but without their children. The parents searched for their children for many years

139. LAW NO. 23.511, June 1, 1987, [XLVII-B] A.D.L.A. 1529. Other materials such as photos, fingerprints, and personal documents could also be submitted, and four kinds of tests were to be performed on the blood samples at the Durand Hospital.

140. *But see* BOKSER & GUARINO, *supra* note 5, at 90 (In nine cases the authors studied in which the children were fraudulently registered as the pretend parents' own children, courts compelled blood tests only in two; in the worst scenario of an *adopción plena*, the pretend parents argued that the relationship was legal and refused to submit the child for testing).

141. *See, e.g.*, ARDITTI, *supra* note 2, at 73 (stating that NGDB work was in jeopardy).

142. BOKSER & GUARINO, *supra* note 5, at 247-72 (twenty-seven cases studied, with forms of reintegration, from return to biological family or parents (with or without contact with raising parents) to continuation with raising parents under various legal statuses and sometimes with significant contact with biological family).

143. BARKI, *supra* note 11, at 269. Irène Barki is a French journalist and photojournalist whose first book was based on original (unedited) documents and interviews (testimony) of survivors, families of victims, found children, and even some of the torturers. *Id.* at backpage. For the Gatica story, she interviewed Ana Maria and Oscar Gatica (the parents who survived), the baby Felipe's adoptive mother, Judge Borrás, and even Rodolfo Silva in prison.

and recovered them both, but in very different manners. After seven years, they recovered Felipe extrajudicially by agreement with a woman who was not a repressor but who had registered the baby as if he were her own child. However, they had to go to court to battle for their daughter, Maria Eugenia, who was found in the hands of a police commissioner, Rodolfo Silva, who was accused of being responsible for creating a corps of women to take temporary charge of the kidnapped children.¹⁴⁴

Felipe was difficult to find because the neighbors that received Felipe from the military officer did not keep him, and the neighbors were themselves hard to locate. Even when the neighbors were located, they kept silent for a long time and were only willing to reveal that Felipe was in good hands. Finally, the neighbor woman agreed to reveal the identity of this person, but only to an intermediary chosen by the *Abuelas de Plaza de Mayo*. The *Abuelas'* president then approached Felipe's adoptive mother Nelly, who later told a reporter how she reacted at first; she claimed that it had never occurred to her that the child's parents might be alive and well. She reacted with tears, a nervous attack, and hysterics, but, she says, never with hostility to the child's parents. She explained that she obtained Felipe through a nursing sister at an infirmary. Since Nelly and her husband already had one adopted child (and previously had temporary guardianship of another child), the nurse thought of them, and they accepted. They did not attempt to adopt Felipe, however, and instead registered him as their own son. When asked why a knowledgeable notary public would do a thing like that, Nelly declined to answer the interviewer. In her own defense, she did say that she should not be taxed with complicity with the regime just because she did not have the courage to seek out the *Abuelas* herself. She asserted that from the age of five, she had told the Felipe that she was not his biological mother, but that she loved him like her own son. Although professing sympathy for her loss of a child, Felipe's parents noted that although Nelly was not guilty of stealing the boy, she was guilty of remaining silent.¹⁴⁵

Felipe was reintegrated into the Gatica family, while not losing his ties with Nelly.¹⁴⁶ The interviews with both families reveal that it was not an easy transition and that Felipe's mother still resented Nelly's intrusion into her family and needed psychological help to deal with it. Ana Maria told the interviewer that despite all the love Nelly gave her son, she still was the person who appropriated him and dispossessed him of his identity. At the same

144. BARKI, *supra* note 11, at 271–76.

145. *Id.* at 269–73.

146. *Id.* at 269–73. The extrajudicial solution reached in Felipe's case is not unlike some of the mediated agreements reached in some Texas courts. Although parental rights are legally terminated, and new parents adopt the child through the process of mediated termination, it is hoped that an agreement to continue some relationship between child and the original parents may be maintained. See Children's Permanency Cooperative, "Fast Forward to Permanency," [The Mediated Permanency Process for New and Long-Standing TDPRS Cases in Harris County, Texas, developed by the Children's Permanency cooperative Work Group in Association with The Honorable Mary Craft, Judge, 314th District Family Court of Harris County, Texas] (November 1997) (on file with author).

time, having lost her children, she seemed to identify with Nelly's loss too.¹⁴⁷ She felt that after all of her children took a vacation with Nelly, relations between her and Nelly became more harmonious to the children's benefit.¹⁴⁸

The restitution of the older child, Maria Eugenia, required judicial action against a "father" found to be criminally responsible for a number of serious offenses. Rodolfo Oscar Silva was a police commissioner who played an active role in the dirty war's campaign against "subversives;" he was said to be responsible for a "female brigade" which temporarily took charge of children in La Plata after their parents were kidnapped. Even in prison, however, he was unrepentant, denying the charges of which he was convicted and the reality of the kidnappings.¹⁴⁹

Silva and his wife already had a little boy when he took the three-year old Maria Eugenia and rebaptized her as Elisabeth Silvina. His son died, however, and he poured all of his affection onto the girl, continuing to see her virtually weekly even after he separated from his wife, who moved 300 kilometers away. The *Abuelas* suspected that this girl was the Gatica child and secretly obtained photos of the now nine-year-old for the family to scrutinize. Even when old photos seemed convincing, the *Abuelas* explained that although they might create a strong presumption, blood tests were necessary for proof.¹⁵⁰

Fortunately, the case was randomly assigned to Judge Borrás, a criminal judge described by interviewer Irène Barki as an old humanist influenced by Anatole France.¹⁵¹ Even during the nightmare years, this judge had procured a conviction against a police officer who beat three people in a bar. Judge Borrás lost no time in ordering Silva, his wife, and the child to submit to blood tests at the Durand Hospital, but Silva refused to comply. A further order also was to no avail. Finally, the court had to resort to force, and in September 1985 Judge Borrás referred the matter to the Juvenile Court in San Nicolas. The Durand Hospital genetic team waited in one part of the court building while court employees went to look for the girl at school, but she was not there. She was located in La Plata with her father and was brought into the court for testing, confused and upset that she was to have blood drawn though she was not sick and her "mother" was not there. The blood sample, when analyzed, proved that she was Maria Eugenia Gatica.¹⁵²

147. BARKI, *supra* note 11, at 273.

148. *Id.* There were siblings in both the Gaticas' and in Nelly's households, so Felipe stood to lose and to gain more than just parents.

149. *Id.* at 276-77, 295-96.

150. *Id.* at 277-81.

151. *Id.* at 282. Judge Borrás presided over the court of the first instance, or lower level court, of La Plata. Juez Penal del Departamento de La Plata, "En la causa contra Rodolfo Oscar Silva," (Feb. 25, 1986) in *LOS NIÑOS DESAPARECIDOS Y LA JUSTICIA: ALGUNOS FALLOS Y RESOLUCIONES*, *supra* note 70, at 10.

152. BARKI, *supra* note 11, at 283-86.

The nightmare was not over, as Silva fled with the child, telling her "lies" about the situation. Finally, he turned himself in, along with his wife and the girl. On September 18, 1985, the court proceeded with the reintegration of Maria Eugenia into the Gatica family. The judge himself prepared the way, meeting alone with the girl even before the child psychologist of the *Abuelas'* expert team, Dr. Norberto Liwski, saw her. Following these meetings was the reunion. Maria's parents entered the room, the mother singing a favorite childhood song to her. At this, the girl leapt into her mother's arms. After the meeting the family retreated from public view, reacquainting themselves with each other with the assistance of the child psychologist. They later told their interviewer that there were no problems reintegrating Maria Eugenia into an extended family with siblings and with cousins who were the same age as the girl.¹⁵³

On February 25, 1986, Silva was convicted of the crimes of kidnapping minors, aggravated suppression of civil status, and forgery of public documents. He was sentenced initially to a four-year prison term. Although the kidnapping charge was not upheld on appeal, the prison sentence remained.¹⁵⁴ There also was a civil damage award for "moral damages," which in civil law countries includes any moral, physical, spiritual, or emotional distress, pain, and suffering that a person may experience as a result of a wrong inflicted by another.¹⁵⁵ Silva's defense had been twofold; he still questioned the validity of the blood tests and the identity of Maria Eugenia. At the same time, although he refused to say from whom he received the child, Silva portrayed himself as the rescuer of an abandoned and endangered child. He argued that he raised her and educated her as his own child for eight years.¹⁵⁶ Judge Borrás accepted neither argument.

The Judge first ruled that the tests which compared the child's blood to that of the Gatica couple, her biological parents,¹⁵⁷ were valid despite defense arguments based on a 1982 opinion by his superior court, the Supreme Court of Buenos Aires.¹⁵⁸ Judge Borrás found blood testing to be a *sui generis*

153. *Id.* at 286–90.

154. "En la causa seguida contra Rodolfo Oscar Silva," Cámara de Apelaciones en lo Criminal y Correccional de la Plata (July 8, 1987) in *LOS NIÑOS DESAPARECIDOS Y LA JUSTICA: ALGUNOS FALLOS Y RESOLUCIONES*, *supra* note 70, at 40.

155. *Id.* at 21. The kidnapping conviction was reversed on appeal, but the other two (suppression of civil status of a minor and falsification of public documents) were upheld. The sentence was reduced to three years. The court nullified the false birth certificate, ordered moral damages reparations of 6,000, *seis mil Australes* paid with interest and indexing, and confirmed restitution of the child to her parents. *Id.* at 40–41.

For the definition of moral damages, see HENRY SAINT DAHL, *DAHL'S LAW DICTIONARY/ DICCIONARIO JURIDICO DAHL* 111 (2d ed. 1996).

156. "En la causa seguida contra Rodolfo Oscar Silva," Cámara de Apelaciones en lo Criminal y Correccional de la Plata (July 8, 1987) in *LOS NIÑOS DESAPARECIDOS Y LA JUSTICA: ALGUNOS FALLOS Y RESOLUCIONES*, *supra* note 70, at 13–18.

157. *Id.* at 17.

158. *Id.* at 15–16: "La extracción de sangre es en sí misma un secuestro." (The extraction of blood is like a seizure.) The full passage, as quoted by Dr. Torres Molina in his article on compulsory blood testing, reads as follows: "La extracción de sangre a los efectos de practicar un dosaje, cuyo resultado ha de ser

measure of proof, not requiring certain procedural formalities, and that it must not be treated as a seizure. He further found that this valid scientific proof established the identity of Maria Eugenia Gatica.¹⁵⁹

The question of the legality of compulsory blood testing was not resolved until rulings by the Argentine Supreme Court in December of 1995 and in 1996. With respect to the minors, the Court ruled that even in a criminal case against "parents" who were charged with falsely registering children as their own, compulsory blood testing of the children worked no violation of the constitutional guarantee against self-incrimination of Article 18 or of other basic liberties, such as the right to privacy. The Court distinguished the production of material evidence from the kind of compelled communication prohibited by the Constitution. It did not see the extraction of a few centimeters of blood by ordinary scientific methods as a violation of basic liberties, particularly in light of the superior liberty interests of another, the defense of society, and the prosecution of a crime. The privacy argument failed because the basis of the objection was not actually to protect the body, but rather to create an obstacle in a criminal investigation in which the objectors were the accused, and the minors were the victims, third parties whose rights were violated. The test was neither degrading nor humiliating. Finally, under the Convention of the Rights of Children, incorporated into the Argentine constitution on a par with other constitutional provisions, the child had a right to know her identity.¹⁶⁰ Whatever the merits of the self-incrimination objections by defendants to the extraction of their own blood, the Court made it clear in a 1996 case that the reasoning could not bar the testing of the blood of those with conflicting interests, that is, the minor victims.¹⁶¹

decisivo para la elaboración del juicio relativo a la materialidad de la infracción—en cuanto, virtualmente, constituiría la única prueba de tal extremo—es, en sí misma un secuestro y por ello está sujeta a las formalidades previstas por los arts. 96 a 99 de la ley procesal." Molina, *supra* note 79, at 169 (quoting Suprema Corte de la Provincia de Buenos Aires causa P.29.115 del 11-5-82 en D.J.B.A. T° 123 p.86). I am grateful to Professor Jonathon Miller for helping me understand this passage.

Judge Borrás was a criminal judge of a court of the first instance, or lower level court, in La Plata, the capitol of Buenos Aires province. *Id.* at 10. While lower courts are subject to reversal by their superior level courts, it should be noted that the 1982 opinion by the Supreme Court of Buenos Aires was handed down during the dictatorship, while Judge Borrás was sitting on the Gatica case in 1986, after the fall of the juntas.

159. *Id.* at 15–17.

160. "Recurso de hecho deducido por la Defensa de XX en la causa XX y otro s/ apelación de medida probatorias," Case No. 197/90," CSJN, [slip op.] (Dec. 4, 1995).

161. See Judgment of December 27, 1996, "Guarino, Mirta Liliana s/querrela," Case No. 449, CJ, [slip op.] (Dec. 27, 1996). This test case involving an *adopción plena*, or full adoption, had been dismissed on the grounds of limitations. This decision prompted a public relations campaign and a complaint before the Human Rights Commission of the OAS. See ARDITTI, *supra* note 2, at 149. But the reasoning of attorney Alcira E. Rios, professor of civil family law at Universidad de BA and one of the *Abuelas'* legal advisors, prevailed in the 1996 decision. See ARDITTI, *supra* note 2, at 149.

See also Cecilia P. Grosman, "Argentina: Recent Developments in Legislation and Case Law," 32 U. LOUISVILLE J. FAM. L. 227, 230 (1993-94).

Under United States' law, even compulsory blood testing of the *parent-defendants* may be considered constitutional. See *Schmerber v. California*, 384 U.S. 757 (1966) in which a divided court held that there

Dr. Borrás also rejected Silva's second defense, that he "rescued" an abandoned child. The Judge was convinced that the police commissioner knew the truth about the origins of the girl.¹⁶² Rodolfo Silva, on the other hand, clung to his version of the "Official Story" even after he was sent to prison.¹⁶³ He spoke only of his "daughter" and denied all the charges of which he had been convicted. He said he was never engaged in the struggle against subversion or any kidnapping of children.¹⁶⁴ Indeed, in a manner reminiscent of those who say the Holocaust never happened,¹⁶⁵ he insisted that many of the infamous events of Argentina's nightmare years were pure fiction. He still balked at the child psychologists' recommendation that the girl needed a clean break with her past with him and protested that he loved her and would do her no harm.¹⁶⁶

was no constitutional violation in the use of a blood sample which showed the defendant to be intoxicated. At the direction of a police officer, and over the objections of the defendant, a doctor had drawn the blood from a man whom he was treating in the hospital for injuries received in a car crash. The Supreme Court agreed that under the circumstances of this case, there was no due process violation. *Id.* at 759-60. Furthermore, it held that testimonial compulsion, i.e., self-incrimination, was not implicated. *Id.* at 760-65. This was so because there was a distinction between compelling communications or testimony, and compelling the suspect to be the source of "real or physical" evidence. *Id.* at 764. While acknowledging this was a troublesome distinction, the Court felt that the extraction of blood was clearly not testimonial. The Court noted that an accused cannot object to fingerprinting, photographing, measurements, writing or speaking for identification, appearing in court, standing, assuming a stance, walking or making a particular gesture. *Id.* (The Court also found that the blood extraction in *Schmerber* did not violate the Fourth Amendment's protection against unreasonable searches and seizures, *id.* at 766, or the Sixth Amendment right to counsel, *id.* at 765-66).

Although the typical state paternity statute provides that if the alleged father refuses to be blood tested, this may constitute a presumption or evidence against him on paternity, some cases have also upheld contempt as a penalty for such noncooperation. *See, e.g., Bowerman v. MacDonald*, 427 N.W.2d 477, 478 (Mich. 1988) (holding that neither a search warrant nor an evidentiary hearing was required before ordering blood tests in a paternity case brought on mother's verified complaint, and that contempt is a permissible sanction). *See also Eagan v. Ayd*, 313 Md. 265, 545 A.2d 55 (Md. 1988) (holding that *Schmerber*, 383 U.S. at 757, establishes that even in a criminal case, a compulsory blood test does not interfere with the privilege against self-incrimination). *Id.* at 275. *Eagan* also upheld the use of contempt power to enforce a blood test order and summarized other state statutes. *Id.* at 276.

Argentine law appears to make the same distinction between compelled testimony and the production of material evidence in criminal cases that is evident in *Schmerber*. *See CLARIA OLMEDO, JORGE, TRATADO DE DERECHO PROCESAL PENAL 422* (Sociedad Anonima Editora 1964). The treatise's author explains that the person who is charged has the right to refuse any coercive measure that would compel him to personally supply evidence against himself. This does not include such coercion that attempts to acquire in a direct way the object of the evidence, such as a search with a court order or corporal inspection.

162. "En la causa contra Rodolfo Oscar Silva," *supra* note 151, at 13-15.

163. The "Official Story" was the fictionalized account of a kidnapping of a child of the *disappeared* that won an academy award in 1984. In the film, the seemingly idyllic domestic life of the family, including a loving and devoted husband and father who is an official of the regime, and a mother who never questioned too carefully the story he told when he brought home the baby who became their beloved daughter, is ultimately shown to be based on a lie and on an underlying violence.

Irène Barki was granted permission to interview Silva in prison. Silva agreed on condition that the journalist would bring him pictures of his "daughter." BARKI, *supra* note 11, at 290-92.

164. *Id.* at 294.

165. *See, e.g., ARTHUR R. BURTZ, THE HOAX OF THE TWENTIETH-CENTURY: THE CASE AGAINST THE PRESUMED EXTERMINATION OF EUROPEAN JEWRY* (1997).

166. *See BARKI, supra* note 11, at 294-95, 297.

The *Abuelas'* child psychologist, Dr. Norberto Liwski, however, questioned this kind of love. "Do you call this love?" he said, when people take children and reduce them to war booty, appropriating them like commodities, falsifying their identity, raising them amid lies and falsification, stealing a part of their past, after directly or indirectly being implicated in the deaths of their parents?¹⁶⁷ Dr. Liwski argued that this kind of emotion is merely the desire to possess a coveted object, not the true love that requires respect for the other, for the truth of her identity. Nothing was more important for the stability of a child than this truth. Indeed, Dr. Liwski remembered one day when he took leave of Maria Eugenia playing happily with her cousin, and she said to him "Goodbye, Mr. Truth."¹⁶⁸

VI. WORSE THAN SLAVERY?: THE BEST INTEREST OF KIDNAPPED CHILDREN

By 1988, the *Abuelas*, their expert psychological and legal teams, and the jurists who agreed with them had articulated a fully developed definition of the "best interest of the child," a counter-story to the version offered by the "parents" who were found in possession of the kidnapped children. Although the need to do justice in the face of such horrors clearly counted, the emphasis was on the "best interest of the child," defined by the healing power of "truth."

This can clearly be illustrated by the 1987 recovery of María José Lavalle Lemos, the second child born in one of the secret detention camps to be returned to her biological family.¹⁶⁹ The Lemos case is particularly revealing because the opinion was written by Dr. Juan Maria Ramos Padilla, who was involved in four judicial restitutions.¹⁷⁰ In 1987 and 1988, the *Abuelas* held conferences which reached resolutions incorporating the *Abuelas'* positions on restitution under a variety of circumstances.¹⁷¹ All these sources reflect that the *Abuelas* always had to fight for their version of the "best interest." After one more major success in 1989, to be considered in the next Part, and amid a changing political climate, the tide of public opinion turned against restitution of the children of the *disappeared* to their families of origin. These developments underline once again the accuracy of Martha Fineman's observation that family law decisions are "inescapably political."¹⁷²

167. *Id.* at 298.

168. *Id.* at 298.

169. *Id.* at 336-37; LOS NIÑOS DESAPARECIDOS Y LA JUSTICIA, *supra* note 70, at 89.

170. HERRERA & TENEMBAUM, *supra* note 5, at 181-82 (interview with Judge Padilla, "The Truth is the Truth). See also *id.* at 167 (Padilla opinion is one of the most elaborated in relation to the *disappeared* children).

171. BOKSER & GUARINO, *supra* note 5, at 55-56; ARDITTI, *supra* note 2, at 106.

172. Fineman, *supra* note 1, at 229.

Monica María Lemos de Lavallo was eight months pregnant when she was kidnapped along with her husband and young daughter.¹⁷³ The child was returned to one of her grandparents by the authorities,¹⁷⁴ but Monica's baby was born in captivity and given to a policewoman while her umbilicus was still attached. The policewoman, Teresa Isabel Gonzalez, worked directly for the Brigade of San Justo where there were a number of political prisoners. When ten years later she was called to answer criminal charges initiated by the *Abuelas*, Teresa averred that she wanted to cooperate with the court in every way, but that she did not remember who gave her the newborn baby. Teresa testified in her confession that she had been saying she would like a sibling for her other child, and such requests were probably the reason she was given the infant. The policewoman and her husband falsely registered the baby as their own, but blood tests taken pursuant to the genetic data bank law (Ley 23.511) proved María José to be the Lavallo-Lemos child with 99.98% certainty.¹⁷⁵

Reminiscing in a later interview entitled "The Truth is the Truth," Judge Padilla remembered that he had doubts before deciding to restore the first child to her family. He did not know what was best for her and feared that it would be painful for her learn that her so-called "parents" were not her parents after all.¹⁷⁶ He was persuaded less by the experts than by his own twelve-year old son, who told him that "the truth is the truth."¹⁷⁷ Rejecting one psychologist's proposal to subject the girl to ten hours of preliminary psychological counseling, the judge instead successfully introduced her to her older sister (also named Maria).¹⁷⁸

Judge Padilla explained in the criminal case why he rejected the defenses of the policewoman. He was unpersuaded by arguments that it was not proper for the head of the *Abuelas*' legal department, Dr. Mirra Liliano Guarino, to represent grandmother Haydee Vallino de Lemos, or even for the grandmother herself to participate as a representative of the girl, so long as there was no definite pronouncement of her identity. As to the contention that only her parents could legitimately act, he pointed out that it was not possible to forget the reality of Argentine history during these years, with its detained and missing. The judge was impatient with the argument that it was not proven that María José's mother gave birth in a detention center because all that existed was Teresa Gonzalez' confession. He emphasized that he was not willing to take the time to further prove this because the welfare of the girl demanded that there be a fast decision that would remove any

173. "En la causa N° 6681 del registro de la Secretaría N° 2 seguida a Teresa Isabel González," Juzgado Federal de Morón (Jan. 19, 1988) in *LOS NIÑOS DESAPARECIDOS Y LA JUSTICIA: ALGUNOS FALLOS Y RESOLUCIONES*, *supra* note 70, at 93 [hereinafter "En la causa Gonzalez"].

174. BARKI, *supra* note 11, at 337; ARDITTI, *supra* note 2, at 119.

175. "En la causa González," (Jan. 19, 1988) *supra* note 173, at 92, 95.

176. HERRERA & TENEMBAUM, *supra* note 5, at 182.

177. *Id.*

178. *Id.* at 90-91.

uncertainty. By this he meant the pressing need to restore her name and the documents she needed to avoid any moral harm.¹⁷⁹

When he reached consideration of Teresa's sentence, Judge Padilla reflected on the sad years of recent Argentine history. The crime of appropriation of children ironically was punishable by a lesser sentence than that for stealing a car by gun, even though there was more at stake, i.e., the human rights and guarantees of children and their dignity. The judge supported the right of any person to know her own history and to be raised amid her own family. Instead of enjoying these rights, María José was treated like an object, the possession of the policewoman.¹⁸⁰

Judge Padilla confronted Teresa with her lies and the contradictory messages that she communicated to María José when she likened the situation to an adoption and told the girl that she was a child not of her belly, but of her heart. Instead of this benign view of psychological parentage, he agreed with the court's social assistant, who argued that no one can own a human being and take control of her personal, familial, and social history, consisting of the values, guidelines, beliefs, and norms of the parents who gave her life. If the parental relationship was not based on love and respect, but on falsifications and concealment, then it was injurious to the health and emotional development of the child. Just as Dr. Petracchi, the judge in the Scaccheri case, said, a case like this affects the community, if it permits toleration of treatment of a child as property. The child has suffered a serious injury by being denied her identity, by having her need to construct her own identity subordinated to the need of adults to impose a false construction.¹⁸¹

The court went on to cite famous psychoanalysts such as Winnicott, Anna Freud, P. Aulagnier, Aberastury, all of whom agreed on the pathological impact of raising a child on a lie. Double messages bombarded the child, one given verbally, the other nonverbally and unconsciously. María José had been treated for many years as a "thing." Despite all the luxury that might surround her, she was like a domestic animal that was treated well only for the benefit of the owner. María José's situation was worse than slavery. Slaves, at least, were allowed to know their history.¹⁸²

Like a number of other such children, María José was treated as a child-object. Judge Padilla warned that those who have these children need to know that they are harming them. He felt that the entire society has an ethical duty to these children, who in no way could be compared to adopted children. While adoption is founded on love and respect for the individuality of the child and on the parents' free choice, what happened to María José and the other children of the *disappeared* was not. The appropriation was made with fraud and falsification of documents, without law or truth,

179. "En la causa González," *supra* note 173, at 97-99.

180. *Id.* at 102-03.

181. *Id.* at 103-04.

182. *Id.* at 105.

thereby damaging the maternal relationship with Teresa from the beginning and harming the psyche of the child. Nobody has the right to suppress or hide the history of another, even if it proves painful to bring the truth out into the open.¹⁸³

The court entrusted María José to the custody of her grandmother, Haydee Vallino de Lemos, one of the original *Abuelas*.¹⁸⁴ Both the granddaughter that was returned immediately and María José, who spent ten years in the hands of the policewoman, are now activists like their missing parents. María José was reintegrated into a large extended family and enjoys a continuing and close relationship with the judge in her case. At sixteen, she claimed that the hardest part was not the trauma of the restitution, but the continuing loss of her missing parents.¹⁸⁵

Judge Padilla elaborated on the distinction from adoption he made in María José's case in a later interview. He criticized an old-fashioned view of adoption prevalent in Argentina, which saw the institution exclusively as satisfying the desires of adults. Although a valid consideration, the most important purpose is to find a place for abandoned children without denying them the right to know their origin and identity. He was critical of what we would call the sealed-records approach, in which the law will not force the adoptive parents to reveal the truth to their children. He believed that the adoptive family should be a second-level institution, coming into play only when the biological family is not there or the child is abandoned. In any case, if there is an intent to substitute the adoptive family for the biological family, instead of love there is a background of falsehood.¹⁸⁶

This issue of the distinction between appropriation and legitimate adoption of children clearly troubled the *Abuelas*. In a book published in 1997 on the occasion of their twentieth birthday, they included an explanation of why Françoise Dolto, a French psychoanalyst who was influential in Argentina, was misinformed in a December 1986 interview published in the *Psyché*

183. *Id.* at 105–06. These circumstances caused the judge to take the sad history of the Argentine people into account in the criminal charges against the policewoman. On the other hand, the judge also considered some mitigating circumstances, even if he had reservations about them: the defendant apparently came forward with a document that facilitated the identification of the child quickly; there was no other criminal record; and the purpose of criminal law was rehabilitation above all. As a result the sentence imposed allowed the application of a law which permitted probation and did not deprive the defendant of her liberty. *Id.* at 107. The appellate court affirmed, interviewing the child before doing so. HERRERA & TENEMBAUM, *supra* note 5, at 168.

184. "En la causa González," *supra* note 173 at 108–09; ARDITTI, *supra* note 2, at 118–21, 176 (biography of grandmother).

185. See ARDITTI, *supra* note 2, at 119–21.

186. HERRERA & TENEMBAUM, *supra* note 5, at 185. Compare the sentiments of Leopoldo Schiffrin, who participated in the restoration of Laura Scaccheri as part of the *Cámara Federal de la Plata*. When he was asked about a legitimate adoption, he said it was complex, but that the difference is that when the adoption was illegal and the natural family appears asking for its rights, the adoptive parents do not have any rights. Adoption is designed to help abandoned children but not to take children from their own group, which gives them their identity. It is best for children to know the truth about their origin. *Id.* at 193.

journal.¹⁸⁷ They insisted that the correct word was not “adoptive parents,” but rather “appropriators.” While Dr. Dolto remarked that it was important not to tell the child he was raised by executioners, the *Abuelas* felt it was critical to allow the child to talk about what he “knows.” The *Abuelas* rejected the analogy to the situation of orphaned Jewish children adopted by French families and emphatically disagreed with the contention that by taking the children from their “adoptive” family to reconstitute them, a second trauma was inflicted. This wrongfully put restitution and appropriation on the same level, whereas restitution is a new situation, one of truth. The children learn that their parents never abandoned them and that their families searched for them for a long time. The *Abuelas* insisted that their children were not abandoned or like those in a war (which Dolto studied). Rather, they could be identified, and their families were looking for them. This was more like genocide.¹⁸⁸

The legal position of the *Abuelas* was expressed in resolutions produced by conferences in 1987 and 1988: Where a child of *disappeared* parents had been subjected to an “*adopción plena*,” or full adoption, but there was positive identification through blood tests, custody should be given to the biological family. Furthermore, in cases of false registration of the children as their own, the registration should be invalidated, the child’s true identity determined, and custody should go to the biological family. The 1988 conference in Buenos Aires recommended reintegration into biological families and compensation in damages for the crimes inflicted on the children.¹⁸⁹

The *Abuelas* version of “best interest,” however, was never as simplistic as this sounds. Individual grandmothers clearly had their doubts.¹⁹⁰ Before the

187. ABUELAS DE PLAZA DE MAYO, RESTITUCIÓN DE NIÑOS 87 (Eudeba 1997). Dr. Dolto had worked with children that had been illegally adopted by the Nazis. Based on that experience, and believing that the children of the *disappeared* were bonded to the raising families rather than to their grandmothers, Dolto argued against subjecting them to another separation and another trauma. Arditti and Lykes, *supra* note 28, at 172–73. Although Dr. Dolto is said to have changed her views later, others have made similar arguments. For example, an article published in March 1984 also argued that parenthood was psychological, not primarily biological. Lidia Castagno de Vicentini published an article in the *Rosario* morning paper entitled, “The True Parents are the Psychological Parents.” After reviewing the psychoanalytic and psychological literature, the author recommended against the return of the children. She contended that parenthood was a cultural and sociological phenomenon and not simply a biological fact. *Id.* at 172–73.

188. *Id.* at 87. See also Arditti and Lykes, *supra* note 28, at 171–72 (*Abuelas*’ arguments for restoration). The Grandmothers had seven arguments for restoration: (1) because the children have the right to recover their identity; (2) because the children have the right to live in freedom and dignity without lies or secrets; (3) because the children must know their origins; (4) because these children have not been abandoned but have been illegally appropriated; (5) because these children carry engraved in their psyches the sinister conditions of their kidnapping and the tortures of their mothers; (6) because that trauma would impede their normal physical and psychological development; and (7) because only by returning to their ‘ecological nest’ can they grow free, with the love and security that their legitimate families will offer them.”

189. BOKSER & GUARINO, *supra* note 5, at 56.

190. See, e.g., BARKI, *supra* note 11, at 195 (dialogue with “Sara,” a mother who had a false lead on her son, Simon, but is still searching, although perhaps with less ardor). Sara asked, can you imagine losing a baby of 20 days and finding an 11-year-old? It is frightening, isn’t it? Sara also noted that she was sepa-

Ford Foundation agreed to fund the first grant to the *Abuelas*, their evaluators wanted to know whether the organization had considered the disruptive effect on children of being removed from their "adoptive families" (*familias adoptivas*).¹⁹¹ Dr. Hernández replied, saying that the problem went beyond strict limits of medical or psychological competence. To focus solely in this fashion decontextualized a social anomaly. He would judge that the restitution of the children benefitted them and would advise that they receive social and psychological support, drawing on the theories of attachment and loss developed by John Bowlby, Mary Ainsworth, and others.¹⁹² Following up in 1985 after the first one-year grant to the *Abuelas*, the Foundation's Mr. Gridley Hall explained that the impact of the knowledge of their true identity on the children tested and the effect of separating them from the only family they had ever known were major concerns of the granting agency. Potential trauma was balanced against the crime of kidnapping. Mr. Hall reported that although the *Abuelas* were sensitive to the problem, they felt strongly that the children had a right to know who they were and that ties ought to be reestablished with their biological families. The *Abuelas* also argued that when the children became suspicious and learned the truth as they grew older, the trauma could be worse. After meeting often with the *Abuelas*, Foundation staff in Lima were persuaded that the organization was taking the "best interests" of the children into consideration. They were convinced in part by the *Abuelas'* decision to form a team of mental health professionals to advise them on specific children. Further evidence of this concern for the "best interest of the child" was evidenced by two agreements reached with biological families that allowed the children to remain with their "adoptive families," while resuming their real names and recreating ties with their biological families.¹⁹³ Mr. Hall noted that evaluation of the grant would pay particular attention to the "extent to which standard mental health practices, including home studies and counseling, are employed to insure that the interests of both the children and, where appropriate, the adoptive families are also given full consideration."¹⁹⁴

The team the *Abuelas* assembled consisted of pediatricians, neonatologists, and specialists in child psychiatry and psychology. Its aim was to facilitate handing the children over to their families "in the best possible conditions."¹⁹⁵ This team worked on judicial action and provided extension serv-

rated from his father, who is in Spain and in bad health. *Id.* Irène Barki commented that the grandmothers had the same problem when they found their grandchildren. Although it might have been difficult at first, it eventually seemed like the most natural thing in the world. Despite their age, the reintegrations worked out well. *Id.*

191. Letter to Dr. Max Hernandez from A. Gridley Hall, 824 (June 20, 1984) (PA 855-0381, Ford Foundation Archives).

192. Letter to A. Gridley Hall from Dr. Max Hernandez, 826 (June 25, 1984) (PA 855-0381, Ford Foundation Archives).

193. Inter-Office Carmichael Memorandum, *supra* note 95, at 580-581.

194. *Id.* at 581.

195. GRANDMOTHERS, *supra* note 58, at 12.

ices to interested parts of the community.¹⁹⁶ It provided a “prolonged follow-up” to children who were restored to their biological families.¹⁹⁷ In a book published in 1990 by the *Abuelas*, their psychological team explained the impact of restitution on children psychologically and medically. The psychological team understood that they were dealing with something unique that required more than knowledge of theory and classic psychopathology. Drawing on their previous experiences, the team planned the upcoming restitution together with the biological families that would be involved. They conceived of their job as aiding in the restoration of the children to an entire ecological nest or social network. They were prepared for crisis intervention because of the drastic impact that judicial restitution could have on the child.¹⁹⁸ They found, however, that the children surprised them and “showed them the correct way,” by adjusting to their legitimate families and identifying with them much faster than might have been expected.¹⁹⁹ The children displayed some shock and confusion and even anger, but also a tremendous amount of curiosity and growing attachment. The seven member psychological team kept the media away and advised the court about the course of the reintegration. For children that were abducted from their parents, the team looked for “clicks” of recognition or “insights” that might trigger memories of a pet name, a voice, or a gesture from the past, thereby recapturing the lost identity. They told some amazing stories about such instances²⁰⁰ and insisted that the children were not depressed after the transfer, as might be expected.²⁰¹ Obviously, no such “click” was possible for children actually born in captivity to mothers who were killed immediately upon their birth. The *Abuelas*’ psychological team had a different view of why these children were also better off after the restoration. The lives of these children had been permeated with lies, sometimes even including made-up accounts of a birth experience that never happened. Psychologically, the team believed that it was quite different to be told falsehoods and to hear true stories about the child’s origins. The adjustment certainly was painful, but the team was convinced from their experience that the children did want to know about their “existence.”²⁰² Pediatrician Dr. Norbert Liwski observed that as the children progressed through the stages of restitution, they made gains in growth, which often had been developmentally delayed, and overcame a variety of psychosomatic ills such as bed-wetting.²⁰³

196. *Id.* at 12.

197. *Id.* at 13.

198. HERRERA & TENEMBAUM, *supra* note 5, at 215–30.

199. *Id.* at 218. Adjustment difficulties, however, may show up later in a child’s life.

200. *Id.* In one instance, a child was insisting that the adoptive father was the true parent, but when the Grandmother quietly repeated the baby name the girl used for her biological father, the child responded immediately. *Id.*

201. *Id.* at 221.

202. *Id.* at 222–23.

203. *Id.* at 225–30.

Three psychologists and psychoanalysts associated with the *Abuelas* further elaborated their views on the importance of restitution to the mental health of the kidnapped children in a round table discussion published in the 1990 book.²⁰⁴ They developed a complicated theory that distinguished the healthy connections of a child to the longings and desires of her legitimate family from the place she occupies in a kidnapper's family. They seemed to focus on ruptures in a child's identity. For example, the "adoptive" parents want to valorize the children by separating them from their parents. If the children want their original identity back, the desire inevitably opens a breach (chasm) between them and those who raised them.²⁰⁵ One of the round table members also discussed a breach of the genetic line and its history, even where no lies are told. But living with secrets and lies has a terrible effect on a family, transforming it into a non-family.²⁰⁶ The third round table participant mused on the importance to the children of finding small points of physical similarity to the families to which they were restored. From there, she said she entered a second stage of thinking, in which she paid more attention to the law. The law provided that adoption is permissible when a child is abandoned. But in a moment of "social catastrophe" some people exploited those rules. Perhaps some were even in good faith to begin with, but if the improper adoption continued after the truth emerged, they acted in good faith no longer.²⁰⁷ The round table participants went on to discuss living with a secret,²⁰⁸ turning a child into an object,²⁰⁹ and facing tragic truths (such as that for children born in captivity, their birth was the occasion of their mother's death).²¹⁰

Out of praxis, the *Abuelas'* mental health team developed a theory of healing which they believed worked for the children of the *disappeared*.²¹¹ The team consisted of clinicians who did not ignore the particular circumstances of individual children or the fact that there was disruption and pain in the transition. But they also firmly believed that restitution was in the best interest of the children involved. Whatever the clinical validity of that position or the needs of individual children, however, the team also operated within a social context.²¹² As the *Abuelas* noted, the meaning of restitution

204. *Id.* at 272. The three discussants were Eva Gilberti, a psychologist, professor, consultant to the Pan-American health office, and author of a book on adoption, who monitored the restored children; Fernando Ulloa, member of the psychoanalytic association of Argentina and professor on the psychology faculty, who supervised the treatment of various children; and Maria Lucila Pelento, professor of psychology and psychoanalyst, who served as expert adviser to judges of first instance, Congress and members of Supreme Court. *Id.*

205. *Id.* at 273–75 (Gilberti).

206. *Id.* at 275–76 (Ulloa).

207. HERRERA & TENENBAUM, *supra* note 5, at 280 (Pelento).

208. *Id.* at 281 (Pelento).

209. *Id.* at 282 (Ulloa).

210. *Id.* at 283 (Ulloa).

211. GRANDMOTHERS, *supra* note 58, at 12.

212. Theorists of contemporary United States social work likewise have argued that in order to act as agents for social change and to enlarge the public good, even social workers who focus on "micro, direct

"transcended" individual justice and was also a matter of the reconstruction of society.²¹³

As the *Abuelas* successfully established a national genetic data bank, the Ford Foundation grant was renewed. A Foundation memorandum specifically noted the variety of resolutions for the forty-two children (of 200 documented kidnapped) located by the *Abuelas* so far: nineteen were returned to biological families; twelve remained with "adoptive families," while resuming their real names and ties with their biological families; six cases were in the courts; and five children were known to be dead.²¹⁴ The agency representative acknowledged that the goal of the *Abuelas* was reunification, but observed that they "take the specific circumstances of each case into account, to assess what is most appropriate and consistent with the children's rights and well-being."²¹⁵ Just as in the original grant evaluation, the renewal acknowledged that the Lima staff recognized the sensitive issues involved—the fear of trauma when a child is separated from the second family after a long period of time. They were still persuaded, though, that the *Abuelas* had addressed the issue with their mental health team on staff and that it would be worse to let the children find out the truth even later.²¹⁶ By 1990, when the Ford Foundation was ready to make its closing grant, however, they were not as comfortable with the best interest balance; the final evaluation spoke of a "growing concern about the possibly traumatic effects of a separation of a child from his or her adoptive parents, especially after a certain period."²¹⁷

service practice" (e.g., family therapy) urgently need "the larger contextualization of macro practice." R. FISHER AND H. KARGER, *SOCIAL WORK AND COMMUNITY IN A PRIVATE WORLD: GETTING OUT IN PUBLIC* (1997). Fisher and Karger define "contextualization" as "knowing and understanding the connection between daily social work practice and the structural dynamics of society—its history, economy, politics, and social and cultural dimensions. Contextualization assumes that individual, family, and community problems are always tied to larger structural factors. At the heart of a critical contextualization is an analysis of power and inequality and a social change ideology that translates this critical analysis into action." *Id.* at 43. As an example of contextualized social work and of an approach that is explicitly founded on feminist ideology, Fisher and Karger offer PIVOT, a therapeutic intervention program for male batterers in Houston which was founded by Toby Myers. *Id.* at 57. "The individual issues of each offender are seen not only as personal problems, but as collective ones resting on a base of patriarchy and violence. Contextualization occurs at the base of the group and the individual work that follows. During the process, individual needs get met in group and individual work, while problems are contextualized and collectivized. Here, social movement ideology serves to unmask oppression and fuel individual healing and collective actions. Similar collective ways of contextualizing social justice can be found in other women's agencies, African American efforts, and community organizing projects in the United States and worldwide." *Id.* It is certainly no more surprising that the *Abuelas'* ideas about the therapeutic value of restitution for the children of the *disappeared* also reflected the context of Argentine society, of the *disappearances*, and of the need to confront rather than deny the reality of the nightmare years.

213. GRANDMOTHERS, *supra* note 58, at 12.

214. Inter-Office Memorandum, *supra* note 46, at 574.

215. *Id.* at 574.

216. *Id.* at 575–76.

217. Inter-Office Offenheiser Memorandum, *supra* note 89, at 640. Mr. Shifter observed that the passage of time had changed the best interest calculus for the children and also had begun to tarnish the Grandmothers' image and reputation when they insisted on restoration in less sympathetic cases. Mr. Shifter concluded that with the "new political realities in Argentina," it had become right to close the

VII. XIMENA VICARIO: THE LAST RESTITUTION?

Although a court granted her grandmother provisional custody of thirteen-year-old Ximena Vicario in 1989, a drawn-out battle over restitution and then over visitation rights extended back to 1984 and forward into the late 1990s. Fought in the courts, the media, and on the international stage, the struggle over this case marked a turning point, after which it was virtually impossible to recover a child of the *disappeared*.²¹⁸ This change coincided with additional calls for impunity, which led to the pardoning of the major figures of the juntas for their varied crimes and to their release from jail. After Ximena Vicario's case, the *Abuelas*' version of the "best interest of the child" lost favor in Argentina, even as the organization continued to enjoy some international success.

On February 5, 1977, Ximena's mother was taken with the nine-month-old baby to federal police headquarters in Buenos Aires. Her father was *disappeared* separately the following day. Neither parent was ever seen again.²¹⁹ The baby, however, arrived at a state orphanage wearing a sign that said, "I am the daughter of Subversives. They killed my parents today."²²⁰ The *Abuelas* located the girl in 1984, discovering that she had been "adopted" and named Romina Siciliano by Susana Siciliano, who worked in the institution where she was left.²²¹ When located, Siciliano refused to come to any kind of agreement with Ximena's grandmother that would involve them both in the raising of the child. It took four years for the girl's identity to be proven through genetic testing.²²² Although the adoptive mother was never part of the military or the police, she was charged with falsifying her knowledge of the child's origin and taking Ximena illicitly from the orphanage.²²³

grant and to give higher priority to political and civil rights type groups instead.

218. Although the Argentine Supreme Court left custody with the grandmother, it made future cases more difficult by limiting the appeals by biological families. Larmer, *supra* note 42, at 39. According to a 1993 report, courts subsequently seemed reluctant even to order blood tests anymore, and not another child had been restored in the interim. *Argentiniens track down children of the Disappeared*, PLAIN DEALER, July 9, 1993, at C22.

219. *Communication No. 400/1990: Argentina, 27/04/95*, Hum. Rts. Comm., 53rd Sess., Annex, para. 2.1, at 1, U.N. Doc. CCR/C/53/D/400/1990 (1995) (submitted by Darwinia Rosa Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario) [hereinafter *Communication No. 400/1990* by Gallicchio].

220. Larmer, *supra* note 42, at 39. See also ARDITTI, *supra* note 2, at 108 (stating that the murdered parents were called "guerrilleros").

221. *Communication No. 400/1990* by Gallicchio, *supra* note 219, para. 2.1, at 2.

222. See ARDITTI, *supra* note 2, at 108.

223. See George de Lama, "Dirty War" Still Tears at Families in Argentina, CHI. TRIB., Jan. 17, 1989, at C1.

The prosecutor asked for "preventive detention of 'S.S.' (Siciliano) on the ground she was suspected of having committed the offences of concealing the whereabouts of a minor (ocultamiento de menor) and forgery of documents, in violation of articles 5, 12, 293, and 146 of the Argentine Criminal Code." *Communication No. 400/1990* by Gallicchio, *supra* note 219, para. 2.2, at 2. This was not a case of falsely registering the child as her own. Rather this was a full adoption or *adopción plena* based on false representations, a much more difficult legal situation.

Even after biological ties were established with grandmother Darwina Monaco de Gallicchio, the first federal judge, Juan Fegoli, ruled that Siciliano could keep Romina-Ximena with visitation rights to the grandmother.²²⁴ On January 2, 1989, the grandmother gained provisional custody of the child²²⁵ after seven hours of interviews with court-appointed psychologists.²²⁶ Dramatically, the twelve-year-old girl stood on the courthouse steps swearing that she did not want to go with "that old woman" and that she would escape from her or commit suicide if she was forcibly separated from Siciliano. Shortly after the transfer, court psychologists reported that the girl was doing fine, but did not answer to her birth name, Ximena Vicario. Her biological family claimed, "She is reconstructing her life and learning about her real family and real identity. She has the telephone next to her but has not chosen to call the other family."²²⁷ The adoptive mother continued her campaign after the transfer, taking it to the media, both domestic and international,²²⁸ and applying for visitation rights.²²⁹

Ximena-Romina remained with her biological grandmother for nine months, but in September 1989, there was a setback in the courts.²³⁰ Relying on an antiquated law, the Supreme Court of Argentina ruled that only the parents and a legal guardian have standing and may directly participate in the proceedings; the grandmother lacked standing.²³¹ The Court distinguished a proceeding concerning the custody of a child, which created this problem, from other proceedings in other courts to determine the familial relationship. Until Siciliano's adoption of Ximena-Romina was declared null, the Court considered *her* the parent. Thus, they were prepared to vacate the lower court's order.²³² The lawyer appointed to represent the child, who had also been the defense attorney for ex-Junta chief General Videla, recommended that the Court turn Ximena-Romina back to Siciliano.²³³ In ordering a remand, however, the Supreme Court noted that the fact that Ximena had lived with her grandmother for most of the last year could not be ignored. The Supreme Court directed the lower court to consider the

224. See de Lama, *supra* note 223, at C1.

225. "Incidente tutelar de Romina Paola Siciliano," CSJN, 312 Fallos 1580, 1583 (Sept. 5, 1989). My gratitude to Dr. Roland E. Gialdino of the Argentine Supreme Court (Secretaría de Investigación de Derecho Comparado de la Corte Suprema de Justicia de la Nación) and to María Silvia Galindez for providing me with a copy of this opinion.

226. *Id.* See also de Lama, *supra* note 223, at C1.

227. See de Lama, *supra* note 223, at C1.

228. See ARDITTI, *supra* note 2, at 108.

229. *Communication No. 400/1990* by Gallicchio, *supra* note 219, para. 2.3, at 2.

230. The appeal to the Supreme Court was backed by the support of an influential press. See ARDITTI, *supra* note 2, at 108.

231. See "Incidente tutelar de Romina Paola Siciliano," *supra* note 225 at 1588-89; *Communication No. 400/1990* by Gallicchio, *supra* note 219, para. 2.3, at 2.

232. "Incidente tutelar de Romina Paola Siciliano," *supra* note 225, at 1584-92. Siciliano was entitled to a presumption of innocence until she was convicted of falsifying the adoption.

233. See ARDITTI, *supra* note 2, at 108. In 1998, Videla was charged with orchestrating the systematic kidnapping of the children of the *disappeared*. See *infra* notes 329-31 and accompanying text.

girl's interests and wishes in making any custody disposition, even if the original order was vacated.²³⁴ The lower court eventually left Ximena with her grandmother, subject to visitation by her adoptive mother. The visitation was a great frustration for Ximena and her grandmother, and they finally appealed to an international court for relief.²³⁵

Meanwhile, the criminal action and the direct attack on the adoption (*adopción plena* or full adoption) both stretched out unconscionably long.²³⁶ Finally, in 1991, a lower level court ruled that the adoption was a nullity. Siciliano claimed that the adoption could not be attacked because of "prescription," that is, the principle of finality. She also disputed the validity of the blood test and claimed to have found Ximena abandoned.²³⁷ The court rejected the "adoptive mother's" arguments about prescription due to reasons of public order and social interest.²³⁸ It held that the case was one of family status, defined as the position or relationship that someone occupies in a family.²³⁹ The judge likened this to a jurisdictional issue to which prescription simply did not apply.²⁴⁰

The lower court reviewed the evidence, including the blood tests that had been ordered as part of the criminal proceedings. The tests showed a 99.82%

234. "Incidente tutelar de Romina Paola Siciliano," *supra* note 225, at 1590-91. Dissenting Judges Drs. Petracchi and Fayt disagreed with the finding of nullity. *Id.* at 1592. They found that the cited law was only applicable to regular situations, not to one where the grandmother's daughter had *disappeared* and in which criminal prosecution was continuing. *Id.* at 1593-94. The majority judges included Jose Severo Caballero, Jorge Antonio Bacque, and Augusto Cesar Belluscio (whose leaked internal memo caused such a stir in the Scaccheri case).

235. Ximena's grandmother complained to the international court that her actions were dismissed for lack of standing and that she had exhausted her domestic remedies in proceedings so prolonged that the girl was going to grow up with the name that her false adoptive mother Siciliano gave her. *Communication No. 400/1990* by Gallicchio, *supra* note 219, para. 2.4, at 2. She alleged that the forced visits constituted a "'psycho-affective' involuntary servitude." *Id.* para. 3.1, at 2.

236. This was the first case of a successful attack on an *adopción plena*. See ARDITTI, *supra* note 2, at 151.

237. "Monaco de Gallicchio, Darwina Rosa contra Siciliano, Susana, Nulidad de Adopción [of Romina Siciliano/ Ximena Vicario]," en la causa Ac. 27.585/87, 1 a Inst., Judicial Department of Moron, Province of Buenos Aires [slip op.] 3-15 (Aug. 9, 1991) [hereinafter Nulidad de Adopción—Siciliano, First Level]. My gratitude to Dr. Roland E. Gialdino of the Argentine Supreme Court (Secretaría de Investigación de Derecho Comparado de la Corte Suprema de Justicia de la Nación) and to Maria Silvia Galindez for providing me with a copy of this opinion.

238. *Id.* Unlike the crime of falsely registering a child as one's own, an *adopción plena* is a completed legal action that has to be overturned, if it is attackable at all.

239. *Id.* at 9.

240. *Id.* They also afforded retroactive effect to their decision, since status in the family is always created by human acts, voluntary or biological and is always a jurisdictional act.

Under the Texas Family Code, there is an effort to promote finality of adoptions which on its face takes a different approach than that of the Argentine court. See TEX. FAM. CODE § 162.012 (1999) which provides that the validity of an adoption order is not subject to attack, apparently for any reason, after six months from either the date of rendition or the date the adoption order was signed. Final adoptions are not subject to attack at any time because the required health, social, educational, and generic history was not filed. (Previously, the period for this kind of finality was two years). See also TEX. FAM. CODE § 161.211 (1999) for the equivalent provision for finality in termination of parental rights. Despite this provision, either the United States Constitution Due Process clause or the Texas Constitution's Open Courts or Due Course of Law provisions may well provide the basis for attacking such a final adoption on the grounds that it was based on a kidnapping.

probability that Ximena was the granddaughter of the Vicario grandparents. Although the criminal action had not yet reached a conclusion, the judge considered it urgent to act to resolve the fate of a girl who was fifteen years old and who had experienced a painful past filled with concealment of her origins and a present filled with uncertainty and conflict. The procedural fraud in obtaining the adoption was enough to act to nullify it. Based on the evidence, he was persuaded that there was no consent by the parents for the adoption and that it was therefore a nullity. At last, Ximena Vicario's real identity was declared legally.²⁴¹ Despite this conclusion, however, litigation stretched out into two appeals, finally reaching the Supreme Court of Buenos Aires in 1994, the year Ximena Vicario reached age eighteen.²⁴²

In a lengthy 1992 decision, the court of the second instance, or intermediate appellate court, upheld the nullification of Siciliano's adoption of Ximena. By now, Ximena-Romina had spent several years with her grandmother, but without finality in the confirmation of her name, identity, or right to resist visitation by Siciliano. There are two particularly interesting features of the court's analysis. First, it referenced international law, specifically the United Nations Convention on the Rights of the Child of 1989, which Argentina had ratified and adopted into domestic law. Second, the judges correspondingly placed the "best interest of the child" at the center of their reasoning.²⁴³ The conclusion was that regardless of the love that Siciliano might have for Ximena, her best interest prevailed; she had a right to her real name, to be cared for by her biological family, and to enjoy her identity and her family relationships without illicit interference.²⁴⁴ The girl herself said she did not want to see Siciliano any more. With this evidence, this was enough.

One of the intermediate appellate judge's remarks illustrated how easily "best interest" could work against the grandmothers and in favor of the "adoptive" family. Judge Conde agreed with the judgment affirming the nullification of the adoption, saying that he had read articles about the children of the *disappeared* and their displacement from one family group to another. He observed that these children have a difficult time adjusting to a new family and that, above all, the best interest of the child should govern. In this case, according to what the child herself said, there was no dispute

241. "Nulidad de Adopción—Siciliano, First Level," *supra* note 237, slip op. at 12–19. The court also refused to deny standing to the grandmother to represent the girl, as had happened in the custody proceeding decided by the Argentine Supreme Court.

242. Monica de Gallichio, Darwina Rosa contra Siciliano, Susana, Nulidad de Adopción," en la causa No. 27.585/87, CApel.CC, Judicial Department of Moron [slip op.] (August 11, 1992) [hereinafter "Nulidad de Adopción—Siciliano, Second Level"]. My gratitude to Dr. Roland E. Gialdino of the Argentine Supreme Court (Secretaría de Investigación de Derecho Comparado de la Corte Suprema de Justicia de la Nación) and to María Silvia Galindez for providing me with a copy of this opinion; *see also* "Mónaco de Gallichio," *supra* note 67.

243. "Nulidad de Adopción—Siciliano, Second Level," *supra* note 242, at 5–13.

244. *Id.* at 27–28.

about what her best interests were.²⁴⁵ The child's own wishes and the status quo of her grandmother's custody coincided in 1992. Thus, Judge Conde justified the complete nullity of Siciliano's fraudulent adoption on the grounds of a best interests definition that departed from the version of best interests that the *Abuelas* had struggled so hard to establish.²⁴⁶

In 1994, when Ximena was nearly eighteen years old, the nullity of her fraudulent adoption achieved finality. Siciliano still contended that the adoption was final because she had committed no fraudulent acts and because the girl had been abandoned. However, Siciliano's prescription argument and application for an extraordinary writ were both denied by the Supreme Court of Buenos Aires.²⁴⁷ However, Ximena and her grandmother continued pressing their claims in international courts for reasons that will be discussed below. After Ximena's case, in the context of a changing political climate, legal and public opinion turned against the claims of the Grandmothers.²⁴⁸ Until political pressure by the *Abuelas* induced a change in the law,²⁴⁹ the Argentine Supreme Court's 1989 decision on standing made future cases more difficult by limiting appeals by biological families.²⁵⁰ According to a 1993 report, courts subsequently were reluctant to order blood tests and no other children had been restored in the interim. Conceding tactical defeat, the Grandmothers concentrated on restoration of the children's *identities* without a change in custody. They also looked increasingly to international courts for hope of any action on the remaining high profile cases.²⁵¹

VIII. DEVELOPING INTERNATIONAL NORMS TO RIGHT WRONGS

After Ximena Vicario's case was decided, the *Abuelas* increasingly turned to international law in order to right the wrongful retention of the kidnapped children. In 1990, while Ximena Vicario was still forced to receive visits by Siciliano, her grandmother submitted a complaint on behalf of Ximena and herself to the Human Rights Committee (the Committee) established by the United Nations under the International Covenant on Civil

245. *Id.* at 29 (Judge Conde).

246. By contrast to Judge Conde, Judge Horacio Cattani, who was involved in the appellate decision that returned Ximena/Romina to her biological family, a decision that he said kept him up nights, reflected a concept of "best interest of the child" which was like the *Abuelas'* version. See Larmer, *supra* note 42, at 39: "My friends said, 'how can you do this, opting for the family of the womb over the family of the heart?' But we knew that we had to change the power relations, so that she could escape the lie and start living the truth."

247. "Mónaco de Gallicchio," *supra* note 67.

248. Angela Singer, *Stolen Children, Argentina's Dirtiest War*, UNIVERSAL NEWS SERVICES, Jan. 8, 1991.

249. See ARDITTI, *supra* note 2, at 144, n.1.

250. See Larmer, *supra* note 42, at 39.

251. See *Argentiniens track down children of the Disappeared*, *supra* note 218.

and Political Rights (CCPR).²⁵² Because Argentina has adopted the Optional Protocol to this Covenant, individuals who believe themselves to be victims of a violation by a State Party of any of the rights protected in the Covenant may communicate directly with the Committee.²⁵³

Ximena's grandmother alleged that they were victims of violations by Argentina of a number of Articles of the CCPR, which entered into force for Argentina in 1986.²⁵⁴ She complained that the forced visits, which were still occurring in 1990, subjected Ximena to a "psycho-affective involuntary servitude" in violation of articles 15 and 8 of the CCPR and constituted an arbitrary intrusion on both her own and Ximena's privacy, which was forbidden by article 17. She also alleged that the Argentine court's refusal to afford her standing in the guardianship proceeding denied her equal protection before the law and the right to privacy. In addition, she claimed that Ximena suffered psychological torture from the forced visits and was being denied her right of identity because she was required to bear the name given to her by Siciliano.²⁵⁵ Her grandmother persisted, even after the visitation ceased in 1991, Ximena received her identity papers in 1993, and the guardianship ended in 1994, arguing that the proceedings violated rights by stretching out unreasonably long and establishing injurious precedents that would bind other Argentine courts.²⁵⁶

The Committee's findings were mixed. It felt unable to rule on the invasions of Ximena's human rights that occurred prior to 1986, when Argentina ratified the Optional Protocol. It was mindful of the numerous proceedings in which Ximena's grandmother was allowed to represent her and in which the State Party's courts attempted to determine the facts, balance the "human interests of the persons" involved, and give redress. On the other hand, it took a long time to afford any relief in the domestic courts,

252. See *Communication No. 400/1990* by Gallicchio, *supra* note 219. The International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations in 1966, establishes in Article 28 a Human Rights Committee, which in Article 41 (1) is empowered to "receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant." *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter *CCPR*].

253. *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966) [hereinafter *Optional Protocol*]. The Optional Protocol further implements the Covenant by permitting individual parties who claim to be victims to file complaints. Argentina is a party to both the original CCPR and the Optional Protocol, while the United States is a party to the Covenant but not to the Optional Protocol.

254. *Communication No. 400/1990* by Gallicchio, *supra* note 219, at 1. The CCPR and the Optional Protocol require that all domestic remedies be exhausted, or that the "application of the remedies is unreasonably prolonged." See *Optional Protocol*, *supra* note 253, at Article 5(2)(b) and *CCPR*, *supra* note 253, at Article 41 (1)(c). The Argentine State's chief argument against jurisdiction over Ximena's complaint was that all kinds of domestic proceedings were still in progress. See "Communication No. 400/1990 by Gallicchio," *supra* note 219, at 4, paras. 4.1-4.5. Ximena's grandmother, however, argued that even after the 1991 nullity of adoption decision, there was no final solution for the case, which was stretched out and "unreasonably prolonged." *Id.* at 4-5, para. 5.1.

255. *Communication No. 400/1990* by Gallicchio, *supra* note 219, at 2-3, paras. 3.1, 3.3.

256. *Id.* at 6-7, para. 5.1-5.2.

and this delay was certainly encouraged by the initial denial of standing to her grandmother to represent the girl. Consequently, the Committee concluded that there was a violation of the Covenant because the State was required to take affirmative steps to protect a child such as Ximena in a timely manner and not to deny her grandmother the right to represent her.²⁵⁷ Although it came at great psychological cost to the girl, whose life was subjected to a long period of uncertainty, Ximena's grandmother and the *Abuelas* ultimately prevailed in Argentina's domestic courts as well as in the international human rights venue.

The *Abuelas* appreciated the importance of international appeals from the beginning of their existence, while they still lived under the hand of the military regime.²⁵⁸ After the restoration of civilian government in Argentina and as the *Abuelas* drew closer to locating and reclaiming some of the children, a number of kidnappers fled to Paraguay with the children they had appropriated. The *Abuelas* called this the "*segunda desaparición*" or "second disappearance." Paraguay was a logical choice, as it shared a border with Argentina and was under the rule of General Alfredo Stroessner, "the longest-running dictatorship in the hemisphere, which ran the country from 1954 to 1989."²⁵⁹ Paraguay had also participated in the collaboration between Southern Cone countries, which led to kidnappings of Uruguayan, Argentinian, Chilean, and Paraguayan citizens wherever they were found. In response to these flights, the *Abuelas* urged international action. In 1988, they persuaded the Human Rights Commission of the United Nations to send an investigator, Theo van Boven. The Paraguayan government, still under Stroessner, refused to cooperate, but van Boven was able to base his report on information he gathered in Argentina.²⁶⁰

In his report, van Boven accepted the *Abuelas'* version of the "best interest of the child" and found it to be incorporated in existing international norms. He concluded that "these children are deprived of their right to keep their own identity, to know their past, to enjoy parental care and not to be separated from their parents against their will." The children lived with the kidnappers who were responsible for atrocities in violation of international humanitarian principles, and thus they themselves were denied the opportunity to develop normally "in conditions of freedom and dignity (Principle 2 of the Declaration of the Rights of the Child)." They learned intolerance and discrimination rather than friendship among peoples, peace and universal brotherhood (Principle 10 of the Declaration) from the parents who appro-

257. *Id.* at 8–9, para. 10.3. The Committee also concluded that the State was obligated to provide an effective remedy, including compensation for the "undue delay in the proceedings and the resulting suffering," and to make sure this kind of thing does not happen again. *Id.* at 9–10, para. 11.2.

258. See *supra* note 56.

259. ARDITTI, *supra* note 2, at 128 (by 1987, *Abuelas* knew of at least 7 children taken in the so-called second *desaparances*). This is what Silva was trying to do in his abortive flight with Maria Eugenia Gatica. See *supra* note 154.

260. ARDITTI, *supra* note 2, at 128–30.

priated and fled with them. Van Boven concluded from "lengthy and intense discussions in Argentina with relatives of disappeared children, health professionals, psychologists and judges," that "nearly without exception the return of the child to the legitimate family is in "the best interests of the child" (see also Principles 2 and 7 of the Declaration) and an imperative requirement of justice.²⁶¹

In his report, van Boven examined two infamous cases: the case of the "Rosetti-Ross twins" (now known to be the Tolosa twins) and the case of the children raised by Major Norberto Atilio Bianco.²⁶² Bianco was a military doctor who worked at the Campo de Mayo Hospital where children were born in captivity to detained mothers who were later murdered and *disappeared*.²⁶³ He took two babies born there, a girl and a boy, and falsely registered them as his own.²⁶⁴ The *Abuelas* located the children in 1984, but Bianco fled with them in 1986 before genetic tests could be administered.²⁶⁵ Paraguay rebuffed Argentine efforts beginning in 1987 to extradite Bianco and his wife Susana Wherli.²⁶⁶ An appeals court in Paraguay accepted Bianco's argument that the extradition would endanger his two children.²⁶⁷ Bianco successfully resisted for nearly ten years after the initial charges and after van Boven's report to the United Nations. Bianco and Wherli were finally arrested by Interpol on March 3, 1997 and extradited to Argentina to face charges of forging documents and misappropriating minors.²⁶⁸ Even though the Bianco couple admitted at the extradition hearing that they were not the biological parents of Carolina and Pablo, they insisted that they had the consent of the biological mothers to take the children.²⁶⁹ By that time,

261. *Report prepared by Mr. Theo van Boven on the Prevention of the disappearance of children*, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 40th Sess., Agenda item 9 c, at 14, U.N. Doc. E/CN.4/Sub.2/1988/19 (1988) [hereinafter *van Boven Report*].

262. *Id.* at 8-9. He also considered the cases of Mariana Zaffaroni Islas; and the child who was in the hands of former Captain Jorge Raul Vildoza. *Id.* at 9-10. As these children grew up, neither story had a happy ending. The Zaffaroni girl wrote letters to her biological family accusing them of being communists, while the boy raised by Vildoza first learned of his identity while surfing on the Internet. He voluntarily went to be tested, but continues to stand by his fugitive father and is uncomfortable with his biological family.

263. *Id.* at 9. Bianco was a trauma expert in the Army and worked in Campo de Mayo, an army compound 15 miles northeast of Buenos Aires where there was a clandestine detention center. *Human Rights: Kidnapped Children May Return to Argentina*, INTER PRESS SERVICE, Mar. 16, 1988. He was in charge of pregnant detainees there. ARDITTI, *supra* note 2, at 129.

264. *See van Boven Report, supra* note 261, at 9. Van Boven believed that the boy is likely the son of Abel Madariaga. His wife, Silvia Quintela, the mother of the child, has been missing since she was *disappeared* in 1977. Argentine courts initially refused to allow the father to appear in the proceeding against Bianco because there was no proof that he was the father. Bianco then fled with the boy before blood tests could establish the biological relationship. *Id.*

265. *Van Boven Report, supra* note 261, at 9. *See Alan Riding, Argentines Fight for Orphans of a Dirty War*, N.Y. TIMES, Dec. 30, 1987, at A1 (after court ordered blood tests in April 1986, Bianco fled with the children to Paraguay where they successfully resisted extradition).

266. ARDITTI, *supra* note 2, at 129.

267. *See* Marta Gurvich, *The Dirty War's Family Secrets*, 21 IN THESE TIMES 27 (Apr. 28, 1997).

268. *See Paraguay to extradite Argentine "Dirty War" couple*, REUTERS NORTH AMERICAN WIRE, Mar. 4, 1997.

269. *See* Gurvich, *supra* note 267.

both of the children had married Paraguayans and were fiercely protective of their "parents."²⁷⁰ They have refused to submit to genetic testing, and Paraguay refused to require it.²⁷¹

The case of the Rosetti-Ross twins involved twin boys, located in the hands of Samuel Miara and his wife Alicia Beatriz Castillo. By many accounts, Samuel Miara was a brutal police sub-commissioner who actively participated in repression and torture.²⁷² He appropriated twin boys, born in captivity, who then were falsely registered as being born to his wife, Beatriz. In 1984, the *Abuelas* denounced the deception, but like Bianco, Miara fled to Paraguay with his "family" before genetic tests could establish the twins' identities.²⁷³ In 1988, when Theo van Boven submitted his report, it was mistakenly believed that the children were related to the Ross-Rossetti family.²⁷⁴ Even with irrefutable evidence that the boys were kidnapped, however, Argentine authorities were unable to reach Miara in Paraguay until after the end of Stroessner's dictatorship there. Genetic testing in 1989 overwhelmingly established that the now twelve-year-old twins were the sons of María Rosa Tolosa and Juan Enrique Reggiardo, young architecture students who were kidnapped and *disappeared* by the military regime. Despite the test results and Miara's confession that the children were not biologically his, the court initially granted custody to the Miaras.²⁷⁵ As late as May 1993, the sixteen-year-old twins remained with Beatriz Miara, even after new decisions that annulled their false birth certificates and gave them the last name of their biological parents.²⁷⁶

270. See Amaranta Wright, *Missing generation in unwanted spotlight*, GAZETTE (MONTREAL) at A8. Pablo and Carolina highlight the mixed reactions of the kidnapped children who were located; while some, such as Elena Gallinaris, who was rescued at age 10, battled for years to obtain proper identity papers acknowledging her birth family, others found the whole thing a nightmare inflicted by the *Abuelas*. Julieta de Petrillo, age 18, for example, had been adopted by a woman who served as midwife to the murdered birth mothers. She believed her adoptive mother's teachings that the *disappeared* were subversives and lived in terror that the *Abuelas* would try to take her away by force. *Id.* One of the grandparents who believed that their daughter had given birth to one of the Bianco children expressed sympathy and understanding for Pablo and Carolina: "It is very painful to follow the path of truth, knowing that you were raised among lies, and that your 'parents' are really the murderers of your parents." See Marcela Valente, *Rights-Argentina: Accounts of Minors Abducted During Dictatorship*, INTER PRESS SERVICE, June 16, 1998.

271. See Gurvich, *supra* note 267.

272. See van Boven Report, *supra* note 261, at 8. See also ARDITTI, *supra* note 2, at 135 (Miara was infamous for his role in several concentration camps; he was accused of rape, kicking pregnant women in the womb, looting, particularly hateful treatment of Jewish prisoners, and picking who would be executed at the camps).

273. See ARDITTI, *supra* note 2, at 135.

274. See van Boven Report, *supra* note 261, at 8.

275. See ARDITTI, *supra* note 2, at 135-36. The court took this action on the advice of the children's court-assigned defender, Dr. Carlos Tavares, the very same attorney who defended the dictator Videla in the 1985 trial of the juntas for their human rights violations in connection with the *disappearances* of thousands of Argentines. See *id.* The boys' biological uncle called this decision "an act of hatred." Larmer, *supra* note 42, at 39.

276. See ARDITTI, *supra* note 2, at 136. The judge, however, let the boys keep the first names the Miaras gave them in order "to avoid confusion." Larmer, *supra* note 42. Miara himself was in jail on evidence of illegal appropriation of children and evasion of justice charges.

The *Abuelas* appealed to the International Commission of Human Rights ("The Commission") of the Organization of American States (OAS), which referred the case to the Inter-American Court of Human Rights ("The Court") for "provisional measures" available in cases that threatened irreparable harm to human rights.²⁷⁷ The Commission and the Court are the official interpreters of the American Convention on Human Rights ("ACHR").²⁷⁸ The Court ruled that Argentina should take steps without

277. Unless the provisional shortcut for cases of irreparable harm is triggered, the parties must utilize an unwieldy two-tier procedure in which the Commission has first to make a report and attempt settlement before making the referral to the Court. See Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INT-AM. L. REV. 297, 306, 311-12 (1995).

Argentina is a party to the Convention, which provides that any "person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State Party." American Convention on Human Rights, November 22, 1969, OEA/ser. K/XVII/1.1., doc. 65 rev. 1 (1970) at art. 44. Corr. 1, January 7, 1970, 9 I.L.M. 101 (1970), 65 A.J.I.L. 679 (1971), 9 I.L.M. 673 (1970) at Art. 44 (American Declaration of the Rights and Duties of Man). Article 46 requires exhaustion of domestic remedies. If the Commission considers the complaint "admissible," it can request information from the state party, investigate, and attempt a settlement between the parties (Article 48). The Commission also may transmit the matter to the Inter-American Court of Human Rights ("The Court"), which consists of seven judges elected in an individual capacity from among nationals of the member states (Article 52). Only the Commission or state parties may submit a matter to the Court (Article 61). The Court may find that there has been a violation of a right protected by the Convention and order reparations or compensation (Article 63). It can order provisional measures where necessary to avoid irreparable damage to persons (Article 63).

On November 8, 1993 the Commission sent a resolution to the Court seeking provisional measures in compliance with Article 63, including immediate transfer of the minors to the temporary custody of a substitute family until the issue of delivery to their legitimate family was resolved. "Caso Reggiardo Tolosa, Medidas Provisionales Solicitadas por la Comisión Interamericana de Derechos Humanos Respecto de la República Argentina" (Jan. 19, 1994) [hereinafter *Caso Reggiardo Tolosa*], at http://www.umn.edu/humanrts/iachr/espanol/B_11_2E.htm (Feb. 14 2000).

As late as 1998, the Commission found another case arising from the children of the *disappeared* in Argentina to be "admissible." The case of Emiliano Carlos Tortrino Castro had created serious legal problems for the *Abuelas* in domestic courts that were refusing to order compulsory genetic testing of a child who was alleged to have been *disappeared* with his mother when he was eight months old. See ARDITI, *supra* note 2, at 148. A child with the same distinguishing physical characteristic was found and quickly adopted (*adopción plena*) shortly after the *disappearance*. It took years for the case to reach the Argentine Supreme Court, which initially failed to rule on the mandatory genetic testing, but declared the case closed due to the statute of limitations. See *id.* at 149. Rita Arditi reports that the *Abuelas* consequently launched a national and international campaign to collect one million signatures on a petition to be presented to the Commission in protest of this decision. *Id.* In 1996, the *Abuelas* achieved a significant victory in the Argentine Supreme Court, which ruled in favor of compulsory genetic testing for the children, although not for the parents who had taken them. See *infra* note 161 and accompanying text, for a discussion of this decision. Although the genetic testing decision ultimately was favorable to the *Abuelas'* position, the Argentine Court did not reach the prescription issue, which continues to be the subject of international litigation.

278. See Nestor Pedro Sagues, *Judicial Censorship of the Press in Argentina*, 4 SW. J. L. & TRADE AM. 45-46 (1997). After the constitutional reform of 1994, Section 22 of Article 75 of Argentine Constitution "conferred constitutional hierarchy to several international documents, including the Pact of San Jose of Costa Rica, officially called the 'American Convention on Human Rights.'" *Id.* This means that the United Nations Convention on the Rights of the Child now also has a "place in the constitutional hierarchy." *Id.* at 68 and n.155.

As of 1996, 26 countries were signatories to the American Convention on Human Rights ("ACHR"), and every country had ratified it except the United States. While only 16 of the 26 signatories accepted

delay to protect the psychological integrity of the minors and to avoid irreparable harm to them.²⁷⁹ Some commentators consider the Argentine response an unusually effective example of the impact of the Inter-American Court,²⁸⁰ as Argentina first moved the boys into a foster home and then into the care of their maternal uncle.²⁸¹

Rita Arditti reports that the domestic decision to return the Tolosa twins "was based on Article 8 of the United Nations International Convention on the Rights of the Child—the right to preservation of identity, an article for which the Grandmothers had lobbied extensively at the United Nations."²⁸² Article 8 of the United Nations Convention on the Rights of the Child ("Child Convention"), adopted in 1989, provides:

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.²⁸³

This provision was included "at the suggestion of Argentina in the light of mass 'disappearances' of children whose identity papers had been deliberately falsified and family ties arbitrarily severed."²⁸⁴

the jurisdiction of the Court, Argentina was one of them. See Holly Dawn Jarmul, Note *The effects of decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311, 312 (1995–96). See also Pasqualucci, *supra* note 277, at 305–06 (The ACHR protects 26 substantive rights).

279. "Caso Reggiardo Tolosa," *supra* note 277, at para. 4.

280. See Pasqualucci, *supra* note 277, at 350–51. Argentina complied so completely with the President of the Court's order of urgent measures that the plenary Court did not need to order provisional measures. *Id.* at 350. Argentina responded to the international Court, stating that since the domestic courts had ordered the children into substitute custody and that they were now living with their maternal uncle, there was no further need for action. *Id.* at 351.

There is no real international enforcement mechanism if a country does not wish to comply. See Jarmul, *supra* note 278, at 315. The Court has only decided a few cases since 1988, making it difficult to evaluate its impact on national law. However, the influence does seem more extensive in Argentina than elsewhere. *Id.* at 323.

281. See "Caso Reggiardo Tolosa," *supra* note 277, at para. 4.

282. ARDITTI, *supra* note 2, at 137, 145–48.

283. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES" 291 (compiled and edited by Sharon Detrick, 1992) (hereinafter GUIDE TO THE "TRAVAUX PREPARATOIRES"). For background on the Convention, see Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child*, 4 LOY. POVERTY L.J. 9 (1998). The Convention derived from a Polish proposal for the 1979 International Year of the Child, itself commemorating the twentieth anniversary of the 1959 Declaration of the Rights of the Child. See also Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1 (1993); Michael Jupp, *The United Nations Convention on the Rights of the Child: An Opportunity for Advocates*, 34 HOW. L.J. 15, 21 (1991).

284. GUIDE TO THE "TRAVAUX PREPARATOIRES," *supra* note 283, at 28, 291–96.

The original version submitted by the delegation of Argentina was even more pointed. It would have established that "the child has the inalienable right to retain his true and genuine personal, legal, and family identity" and imposed affirmative duties on states to assist any child who "has been fraudulently deprived of some or all of the elements of his identity" to reestablish his "true and genuine identity." In a reflection of the *Abuelas'* position in Argentina, this obligation would have included restitution or restoration of the child to his blood relations.²⁸⁵

In response to questions from Norway about whether the same guarantee generally was covered in other provisions, Argentina insisted that specific protection was necessary. They distinguished between a child's true and genuine identity and his or her legal one. There was some concern expressed by other representatives about hidden family law problems in the proposal as drafted and about the meaning of "family identity." As a result, the term "family identity" was replaced by "identity, including nationality, name and family relations as recognized by law."²⁸⁶

According to Cynthia Price Cohen, a leading scholar and activist who participated in the drafting of the Child Convention,²⁸⁷ the "best interest of the child" is only one of four major themes that pervade the agreement.²⁸⁸ The Child Convention makes many references to "best interest," which appears to be the standard by which to measure state compliance.²⁸⁹ For example, though Article 3 makes the "Best Interests of the Child" a primary consideration in all actions regarding children,²⁹⁰ there is also a recognition of the child's own evolving capacities, implying that care and protection must be balanced against a child's "individual personality rights." Nondiscrimination is a third major theme. Fourth, "respect for the child's human dignity" is also required. Cohen believes that the chief importance of the Child Convention is that it establishes the child, rather than the adults who care for the child, as the rights holder, and that its standards, (while "pro-family"), make it clear that the child is a separate human being, not the family's property.²⁹¹

Interestingly, in the working groups that drafted the Child Convention, debate and revision reduced the Article 3 "best interest" standard from *the*

285. *Id.* at 292.

286. *Id.* at 292.

287. Cynthia Price Cohen is Executive Director of the Child Rights International Research Institute, which she founded in 1992. Cohen, "Role of the United States in Drafting," *supra* note 283, at 15.

288. *Id.* at 19.

289. *Id.*

290. GUIDE TO THE TRAVAUX PREPARATOIRES, *supra* note 283, at 131. The Polish draft made the best interest of the child the "paramount concern." *Id.* at 133. Although there were questions about the best interest of the child being too subjective a term, a number of delegations favored that formulation. *Id.* at 137. A number of delegations questioned whether the BIC should be the primary consideration in all actions, *e.g.*, where there were competing interests such as justice and of society at large. As a result, Canada proposed changing it to "a" primary consideration. This suggestion was supported by the United States, Japan, and Argentina, and consensus was reached on that basis. *Id.* at 137-38.

291. Cohen, *The Developing Jurisprudence of the Rights of the Child*, *supra* note 283, at 19.

paramount to a *primary* consideration.²⁹² How then is Article 8's "right to identity," the provision which the Argentine delegation contributed out of their own experience, to be understood? Is it the *implementation* of the best interest of the child standard, or is it one of those instances, referred to in the working groups, of a competing interest in justice?

After the twins were placed in the custody of their uncle, the case became a cause *celebré* in the media, and the boys' custody was changed yet again in the name of their "best interest." It began with an appearance on a "show hosted by a right-wing politician," but extended to the "most popular prime-time programs." In Rita Arditti's words, audiences in these programs were "manipulated" to favor the Miaras, now called "love parents" or "historical parents." Shortly thereafter, the judge placed the twins with a foster family and permitted visits with the Miaras.²⁹³

The criminal case finally reached a conclusion at the end of 1994. Miara was freed based on credit toward his sentence for time spent in pretrial detention.²⁹⁴ On appeal, the judges were convinced that the couple knew the illicit origins of the twins, though they felt that the charge of kidnapping could not be proven against them (a problem in most of these cases). Most interesting was the appellate judges' treatment of children's "choices." The chief opinion observed that the Miaras never intended to tell the boys the truth because it would have damaged the couple's selfish interest in possession. Miara did not care about the suffering he imposed on the children he forced to be his "sons." Any "consent" by the minor children, moreover, was ineffective in light of family rights and the boys' lack of legal capacity to make a choice. Only their legitimate parents could consent.²⁹⁵ The court continued in this vein, commenting on legal scholarship that discussed the protection afforded by law to familial and social integration. Because a child under ten years of age is totally dependent, the law punishes anyone who encroaches on the only valid exercise of will—that of the parents or legiti-

292. GUIDE TO THE TRAVAUX PREPARATOIRES, *supra* note 283, at 292.

293. ARDITTI, *supra* note 2, at 137. The boys were allowed to return to a private school previously attended; their uncle gave up custody after only seven months, admitting that he might have made some mistakes. He expressed his hopes that they would realize someday that they too were victims of the dictatorship, just like their parents.

294. "Miara, Samuel yorra s/suposición de estado civil, etc. "en la causa no. 11.000, Provincia de Buenos Aires (Dec. 19, 1995). My gratitude to Dr. Ronald E. Gialdino of the Argentine Supreme Court (Secretaría de Investigación de Derecho Comparado de la Corte Suprema de Justicia de la Nación) and to Maria Silvia Galindez for providing me with a copy of this opinion.

295. *Id.* at 16–18. The term used by the court is "*patria potestad*." "*Patria Potestad*" is defined in DAHL, *supra* note 155, at 305 as parental authority. Dahl says that the "*patria potestas*" over unemancipated legitimate children belongs to the father and mother jointly. The Court decides in case of any disagreement between them. Illegitimate children and adopted minors are under the "*potestas*" of the father or mother acknowledging or adopting them. Parents who exercise this authority over unemancipated children have a duty to support them, keep them in their company, educate them, and instruct them in accordance with parental means. The parents represent the children in the exercise of all actions, which may redound to their benefit of such children, and they exercise the power to correct and moderately punish their children. The authority ends with death of either parents or child, the emancipation of the child, or by adoption of the child by another. *Id.* (citing SPANISH CIV. C., sec. 22, 223, 233).

mate custodians. The defendants deprived the twins of a necessary component of their upbringing: knowledge of their parents and their history. Thus, the Miaras damaged the boys psychologically and took away their choices by removing them from one world and placing them in another. The lies told them permeated the children's upbringing. Not surprisingly, the judges in this criminal proceeding against the Miaras did not rely on the "right to identity" of Article 8 of the Child Convention. They focused on the guilt of the defendants rather than on making any decision concerning the custody of the children.

IX. IMPUNITY UNDER ATTACK: RECENT DEVELOPMENTS IN PROVING A SYSTEMATIC PLAN

Even as it became more difficult to succeed legally and in the court of public opinion, the *Abuelas* persisted. They methodically began building a case designed to demonstrate that the kidnappings of the children of the *disappeared* were not isolated occurrences, but part of a systematic plan orchestrated from above.²⁹⁶ The late human rights activist Emilio Mignone, whose own daughter was *disappeared*, reported that while he looked for her, "an officer told him the army was working on a system by which the children of 'subversives' would not grow up hating the military"—a doctrine based on abduction and change of identity.²⁹⁷

After 1995, changes in the political and legal climate in Argentina and abroad once again brought to the forefront the children of the *disappeared*. With the arrests of high officials of the juntas beginning again in 1998, it was clear that the fate of the children of the *disappeared* had an impact that went far beyond the sixty-three resolved cases, affecting Argentine literature, music, popular culture, public life, criminal justice, and, once again, politics.²⁹⁸ In 1995, navy officer Adolfo Scilingo became the first member of the Argentine military to break the silence about the "dirty war."²⁹⁹ Horacio Verbitsky published *The Flight: Confessions of an Argentine Dirty Warrior*,³⁰⁰ in

296. See Marcela Valente, *Rights-Argentina: Jurists Say Case on Theft of Minors Weakened*, INTER PRESS SERVICE, June 12, 1998.

297. See Marcela Valente, *Rights-Argentina: Loophole May Allow Prosecution of "Dirty War" Generals*, INTER PRESS SERVICE, June 10, 1998. Mignone was founder and director of the Center for Legal and Social Studies, or "CELS," and has been regarded as Argentina's best-known human rights activist, especially during the dictatorship years. He was a lawyer and had been an official of the OAS but was retired by the time of the Juntas. However, after one of his own children, a Catholic social justice activist, was *disappeared* in 1976, he began his unsuccessful search for her and founded CELS. See Michael T. Kaufman, *Emilio F. Mignone, 76, Dies; Argentine Rights Campaigner*, N.Y. TIMES, Dec. 25, 1998, at B11.

298. Rock stars and bands, such as Los Caballeros de La Quema, 2 Minutos, Fun People, and Los Pericos, and documentaries, such as *Por Esos Ojos* (Through Those Eyes) by the Uruguayans Gonzalo Arijon and Virginia Martinez or *Boin de Guerra* (Spoils of War), publicized the plight of the kidnapped children. See Daniel Gatti, *LatAm-Rights: Hunt Continues for 'Disappeared' in S. America*, INTER PRESS SERVICE, Mar. 24, 1999.

299. See ARDITTI, *supra* note 2, at 159.

300. HORACIO VERBITSKY, *THE FLIGHT: CONFESSIONS OF AN ARGENTINIAN DIRTY WARRIOR* (trans.

which Scilingo expressed his remorse about participating in the death flights in which the *disappeared* were thrown into the sea.³⁰¹ His admissions forced Army Chief of Staff General Martin Balza to admit for the first time that "illegal means" had been used to fight the dirty war.³⁰² The revelations reignited public outrage.³⁰³ In June 1996, the *Madres* marched for the 1000th time. A new generation of young activists admired them³⁰⁴ and challenged the spectacle of known murderers and torturers walking the streets with impunity.³⁰⁵ Calling themselves HIJOS, they began to conduct "outings" ("*escrachas*") in which they followed the former officers of the dictatorship, carrying posters accusing them of their crimes. They occupied the streets in front of the houses of the dirty warriors and drove them out of public spaces.³⁰⁶

In October 1996, Spanish Judge Baltasar Garzón opened an investigation into the fate of Spanish nationals who were *disappeared* in Argentina.³⁰⁷ Garzón, sometimes called "King Baltasar," led a high-profile campaign against Chile's infamous former dictator that resulted in the detention in London of Augusto Pinochet.³⁰⁸ In the Argentine case, Judge Garzón heard testimony from, among others, Carla Artes, a HIJO whose Spanish-Argentine mother was *disappeared* by the regime in 1976. Her nine-month-old baby was given to Eduardo Ruffo, who worked at the concentration camp where the mother was confined and presumably murdered. Carla was raised by Ruffo until her grandmother made an open appeal on Argentine television. One hundred former Argentine officials were initially named as suspects in Judge Garzón's investigation of genocide and terrorism against Spanish citizens. If they were

Esther Allen 1996).

301. Scilingo was slashed in the face by unknown assailants after he publicly described these flights. Michael McCaughan, *Long Memories of a Continent's Shallow Graves Still Fester*, IRISH TIMES, Feb. 21, 1998 at 13. He subsequently traveled to Spain, where he testified about the "death flights" before Judge Baltasar Garzon. But after two years of being held in custody in Spain, he subsequently retracted his "confession." See Marcela Valente, *Scilingo's Retraction Doesn't Change Facts*, INTER PRESS SERVICE, Nov. 5, 1999.

302. See ARDITTI, *supra* note 2, at 159-60.

303. See Linda Diebel, *Trying to Cage a Deadly Angel*, TORONTO STAR, Feb. 15, 1998, at F6.

304. Stephen Brown, *Argentine Mothers Mark 1,000 Sad Thursdays*, REUTERS NORTH AMERICAN WIRE, June 27, 1996.

305. See, e.g., Marcela Valente, *Accounts of Minors Abducted During Dictatorship*, INTER PRESS SERVICE, June 15, 1998.

306. See ARDITTI, *supra* note 2, at 167. HIJOS is a human rights group established by about seventy children of the *disappeared* (whether they themselves were kidnapped or not) in 1995. The initials stand for "HIJOS por la Identidad y la Justicia, contra el Olvido y el Silencio," translated by Arditti as "Children for Identity and Justice, against Oblivion and Silence." They demanded annulment of the amnesties and pardons, prosecution of their parents' murderers, and restitution of the kidnapped children of the *disappeared*. See *id.*

307. The controversial Judge Garzón, who has been called Spain's best known magistrate, initiated his investigation at the behest of several groups that filed complaints. See Serrill, *supra* note 7; Marlise Simons, *Unforgiving Spain Pursues Argentine Killers*, N.Y. TIMES, Oct. 24, 1996, at A3.

308. Hubert Kahl, *Spaniards dub magistrate Garzon 'King Baltasar'*, DEUTSCHE PRESSE-AGENTUR, Nov. 3, 1999. Pinochet was held under house arrest in London for more than sixteen months. While new precedents were set for holding foreign dictators accountable in the courts of other nations for crimes committed at home, the British government released him on humanitarian grounds on March 2, 2000, and he returned to Chile a free man.

summoned, the judge was empowered to seek international search and arrest warrants, but then-President Menem said that he would not honor any requests for extradition.³⁰⁹ He issued a presidential decree in January 1998 instructing Argentine federal courts not to cooperate with Judge Garzón's extradition efforts.³¹⁰

The *Abuelas* had already filed lawsuits designed to establish that the kidnappings were pursued according to a plan.³¹¹ Although Carlos Menem, the man who issued presidential pardons to the leaders of the junta in 1989 and 1990 and who initially fostered impunity, could hardly be accused of pressing for action, events began to overtake his government. In June 1997, the transcript of an interrogation under torture was broadcast on television, lending credence to the idea that not all archives were purged at the end of the dictatorship and that evidence would still be found.³¹² Graciela Fernandez Meijide, former secretary to CONADEP with a human rights reputation whose own son was *disappeared* in 1977, swept to victory for the Buenos Aires legislative seat, temporarily making her a leading opposition candidate for the 1999 presidential elections.³¹³

In November 1997, attorney Alberto Pedroncini filed a lawsuit on behalf of twelve of the *disappeared*, alleging that the pardons were ineffective in cases of kidnapping where the victims were never found, thereby creating a continuing offense.³¹⁴ Popular protest forced Menem to shelve his proposal to build a shrine to national reconciliation on the site of the most brutal detention center, the Navy's Mechanics' School (ESMA). This gesture to the Argentine military came just hours after legislators announced plans to draft

309. See Serrill, *supra* note 7. Although Spanish law does not allow trial in absentia, the judge took testimony and issued international arrest warrants for members of the former ruling juntas. Argentina's then-President Menem (who had pardoned these same individuals in the 1980s), however, angrily refused to extradite them, calling Garzon a "publicity-seeking show off." See Jack Epstein, *Legacies of Terror*, HOUSTON CHRON., May 10, 1998, at A1.

310. Marcela Valente, *Rights-Argentina: Gov't to Leave Human Rights Cases to Courts*, INTER PRESS SERVICE, Jan. 4, 2000, LEXIS, Nexis Library, Inter Press File. Interior Minister Carlos Corach later stated that he would defend the principles of territoriality and non-retroactivity and the fact that these cases had been closed. Viviana Alonso, *Rights-Argentina: Menem Expresses Concern Over Pinochet Case*, INTER PRESS SERVICE, Nov. 27, 1998, LEXIS, Nexis Library, Inter Press File.

International law scholar Jordan Paust states that there are five theories of "jurisdictional competence": (1) territorial (alleged offense happened within the jurisdiction or where there is an impact within the territory); (2) nationality of the defendant; (3) passive personality, or victim theory, i.e., the victim is the jurisdiction's national (this is a minority view); (4) universal jurisdiction (any state may address a violation of customary international law) or its subset, "universal by treaty" (applicable only by mutual consent of the signatories of a treaty); and (5) protective jurisdiction, which applies to significant national security crimes against the state, and is enforceable only when the defendant is present in the state (as in the Eichmann trial). JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 387-412 (1996).

311. See Marcela Valente, *Argentina-Human Rights: Plaza de Mayo Grandmothers to Meet Popz*, INTER PRESS SERVICE, Nov. 20, 1997, LEXIS, Nexis Library, Inter Press File; Marcela Valente, *Videla on House Arrest for Humanitarian Reasons*, INTER PRESS SERVICE, July 17, 1998, LEXIS, Nexis Library, Inter Press File.

312. Marcela Valente, *The Reappearing Ghosts of the Disappeared*, INTER PRESS SERVICE, June 3, 1997.

313. Marcela Valente, *Menemism in Trouble*, INTER PRESS SERVICE, Nov. 3, 1997.

314. See Epstein, *supra* note 309.

a law annulling amnesty and was called a "provocation" by the *Abuelas* and other human rights groups in Argentina.³¹⁵ After Navy officer Alfredo Astiz, "the blond angel," publically admitted his role in the dirty war on January 13, 1998, he was summoned to civil court by the relatives of one of the *disappeared* to be interrogated.³¹⁶ An avalanche of complaints followed.³¹⁷

By the middle of 1998, the scale and success of the HIJOS "*escraches*" or "outings" had quickened,³¹⁸ and the federal Congress had enacted a symbolic repeal of the amnesty laws.³¹⁹ A federal judge investigating the kidnapped babies, Judge Antonio Bagnasco, received a hoax bomb threat.³²⁰ In June of 1998, federal judge Roberto Marquevich dropped a legal bombshell. He ordered the detention of former President General Jorge Videla on charges that he was responsible for the kidnapping of five children of the *disappeared*.³²¹

For the *Abuelas* and other human rights groups, this development evoked a mixed reaction. Though Videla was questioned and detained on charges relating to the kidnapping of first five, and later more,³²² children, he was not arrested for the 66 charges of murder, 306 abductions, 97 cases of torture, and 26 cases of theft for which he had originally been sentenced to life imprisonment in 1985 but for which he had been pardoned by President Menem in 1990.³²³ This was because the amnesty laws and pardons were said to have exempted the crime of kidnapping children from their purview.³²⁴ Even this rather strange result, which might insulate Videla from accountability for murdering the parents but at least hold him responsible for kidnapping their children, was not a certainty. A former federal prosecutor doubted that legal charges could be filed against Videla because he was absolved of the crime of theft of minors by the Federal Chamber in 1985. At

315. See Marcela Valente, *O outcry Over Proposed Monument*, INTER PRESS SERVICE, Jan. 8, 1998, LEXIS, Nexis Library, Inter Press File.

316. See Marcela Valente, *Astiz Appears in Court as Crowds Howl Outside*, INTER PRESS SERVICE, Jan. 19, 1998, LEXIS, Nexis Library, Inter Press File. He claimed to regret nothing about his role in the dirty war. McCaughan, *supra* note 301.

317. Valente, *Astiz Appears in Court as Crowds Howl Outside*, *supra* note 316.

318. See, e.g., Epstein, *supra* note 309.

319. *Id.* Public opinion had shifted from believing the protesters to be "insane," to seventy-eight percent in favor of reversing the pardons of junta leaders. McCaughan, *supra* note 301.

320. Marcela Valente, *Dictatorship Child Theft Judge Intimidated*, INTER PRESS SERVICE, Mar. 4, 1998, LEXIS, Nexis Library, Inter Press File.

321. Daniel Zadunaisky, *Former Military Junta Leader is Arrested for Child Kidnapping*, AP, June 9, 1998, LEXIS, Nexis Library, News; AP File.

322. *Ex-Argentine Dictator Faces More Kidnap Charges*, AGENCE FR. PRESSE, Aug. 12, 1998, LEXIS, Nexis Library, Agence Fr. Presse File.

323. *Former Dictator Jorge Rafael Videla Detained for Stealing Children During Repression*, NOTISUR-LATIN AM. POL. AFF. (U.N.M. Latin Am. Inst., Albuquerque, N.M.) June 12, 1998.

324. See *supra* text accompanying note 46. In a landmark ruling on March 6, 2001, however, a lower court federal judge ruled that the pardon laws, which shield lesser officials of the regime from prosecution for murder, torture, and kidnapping, are unconstitutional because they violate international human rights treaties signed by Argentina. Anthony Faiola, *Argentine Amnesty Overturned; Ruling Could Bring Trials of Soldiers Involved in "Dirty War"*, WASH. POST, Mar. 7, 2001, at A19. If upheld, this would mean that the crimes against the parents could be prosecuted along with the kidnapping of the children.

that time, the child stealings were considered isolated cases not to be pursued. Videla could not be tried twice for the same crimes.³²⁵ Even as the general prosecutor announced the creation of a special unit to work on kidnap cases on the same day that Judge Markevich ordered Videla's detention, human rights groups expressed skepticism about the motives of the office and the judge.³²⁶

In any event, however, the arrest of the former junta head Videla reignited debate over the stolen babies,³²⁷ produced evidence of a plan orchestrated from above and executed with the cooperation of other Southern Cone nations,³²⁸ and led to the arrest of a whole string of officials of the late dictatorship.³²⁹ The cases were consolidated in front of another federal judge, Antonio Bagnasco, who had already been investigating the child stealings. He ultimately issued a lengthy indictment involving seven former officials.³³⁰ President Menem promised he would not interfere with the workings of the judicial system,³³¹ but his government nonetheless opposed any extradition to Spain, Italy, or Switzerland where inquiries proceeded about the *disappearances* of Argentine citizens.³³² Menem was disqualified from serving a third

325. See Valente, *supra* note 296. The attorney for the *Abuelas* agreed that there might be a problem with some legal elements.

326. See Valente, *supra* note 296. On the new unit, see *Argentina Creates Special Office to Probe Missing Children Cases*, AGENCY FR. PRESSE, June 12, 1998, LEXIS, Nexis Library, Agence Fr. Presse File.

327. VALENTE, *supra* note 305.

328. Daniel Gatti, *Rights-Latam: New Proof of Coordination Among Dictatorships*, INTER PRESS SERVICE, June 30, 1998, LEXIS, Nexis Library, Inter Press File.

329. The second official arrested was Emilio Eduardo Massera, seventy-three, former admiral in charge of the infamous Navy Mechanics' School. His case involved the children of Patricia Roisinblit and Cecilia Vinas, two women who *disappeared* from that facility. Vinas' son was raised by Jorge Vildoza, one of Massera's chief assistants, until the son took a DNA test at age twenty and found out his real parents. See Kevin Gray, *Former Argentine Military Junta Leader Detained on Child Kidnap Charges*, AP WORLDSTREAM, Nov. 24, 1998, LEXIS, Nexis Library, News; AP File.

Subsequently, the most notorious member of the military junta, Leopoldo Galtieri, (who was its chief at the time of Argentina's invasion of Malvinas/Falklands) was detained. After Massera was arrested, a group of about 100 naval officers formed the Group of Retired Admirals, apparently to combat attacks on the institution of the military; they said no action should be taken in these cases. See *id.*

General Reynaldo Bignone, the military chief before the return to democracy, was ordered to testify on Dec. 23. See Oscar Martinez, *Another Argentine Ex-dictator Investigated for Baby Stealing*, AGENCY FR. PRESSE, Nov. 3, 1998, LEXIS, Nexis Library, Agence Fr. Presse File.

The investigations and detentions, and then actual charges, began to mount up: *Argentina army dictators formally charged with baby-snatching*, AGENCY FR. PRESSE, Jan. 22, 1999, LEXIS, Nexis Library, Agence Fr. Presse File. (seven formally charged: leaders Reynaldo Bignone, Emilio Massera, Cristino Nicolaides, Ruben Franco, and naval officers Antonio Vanek, Jorge Acosta, and Hector Febres; liens were placed against them in anticipation of possible money judgments).

Conditions of detention, however, were not too onerous, especially for the over-seventy-year-olds, who are permitted to remain under house arrest by Argentine law. See Marcela Valente, *Activists Hound Admiral Holed Up in Posh Estate*, INTER PRESS SERVICE, May 27, 1999, LEXIS, Nexis Library, Inter Press File (noting that *Abuelas* demonstrate outside of Massera's family estate, where he is receiving a stream of visitors while under "house arrest"; Videla leaves his apartment at will; and Galtieri appeared at the army's independence day celebration on May 25).

330. *Argentina army dictators formally charged with baby-snatching*, *supra* note 329.

331. *President Rules Out Pardons in Argentina Baby-Stealing Cases*, AGENCY FR. PRESSE, Jan. 1, 1999, LEXIS, Nexis Library, Agence Fr. Presse File.

332. Travis Lea, *Cleaning Up the Dirty War*, IN THESE TIMES, July 11, 1999, at 16.

term,³³³ and his *Peronista* (PJ) party suffered a resounding defeat on October 24, 1999, at the hands of the center-left *Alianza* (a coalition of *Frepaso* and the Radical Party), led by Fernando de la Rúa, the former mayor of Buenos Aires.³³⁴ Although the election contest centered around the stalling economy, corruption, and the flamboyant excesses of the Menem years, its result also changed the climate for human rights complaints.³³⁵

Since the detention of Videla, the number of teenagers coming forward to determine whether they are children of the *disappeared* has tripled.³³⁶ Yet, after all the years of the *Abuelas'* work, only sixty-three children have been identified and had their cases resolved.³³⁷ Although one of the officials interrogated gave some information about the outline of the kidnapping plan,³³⁸ no lists of the *disappeared* have been forthcoming.³³⁹ Some of the now-grown children of the *disappeared* who are learning their identity at this late stage find it hard to accept the implications of that truth.³⁴⁰ It remains to be seen what effect the arrests will have on the future of Argentine democracy³⁴¹ or even on the individual officers charged.³⁴²

333. *Argentines Take to the Polls*, UPI, Oct. 24, 1999, LEXIS, Nexis Library, UPI File.

334. Clifford Krauss, *Party of Peron Loses its Hold on Argentina*, N.Y. TIMES, Oct. 25, 1999, at A1.

335. See Clifford Krauss, *Sour on the Status Quo, Argentines Vote Today*, N.Y. TIMES, Oct. 24, 1999, at § 1, pg.3 (election issues); *De la Rúa Says Judges to Consider Spanish Judge's Request*, BBC MONITORING LATIN AM., Jan. 6, 2000, LEXIS, Nexis Library, BBC File (reporting that the newly installed president said that if his government receives an arrest warrant from Spanish judge Garzon, they will consider it and decide in accord with existing treaties).

336. Gatti, *supra* note 298.

337. See, e.g., Lea, *supra* note 332.

338. *Seven Retired Officers in the Dock; Federal judge commits Massera and Co for Trial*, LATIN AM. S. CONE REP., Feb. 2, 1999, at 3 (Acosta, who may have been most directly involved, is cooperating and providing details).

339. *No Lists of Argentine Disappeared—Army Chief*, *supra* note 47.

340. See, e.g., Gatti, *supra* note 298 (Mariana Zaffaroni, raised by a man who participated in the kidnapping and perhaps the murder of her parents, still does not want a relationship with her biological parents and has written them letters accusing them of being communists); Wright, *supra* note 270, at A8; Katherine Ellison, *Cry for Argentina's Children*, CALGARY HERALD OBSERVER, Apr. 17, 1999, at H3 (noting the case of Javier Vildoza, who located his identity by surfing the Web, but still stands by his naval officer adoptive father and wants to keep his name). As one of the grandparents who believed that their daughter had given birth to one of the Bianco children said, "It is very painful to follow the path of truth, knowing that you were raised among lies, and that your 'parents' are really the murderers of your parents." See Valente, *supra* note 301.

341. The election of October 24, 1999, which unseated Menem's ruling PJ party in favor of the opposition *Alianza*, was more a plebiscite on the ills of the Argentine economy and the personal style and political corruption of the Menem regime than on human rights or fear of the military. See, e.g., Krauss, *supra* note 335, at §§ 1, 3; Anthony Faiola, *Argentine Voters Pick Opposition in Landslide; Polls Show De La Rúa Ahead*, WASH. POST, Oct. 25, 1999, at A19; Rodolfo A. Windhausen, *De la Rúa's victory marks new Era*, UPI, Oct. 25, 1999, LEXIS, Nexis Library, UPI File.

342. Many of them are over 70 years old and may face only house arrest at the worst. See Didier Lapeyronie, *Former Argentine Army Chief Accepts Baby-Stealing Probe*, AGENCE FR. PRESSE, Jan. 6, 1999 (*Abuelas* charge he is willing to accept responsibility because he knows he will not go to jail).

X. CONCLUSION: LESSONS FROM ARGENTINA? THE BEST INTEREST OF THE INDIVIDUAL CHILD IS POLITICAL; THE PROCEDURAL IS POLITICAL³⁴³

Just as in United States' law, the disputes over both substance and procedure in Argentina's law were political. First, it is clear that in the custody disputes over the children of the *disappeared*, the "best interest of the child" is not just an individual question, but necessarily reflects the social, cultural, that is to say, political, context in Argentina.³⁴⁴ Consequently, there are competing versions of what indeed constitutes the "best interest of the child."

Second, even procedural issues may reflect the political context of family law decisions. In Argentina, the *Abuelas* struggled to establish a procedure for determining identity in these cases. To the extent that they succeeded, they made inroads on the impunity for their crimes enjoyed by the former regime. To the extent that the courts permitted procedural doctrines such as jurisdiction, standing, and prescription (limitations periods),³⁴⁵ to block or

343. "The personal is political" is a phrase used by the "women's liberation movement" of the 1960s. See SARA EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* 280 (1989). It expresses both a substantive and a methodological insight. Substantively, it is a rejection of the distinction between the public world of politics (inhabited by men) and the private world of home and family (the realm of women). It also reflects a methodology of social change by which women gathered in "consciousness-raising" groups to share personal experiences, which led them to a political understanding of their common experience as women.

344. This statement does not refer to the same phenomenon as the one that Professor Jonathan Miller is describing in his excellent article on *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77-176 (1997). He is explaining a kind of collapse of judicial independence in Argentina, which resulted in a highly politicized judicial review which *de facto* always supported the actions of the executive branch. See *id.* at 151-52. This Article is concerned with a different kind of "political" meaning, i.e., in the sense of a dispute that is contested with respect to important value judgments and power relationships in society.

345. Similar gateway issues arise and cause delay in US courts when babies are accidentally swapped or adoptions go wrong due to fraud, mistake, or jurisdictional defects. See, e.g., *In re Clausen*, 502 N.W.2d 649 (Mich. 1993) *stay den. sub nom. DeBoer v. DeBoer*, 509 U.S. 1301 (1993) ("Baby Jessica" case in which child returned to biological parents from adoptive family); *In re* Petition of Doe, 638 N.E.2d 181 (Ill. 1994), 649 N.E.2d 324 (Ill. 1995), *stay den. sub nom. Baby Boy Richard v. Kirchner*, 513 U.S. 1138 (1995) ("Baby Richard" case in which child returned to biological father from adoptive parents). Regardless of the legal outcome in some of these high-profile cases, there was not a happy ending for the children. Baby Richard's father subsequently divorced his mother, whom he had married during the fight for the boy. Kimberly Mays, who was swapped at birth, but permitted by a court to "divorce" her biological parents and stay with the man she had always believed to be her biological father, ended up a runaway, a young bride and mother, accused of abuse or neglect of her own child, and divorced herself. See, e.g., *Girl Who 'Divorced' Parents is Missing*, CHI. TRIB. Apr. 14, 1996, at 12c. About six months after Kimberly Mays testified that she wanted nothing to do with her biological parents, and a Florida court determined that Regina and Ernest Twigg would not be permitted to prove their biological parentage of the girl, Kimberly ran away from the Mays's home to a youth center. She later moved in with the Twigg's as part of a negotiated settlement. Subsequently she was reported missing from their home as well and found safe at a youth shelter.

The decisions awarding absolute custody of children like Baby Jessica or Baby Richard to their biological fathers have been criticized on the grounds that courts are ignoring the "best interest of the child." See, e.g., Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 44. Dr. Albert J. Solnit, Connecticut state mental health commissioner, commented about a case involving a baby who had been abandoned in the hospital by her teenage mother and adopted by a family who was raising her. When the homeless birthmother, Gina Pellegrino, subsequently sued and obtained custody of the child, Dr. Solnit

significantly delay the ordering of blood tests and the resolution of custody, impunity benefitted, but the children suffered the costs of delay. Even if incurred in the name of finality of legal proceedings or of stability in a child's life, in the Argentine context, the delays added to the injury she suffered.

A. *The Best Interest of the Individual Child Is Political*

The political context was evident in the competing versions of "best interest" propounded by the parties. The Lavalléns' lawyers in Paula Logares' case for example, argued that those they called the "*padres de crianza*" or raising parents were the protectors of the child. The fact that they engaged in criminal conduct was secondary to the interest of the child. The lawyers defined those interests as being protected from disturbance or trauma or having custody changed solely in the interests of third persons, even of the biological parents themselves.³⁴⁶ This was a kind of "psychological parent"³⁴⁷ argument that seemed entirely abstracted from anything that had happened in Argentina or in the child's own life.³⁴⁸ The defenders also talked about the wishes of the child and the affection they felt for their raising parents, an argument that was particularly dramatic in cases of older children like the Tolosa twins who were displayed in the media, articulately expressing their attachment for the Miaras and their strong identification with them. The Miaras claimed in their own defense that "the children should have the right to choose, to be happy, to be with whom they want to be."³⁴⁹ During the long legal battles the teenaged boys resisted admitting their biological relationship to the Tolosas and defended their adoptive family from the allegations made by their maternal uncle: "He can't come saying my father is a kidnapper, because if you attack my father, you're attacking me."³⁵⁰ One of the boys said that he already had an identity which could not be changed.³⁵¹ After years in the hands of the Miaras, the demand that

remarked: "The best interests of the child were totally ignored. What was worshipped was the technicality of law and the mystique of blood ties." *Id.* Professor Elizabeth Bartholet, author of *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993) and an adoptive parent, expressed similar sentiments about the "Baby Jessica" case: "It's outrageous to say the only issue that can be thought about is whether Dan Schmidt's rights were appropriately terminated or not" in light of the fact that "you're dealing with a child who has had a 2 1/2 year relationship with a set of de facto parents." *Id.*

An assessment of whether the gateway devices are useful or harmful in these domestic cases, however, may very well depend on the context and requires further study.

346. See *supra* notes 99–100 and accompanying text.

347. For the concepts of the "psychological parent" and the child's need for stability with that family, see generally JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973), *BEFORE THE BEST INTERESTS OF THE CHILD* (1977), and *IN THE BEST INTERESTS OF THE CHILD* (1986).

348. Compare the views of Francoise Dolto, the French psychiatrist who studied orphaned Jewish children adopted by French families, *supra* note 187 and accompanying text.

349. Gary Marx, *For Children of the Disappeared, a different Torture*, CHI. TRIB., Apr. 4, 1993, at 21, zone C.

350. Sam Dillon, *Custody of twin boys is a battle that lingers from Argentina's "dirty war,"* HOUSTON CHRON., Apr. 10, 1992, at A24.

351. Marx, *supra* note 349.

they be reintegrated into their legitimate family seemed threatening to the Tolosa boys, and they were not able to make an adjustment to living with their maternal uncle when the transfer finally occurred at age sixteen.

The *Abuelas*, and the Argentine legal system to a greater or lesser extent, had a counter-story to this a-contextual view of the "raising parents" and the alleged stability and security they provided. Although the *Abuelas* talked about "strict and pure justice to the bitter end" for their murdered children and kidnapped grandchildren,³⁵² this was not simply a matter of "best interest" *versus* "justice." Rather, the *Abuelas* developed an entirely different version of "the best interest of the child," one that was grounded in Argentine social reality and was about the children's right "to their name, to their heritage, to their identities."³⁵³

The assertion that the criminal conduct of the appropriators of children was irrelevant certainly would be hard to swallow. The famous Argentinean dissident and victim of the regime, the late Jacobo Timmerman, said that he could not feel calm at the thought of the boys in the custody of a "beast of that caliber." He explained, "a torturer cannot say, 'I feel like a father for these children.' . . . If we accept that, we have to accept that they were right when they killed, they were right when they tortured, and they are right now in keeping the children."³⁵⁴

The *Abuelas'* views, however, went beyond the claim of injustice. In the context of the wrenching and murderous secrets and lies of the nightmare years, they believed that the truth was healing for the children and in their best interest.³⁵⁵ The *Abuelas* were reacting to a deliberate plan devised by a dictatorship to wipe out the identity of part of their own people by murdering them, taking their children, and raising the infants with values alien to the whole familial and social setting from which they had been stolen.³⁵⁶ Restitution (or reintegration) was a social remedy for a social crime in the sense that it was a reclaiming of the children by the families of the victims for the values the children would otherwise have enjoyed.³⁵⁷ The Tolosas spoke of the boys' need to learn their own history and said that the then-

352. *Id.*

353. James F. Smith, *Sought by Argentina; Children of "Dirty War": Sad Legacy*, L.A. TIMES, Apr. 20, 1988, Part I, at 1.

354. *Children of the Disappeared* PRIMETIME LIVE, (ABC NEWS Television broadcast, Aug. 19, 1993).

355. See, e.g., *supra* notes 204–210 and accompanying text.

356. See, e.g., *van Boven Report*, *supra* note 261 at 14 (children learned values of intolerance and discrimination from "adoptive" parents); *supra* note 113 and accompanying text (Paula Logares kidnapped from Jewish family of left-leaning sympathies and raised by wealthy conservative Catholic police family); *supra* note 293 and accompanying text (unhappy Tolosa twins permitted to return to private school attended when in custody of the Míaras).

357. See, for example, the Lemos case in which Judge Padilla rejected defense arguments because no one has the right to own a human being and take control of her personal, familial, and social history, consisting of the values, guidelines, beliefs, and norms of the parents who gave her life. "En la causa Gonzalez," *supra* note 173, at 104.

fifteen-year-olds had been lied to and brainwashed and could not be expected to make their own choices.³⁵⁸

The competing versions of “best interest of the child” are also competing versions of “children’s rights.” Best interest of the child implies what is called *parens patriae* in United States law, that is, that adults, in particular the court, substitute for the minor’s parents to protect and make decisions on her behalf.³⁵⁹ Children’s rights, on the other hand, connote interests that the child herself possesses, not just as the object of the parents’ care and affection.³⁶⁰

The *Abuelas* decried the treatment of children as chattel, objects, war booty who were taken and distributed to satisfy the desires of adults.³⁶¹ They upheld the *child’s right to identity* and were instrumental in the passage of Article 8 of the United Nations Convention on the Rights of the Child, which establishes that right as a matter of international law. Some children, though, were unwilling to accept their legitimate identity, and the appropriators also claimed that they were defending the child’s right to choose which identity he or she wanted.³⁶² This reflects a troubling dilemma: whatever is said about “children’s rights,” someone else always speaks for the child and defines those rights. The competing views of “children’s rights” in Argentina, like the story and counter-story of “best interest of the child,” pit the overtly social against the covertly political. The *Abuelas’* definition is grounded in their view that a child stolen out of his social environment has a “right” to regain his origins, his history, and his identity. The *Abuelas* demanded full restitution of the child to the legitimate family at first and then later at least restoration of that family’s name.

In the hands of some jurists, this easily could slide into a parental rights claim,³⁶³ but the *Abuelas* consistently maintained that they were promoting children’s rights. The care with which they negotiated individual accommo-

358. *Buenos Aires, Argentina*, UPI, Nov. 26, 1989, LEXIS, Nexis Library, UPI File.

359. For the *parens patriae* doctrine and the historical development of what he calls “judicial patriarchy” based on it, see Grossberg, *supra* note 10, at 235.

360. *See, e.g., supra* note 283 and accompanying text (U.N. Convention on the Rights of the Child rests in part on the idea of the child as separate rights holder).

361. *See, e.g., supra* note 182 and accompanying text (the defendant parents’ kind of love is merely the desire to possess an object); *supra* note 183 and accompanying text (judge in Lemos case analysis of objectification of the child).

362. *See supra* notes 97–99 and accompanying text (appropriators’ arguments).

363. *See, e.g., HERRARA & TENENBAUM, supra* note 5, at 190 (Interview with Leopoldo Schiffrin, ex-secretary of the Supreme Court and then-member of La Plata “*Cámara Federal*,” an appellate court). He participated in both capacities in the restoration of Laura Scaccheri. Schiffrin explained that the issue was one of defense of the family order, an almost preservative value. This was an old value. The norms that protect the legitimate family, usually one tied by blood except for particular circumstances, are a fundamental part of the development of the civilized world; they are universal, neither progressive nor conservative. The familial group had a right to transmit its values and traditions. Schiffrin further explained that the kidnappings robbed the family of its legitimate role to acculturate a child and pass on its values, a role which is related to biological inheritance and blood ties. When the junta argued that children should not be educated as subversives, they acted like a platonic state in which children were educated by the state. *Id.* at 191–93.

dations and with which they managed transitions in the restitution process lends significant support to this claim.³⁶⁴ Their definition of "children's rights," however, clearly was a social one.

The appropriators' definition was superficially grounded on the needs of each individual child. By ignoring the context, however, it in fact serves the desires of "raising parents" and their right-wing political position and does little to secure "children's rights." Moreover, they often failed to show care and concern for the impact of the transition on the children they had appropriated, instead telling them abruptly and only when caught, continuing to lie about what happened, fleeing with them, and delaying and extending their suffering.³⁶⁵

Under United States constitutional law, the approach would be strikingly different. First, the United States is one of only two states in the world that have not signed the Child Convention that includes the concepts of "children's rights" and the "right to identity," shaped largely by the Argentine delegation.³⁶⁶ Second, many of these issues would be resolved strictly as a matter of individual rights under the Fourteenth Amendment to the United States Constitution rather than as a social question. The critical inquiry would be whether or not the grandmothers enjoyed a protected "liberty interest" in their putative relationship with their missing grandchildren, or if the children enjoyed a "liberty interest" in their relationship with their families of origin. The United States Supreme Court has recognized the constitutional dimension of the parent-child relationship since *Meyer v. Nebraska*,³⁶⁷ a 1923 case which held that parents have a liberty interest in educating their children in a foreign language.³⁶⁸ Over twenty years ago, in *Stanley v. Illinois*,³⁶⁹ the Court made it clear that the right to family integrity is a basic one that is protected by the due process clause of the Fourteenth Amendment to the United States Constitution. It stated:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," . . . "basic civil rights of man," . . . and "rights

364. See, e.g., *supra* text accompanying notes 193-194.

365. See, e.g., *supra* text accompanying note 294 (Miara case in which the court observed that the couple only told the boys about their being adopted after they were caught and then did it in the most suppressive way possible).

366. The Child Convention has been ratified by 191 states, with only the United States and Somalia abstaining. The United States refuses to ratify because many states have death penalty laws that allow an adult to be executed for a crime committed while still a child. Convention on the Rights of the Child, United Nations General Assembly Resolution, U.N.G.A. Res. 44/25, annex, 44 U.N. GAOR, Supp. No. 49 (Nov. 20, 1989), 28 I.L.M. 1448 (1989).

For the role of Argentina in the adoption of the "right to identity" provision, see *supra* notes 283-286 and accompanying text.

367. 262 U.S. 390 (1923).

368. *Id.* at 399. See also *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (right of parents to send children to private school).

369. 405 U.S. 645 (1972).

far more precious than . . . property rights." It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment³⁷⁰

The Court has extended the recognition of a liberty interest to other instances where the father was not married to the mother of the child, but where there was both biological fatherhood and an established parental relationship.³⁷¹ It has limited this protection, however, where the father was competing against a traditional marital family consisting of the mother and her husband.³⁷²

If a "liberty interest" is not triggered, the protections of the Due Process Clause, whether procedural or substantive, do not come into play. Without a "fundamental" liberty interest, government is free to regulate in any fashion that is procedurally regular and not totally arbitrary or irrational.³⁷³ A plurality of the Court in *Michael H. v. Gerald D.*³⁷⁴ decided that unlike other family units that have traditionally merited constitutional protection, the unwed father's relationship with his young daughter did not, either historically or in contemporary constitutional jurisprudence. Although observing that the United States Supreme Court has "never had the occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship," the plurality also found that the girl's due process claim was even weaker and must fail as well. To the extent there was a social component here, it was the right of the *state* to decide to protect a marital family against an interloper, albeit one who was both a biological and psychological father.³⁷⁵

It has been much more difficult in United States law to gain recognition of a liberty interest on behalf of anyone other than acknowledged parents and blood-related family groupings in certain contexts. Recently, in *Troxel v.*

370. *Id.* at 651 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and *May v. Anderson*, 345 U.S. 528, 533 (1953)).

371. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978) (upholding Georgia adoption statute which permitted adoption on the sole consent of the mother unless the father had legitimated child by marriage to mother and acknowledgment or court order); *Caban, v. Mohammed*, 441 U.S. 380 (1979) (invalidating New York law which permitted adoption of an unmarried father's children by mother's husband without his consent, under circumstances where father had lived with and supported the children); and *Lehr v. Robertson*, 463 U.S. 248 (1983) (upholding New York's adoption statute permitting adoption without notice if the biological father failed to send a postcard to the putative father registry, had not been adjudicated a parent, and also had not lived openly with the child or been married to the mother).

372. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

373. See Laura Oren, *Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It*, 72 *CHI-KENT L. REV.* 747, 759-61 (1997) (liberty interest is necessary for due process protection, but strict scrutiny review is not triggered unless the liberty involved is held to be fundamental).

374. 491 U.S. 110 (1989).

375. *Michael H.*, 491 U.S. at 124, 130-31.

Granville,³⁷⁶ the Court held that a Washington State statute, which permitted any person to petition for visitation rights at any time so long as visitation is in the best interest of the child, violated the substantive due process rights of the mother as applied in that case. Earlier, in *Moore v. City of East Cleveland*,³⁷⁷ a divided Court invalidated a zoning regulation that had the effect of prohibiting a grandmother from living with her two grandsons by different children, and the cousins from residing together. The Court noted that the minors' relationships with uncles, aunts, cousins and grandparents merited constitutional protection.³⁷⁸

By contrast to even this relatively modest ruling, "psychological" families have had a great deal of difficulty establishing a protected constitutional interest, largely because of *Smith v. Organization of Foster Families for Equality and Reform* ("OFFER").³⁷⁹ In *OFFER*, a class of foster parents lost on their claims that after a child lived in a foster home for twelve months or more, the foster parent and child developed psychological and other familial ties, creating a protected liberty interest in the foster parents entitling them to procedural fairness before the foster family is disrupted. The Justices emphasized three distinctions between foster parent-child relationships and the families that were constitutionally protected: there is no biological tie, there is a conflict and tension between foster parents and the biological parents, and foster parents assume the relationship contractually, knowing it is not meant to be permanent.³⁸⁰

Attacks by adoptees on sealed records in the United States, although they may be based on a child's "right to identity," nonetheless also are grounded

376. 120 S. Ct. 2054 (2000). Justices Souter and Thomas concurred in the judgment and wrote their own opinions. *Id.* at 2065 (Souter, J., concurring in the judgment) and at 2067 (Thomas, J., concurring in the judgment). After the death of their son, the paternal grandparents in *Troxel* were dissatisfied with the amount of visitation that the children's mother was willing to allow them. Consequently, they brought suit seeking visitation rights under the state statute. The Washington high court found that, in the absence of any showing of potential harm to the children, the broad grant of standing to seek visitation was an unconstitutional interference with the rights of parents to raise their children. *Id.* at 2057-59. Justice O'Connor's opinion for the United States Supreme Court did not address the question of whether actual or potential harm must be shown, but it did find that in the particulars of this case, the application of the broad and sweeping visitation statute unconstitutionally infringed on the mother's fundamental right to make childrearing decisions. *Id.* at 2063-64. Given the multiplicity of opinions in *Troxel*, it is difficult to determine either the scope of the due process "liberty" interest possessed by the parents or of any countervailing "best interest of the child." Furthermore, the biological mother in *Troxel* also was the raising parent. The grandparents clearly were interlopers, even if they had a prior relationship with the child. The issue, therefore, was not one of blood ties *versus* psychological parentage. Different fact scenarios in future grandparent cases, however, may come closer to the Argentine conflict.

377. 431 U.S. 494 (1977).

378. *Id.* at 504.

379. 431 U.S. 816 (1977).

380. *Id.* at 839, 845. Since child protection agencies often prefer placing children with relatives, it may not be accurate to say that there are no biological ties. A lower court has found a recognized liberty interest by contrast for foster parents whose child's biological parents' parental rights have been terminated, who have cared for the child continuously for more than 12 months since infancy, and who have entered into an adoptive placement agreement. *See Rodriguez v. McLoughlin*, 214 F.3d 328 (2d Cir. 2000).

in the constitutional jurisprudence of "privacy," "liberty," and "due process."³⁸¹ But even a brief comparison underlines an important feature of the story of the children of the *disappeared* in Argentina. Although not lacking in "rights" language, there is a social meaning in the *Abuelas'* legal position which is something different than the United States' framework of individual rights and liberties.

B. *The Procedural Is Political*

The significance of social context in the Argentine cases extends to legal procedures. The searches started with individual grandmothers (and other family members) who transformed themselves into the *Abuelas* by developing a social perspective and a political and legal strategy. They had to meet both a social and an individual burden of proof in order to establish the identity of the children. The *Abuelas'* strategy moved Argentine society from very uncertain legal precedent and a science that had to be invented for just this purpose to the National Genetic Data Bank and *Ley 23.511*. It is possible to consider the 1987 legislation an acknowledgement of the social probable cause.³⁸² The Argentine legal system thereby admitted the truth of the secret kidnappings and *disappearances* in society as a whole. It also established a mechanism for proof of individual cases. The individual standard required a reasonable claim before genetic tests could be ordered. Refusal to take the tests counted as evidence against those who refused. By using informants and pictures and pointing out discrepancies in the stories of supposed parents, the *Abuelas* sought to meet the legal standard and make individual claims that were true and reasonable.³⁸³

This certainly is too simple a picture because, as discussed above, the search for the children of the *disappeared* is inextricably intertwined with the politics of impunity in Argentina. Even the 1987 legislation did not guarantee results. It depended on the court, the timing of the latest military rumbles, the civilian government's interest in assuaging that group, and on public opinion, which could be influenced by the *Abuelas* on the one hand, or right-wing media, on the other.³⁸⁴ It also mattered whether the case involved a birth that was falsely registered or a full adoption which was final

381. See, e.g., *ALMA Soc'y Inc. v. Mellon*, 601 F.2d 1225 (2d Cir. 1979). The adoptees also argued unsuccessfully that they constituted a suspect class for purposes of the Equal Protection Clause and that sealing records of their birth was an incident of slavery barred under the Thirteenth Amendment.

382. Compare the first element of the two-prong test used by the OAS' InterAmerican Court in cases of *disappearances* (which by their nature, are designed not to leave much evidence) in Honduras; the burden of proof on the party making the allegations was first to show that the state engaged in an official practice of *disappearances* or at least tolerated such a practice. For the second prong the Commission then had to establish a link between an individual's *disappearance* and that state practice. The Honduras cases reflected a state practice of *disappearances* notoriously carried out by the military or the police. Then, they showed a link to particular victims. See Pasqualucci, *supra* note 277, at 343-44.

383. See *supra* notes 138-140 and accompanying text.

384. See, e.g., the story of Ximena Vicario, *supra* notes 218-257 and accompanying text.

(even if alleged to be fraudulent).³⁸⁵ Finally, as time went on, the children got older and the delay itself had its own effect.

Delay was caused by many things in these cases. First it was the dangers of the dictatorship. When children were located prior to 1983, and their families had the courage to seek judicial remedies, the outlook was bleak.³⁸⁶ Even after 1983, searches were not easy and children once located might *disappear* again. Some were taken abroad to Paraguay or other refuges for junta veterans.³⁸⁷ Meanwhile, the Argentine legal system was still staffed with many of the 400 judges appointed by the dictatorship as part of the *Proceso*, or general reorganization of all of Argentine life undertaken by the juntas.³⁸⁸ There were lengthy delays in ordering genetic testing and even lengthier delays in disposition of the criminal cases against the appropriators.³⁸⁹ Just as in United States' law, "jurisdiction," "standing" and "prescription" procedural doctrines operated as gateways to the merits. They created obstacles that had to be overcome in order to reach the substantive issues of custody or the child's true identity. In the case of Argentina, "jurisdiction" was a question of the competence of a federal criminal court to provide for the children who were the victims of the alleged crimes. In order for the court to be able to order a custodial disposition, it had to find that the child was abandoned or in moral danger.³⁹⁰ In the case of full adoptions (*adopción plena*), "standing" objections created delay. The argument was that only parents or legal guardians had standing to participate in custody proceedings and that the grandmothers therefore could not represent themselves or the child until after the adoption was nullified.³⁹¹ In other cases, "prescription" defenses (limitations on the accused crimes) were raised. During these delays, judges did not agree about what to do in the meantime, whether to leave the child in situ, transfer the child to her legitimate family, or even to send the child to a neutral foster family.³⁹²

Procedural devices which have the effect of promoting stability and finality in child custody disputes are appealing. The Uniform Child Custody Jurisdiction Act (UCCJA)³⁹³ and its recent successor, the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA),³⁹⁴ along with the full faith and credit provisions of the federal Parental Kidnapping Prevention

385. See *supra* note 142.

386. See, e.g., Smith, *supra* note 70, Part I, at 5.

387. See *supra* note 259 and accompanying text.

388. See Serrill, *supra* note 7, at 46 (in 1996, there were more than 400 judges still in office who were appointed by the military dictatorship).

389. See, e.g., *supra* notes 222-242 and accompanying text (Ximena Vicario case).

390. See, e.g., *supra* notes 116-132 and accompanying text (Laura Scaccheri case).

391. See, e.g., *supra* notes 229-232 and accompanying text. (Ximena Vicario case).

392. See, e.g., *supra* note 105 and accompanying text (Paula Logares case).

393. Unif. Child Custody Jurisdiction Act § 14, 9 U.L.A. 580 (Modification of Custody Decree of Another State).

394. See TEX. FAM. CODE ANN. § 152.202 (Exclusive Continuing Jurisdiction).

Act (PKPA),³⁹⁵ create their own gateways which are supposed to force the disputants to return to the original court for any modifications of child custody so long as there is continuing exclusive jurisdiction. Because jurisdictional limits discourage forum shopping for a more sympathetic court, this is a major way of controlling outcome through procedural devices. It is also a way of promoting the best interest of *all* children, even if it is at the expense of any individual child. Because we think that “snatch-and-litigate” is bad for children, we legislate to discourage that kind of behavior. The individual court which has a child before it who is already subject to an order by another court with continuing jurisdiction is not supposed to make a merits inquiry.³⁹⁶ Instead, when the court enforces jurisdictional mandates, it upholds a substantive decision made by the system as a whole; the less incentive there is to grab children and try for a better result in another court, the better it is for children as a group.

In Argentina, delay meant the passage of time for a child who was growing up with the “wrong” set of parents, time in which the child also imbibed the values of the family raising him and came to believe the lies offered to him as truth. Delay and lack of finality created terrible conflicts for Ximena Vicario, left in a no-man’s land between her grandmother and her “adoptive mother.” Initially, she was left with Siciliano, even when the genetic tests established her true identity with a 99.82% certainty. Subsequently, this decision was reversed, and she went to her legitimate family. Nine months later, the court ruled that her grandmother lacked standing but decided to leave the girl with her, together with compelled visitation by Siciliano. Even after the false adoption was nullified, the appeals went on for years. The struggle over visitation, which the child herself did not want, continued in Argentine and international courts until Ximena turned 18.³⁹⁷ Delays caused by flight, extradition, and legal processes meant that the Tolosa twins were sixteen-year-old adolescents by the time they were unsuccessfully entrusted to their maternal uncle.³⁹⁸ Carolina and Pablo were over eighteen and married by the time the Biancos were brought to justice. The two children raised by Bianco, a brutal servant of the dictatorship, were unwilling to return to Argentina or submit to genetic testing that would establish their true identity.³⁹⁹ Delay clearly compromised the best interest of the children caught in its sticky embrace and made the question of remedy much more complicated. Even the *Abuelas* had to recognize the significance of delay. As the years went by, they changed their demands from restitution

395. See 28 U.S.C. § 1738A (affording full faith and credit afforded to child custody orders of the court with continuing exclusive jurisdiction).

396. There is an exception for an emergency which permits a merits hearing but which only supports a temporary order. See TEX. FAM. CODE § 152.204 (Temporary Emergency Jurisdiction).

397. See *supra* notes 225–248 and accompanying text.

398. See *supra* note 281 and accompanying text.

399. See *supra* notes 262–271 and accompanying text.

of the child to restitution of the child's identity, knowledge of her origins and name and return of her legal identity.⁴⁰⁰

The procedural delays suffered by the children of the *disappeared*, even in the name of stability or finality, were a mistake. The truth that these terrible things had happened in Argentina and that these "parents" had taken children illegitimately could not be denied. This was a situation of planned, mass kidnapping of young children and babies with an ideological motive. In that context, procedural devices that artificially prevented or slowed the legal resolution of that truth could not be justified. Similarly, the refusal to rectify the wrong when other proof existed and identity was established to a 99.82% certainty by scientific tests was harmful in that context.

The disputes over procedure and substance were "political" in the sense that they were contests over values. The question was who would get to control the transmission of values to the next generation. The *Abuelas* took the position that the legitimate families of the kidnapped children were entitled to pass on their values. They argued that the children had to be restored to an entire ecological nest or social network from which they had been wrongfully stolen.⁴⁰¹ Theo van Boven concluded in his report for the United Nations that the appropriators taught children values which violated international norms: intolerance and discrimination rather than friendship among peoples, peace, and universal brotherhood.⁴⁰² Finally, for the *Abuelas*, restitution was necessary for the reconstruction of a society that had been shattered by the nightmare years.⁴⁰³

On their part, the appropriators often were more than just psychological "parents" trying to protect their children. The basic argument of the "raising parents" was that no matter how guilty they were of criminal acts, they were entitled to retain custody of "their" children.⁴⁰⁴ They did not really talk about their right to transmit their values, an argument the courts would have been likely to reject. Instead, they talked about "attachment." Yet it was no accident that Miara and Bianco fled to Paraguay with their kidnapped children, where another right-wing dictator remained in power for a long time and where they socialized with one another.⁴⁰⁵ Nor was it coincidence when lawyers for the junta officers accused of horrific crimes in the name of national security and the fight against "subversion" showed up to defend the "parents" of the children under dispute.⁴⁰⁶ Siciliano (who had raised Ximena Vicario) and the unhappy Tolosa boys became the darlings of

400. Rita Arditti calls it a change of strategy. See ARDITTI, *supra* note 2, at 144–58.

401. See *supra* note 189 and accompanying text.

402. *Van Boven Report*, *supra* note 261, at 14.

403. GRANDMOTHERS, *supra* note 58, at 13.

404. See, e.g., the arguments of the attorneys for the Lavallens in the Logares case, *supra* notes 100 and accompanying text.

405. For the "segunda desaparición," see ARDITTI, *supra* note 2, at 128–31.

406. For example, the attorneys for the Lavalléns had also defended notorious ultra-rightists of the dictatorship. See HERRERA & TENENBAUM *supra* note 5, at 156.

the right-wing media,⁴⁰⁷ just as the *Abuelas* learned how to appeal to international opinion.⁴⁰⁸ Insofar as “impunity” was the watchword for the aftermath of the nightmare years, it was difficult to reclaim the children. Insofar as the *Abuelas* succeeded, they also made inroads on “impunity.” Both in the broader sense, which applies to all family law, and in a meaning that is more specific to the Argentine situation, family law once again has been shown to be “inescapably political.”

407. See, e.g., ARDITTI, *supra* note 2, at 137–38 (Tolosa twins).

408. *Id.* at 149 (the *Abuelas* were able to gather a million signatures to send to Human Rights Commission to protest decision declaring Emiliano Carlos Tortrino Castro case closed on the grounds of limitations).

