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Compulsory DNA Testing in Argentina: The Right to Truth Versus the Right to Privacy

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COMPULSORY DNA TESTING IN ARGENTINA: THE RIGHT TO TRUTH VERSUS THE RIGHT TO PRIVACY

INTRODUCTION

In March 1976, after years of growing political hostility, the Argentine military overthrew the democratic government and began a seven-year dictatorship that is now known as the Dirty War.[1] The regime targeted "subversives"—Argentines who they believed to have opposite ideologies of the more conservative military junta.[2] In an effort to eliminate any threat to the military's reign of terror, the government labeled these subversives as enemies of the state and set out to eliminate their existence.[3] The regime generally targeted "teachers, students, scientists, workers, clergy, and journalists . . ." because such individuals were seen as capable of challenging the junta.[4] The subversives were kidnapped in secret and taken to clandestine camps located throughout the country where they were killed.[5] These victims are known as "the desaparecidos" because the government denies any involvement of their abductions.[6] The desaparecidos included pregnant women who were forced to give birth in the clandestine camps and give up their babies to military officials within the regime.[7] An estimated 500 babies were stolen from their mothers and "handed over, their identities erased, to childless military and police couples

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1. Ashley Maria Gonzalez Tucker, Argentina's Dirty War: *Deconstructing the Disappearances through Justice & Accountability*, 21 ILSA Quart. 23, 23 (2013).

2. *Id.; see also Junta*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/junta (last visited Oct. 22, 2019) (one definition as "a group of persons controlling a government especially after a revolutionary seizure of power").

3. Gonzalez Tucker, *supra* note 1, at 23.

4. *Id.* at 24.

5. *Id.*

6. Dieke Brockhus, *The Living Disappeared and Their 'True Identity': The Role of the Rights to the Truth and to a Personal Identity in the Conflict between Disappeared Children and their Abuelas* (Feb. 29, 2014) (LLM dissertation, University of Utrecht (on file with author) ("Desaparecidos" means disappeared in English and references those who were kidnapped without any information being given to their families. *Id.* (translation by author).

7. Gonzalez Tucker, *supra* note 1, at 24.

and others favored by the regime."[8] Thus, a new generation of victims was born—the babies of the desaparecidos.

This Note will explore Argentina's response to the Dirty War through its implementation of a law that aims to uncover the truth behind the disappearances that consequently inhibits one's right to privacy in doing so. This Note will analyze the evolution of the right to truth, an international right often associated with enforced disappearances, and the international right to privacy and how Argentina has pitted the two rights against each other with its compulsory DNA testing law that is aimed at uncovering the truth behind the Dirty War. As it stands, the DNA law focuses on the method in which DNA is collected, rather than what happens to that information once it is taken. While Argentina has the power to choose the right to truth over the right to privacy, the DNA law can be changed so that both rights are respected. The current law is susceptible to corruption and should provide more procedural guidelines in order to respect social benefit of the right to privacy.

Part I of this Note will provide a brief contextual background of the desaparecidos, the methods that military officials used to kidnap babies from their mothers, and the importance of the human rights organizations that formed in response to the regime. It will also touch on the role of the Argentine government and modern science in finding answers. This section will introduce the Argentine dilemma of the contradiction and importance of both the right to privacy and the right to truth. Part II of this Note will explain the international right to truth and its development in the past several decades while also highlighting Argentina's implementation of the right to truth. Part III will discuss the international fundamental right to privacy and international courts' adjudicating the right. It will also talk about the limits of the right, and balancing the right against other state interests. Part IV of this Note will explore the cases in which adults have resisted DNA testing, and the effect it has one their personal identities. It will also discuss what happens after testing when there is no match. Finally, Part V of this Note will suggests reforms to the DNA law so that it better respects an individual's right to privacy. The Ar-

8. Francisco Goldman, *Children of the Dirty War: Argentina's Stolen Orphans*, NEW YORKER (Mar. 12, 2012), https://www.newyorker.com/magazine/2012/03/19/children-of-the-dirty-war.

gentine law promotes the right to truth while also infringing on an individual's right to privacy, and this Note will explore ways to balance both.

I. BACKGROUND

It is estimated that up to 30,000 people disappeared during the 1976–83 military dictatorship.[9] As the number of desaparecidos continued to grow, so did the number of babies taken from their mothers. One of the most notorious clandestine camps, La Escuela Superior de Mecánica de la Armada (ESMA) was located in the heart of Buenos Aires.[10] Initially, ESMA held detainees to torture and eventually kill them.[11] ESMA also housed pregnant women who were typically executed after giving birth.[12] ESMA officials went beyond their practices of torture and murder by creating "a list of navy wives without children . . ." that were prepared to illegally take the babies from their mothers once born.[13] The military families selected "were given guided tours around the rooms where the pregnant detainees were waiting to deliver their children."[14] Once the babies were born, the mothers were usually murdered "and the newborns were given, in secret, to military families."[15] The families either created false identification papers indicating that the babies were born to them, or they registered illegal

9. Erin Blakemore, *30,000 People Were 'Disappeared' in Argentina's Dirty War. These Women Never Stopped Looking*, HISTORY (Mar. 7, 2019), https://www.history.com/news/mothers-plaza-de-mayo-disappeared-children-dirty-war-argentina#:~:text=These%20Women%20Never%20Stopped%20Looking,-For%20decades%2C%20the&text=The%20military%20dictatorship%20that%20resulted,its%20activities%20the%20Dirty%20War.

10. Gonzalez Tucker, *supra* note 1, at 24.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* The reason for appropriating the babies of the "subversives" was part of a "deliberate genocidal policy," based on the thought that "subversives breed subversives" and military officials had the duty of "freeing" the babies from the "subversive" ideologies of their parents. Victor B. Penchaszadeh, *Ethical, Legal and Social Issues in Restoring Genetic Identity after Forced Disappearance and Suppression of Identity in Argentina*, J. CMTY. GENETICS 207, 208. (2015).

adoption papers.[16] By 1983 the military was "criticized and weakened by strikes, demonstrations . . ." due to the enforced disappearances and the country prepared for democratic elections.[17] An estimated 500 babies were kidnapped.[18]

A. The Rise of Human Rights Organizations and the Government's Response

The military regime made no effort to document the desaparecidos, but that does not mean that their families and friends forgot about them.[19] In response to rumors about the tortures and killings taking place, a group known as the Madres de la Plaza de Mayo (Mothers) began to protest the disappearances of their children in 1977.[20] The Mothers protested despite state threats and despite some of their founders being kidnapped and killed themselves.[21] Their bravery helped turn the public against the regime that relied on intimidation.[22] Also in 1977, a group of grandmothers known as the Grandmothers of the Plaza de Mayo (Grandmothers) joined forces to fight for the return of their grandchildren.[23] The Grandmothers were dedicated to fighting for the return of their grandchildren that were born in captivity and kidnapped.[24] Their mission continues to be that the children "kidnapped as a method of political repression be restored to their legitimate families."[25] Through their activism, the Grandmothers have located 120 of the kidnapped children.[26] Of the disappeared children who

16. Laura Oren, *Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina*, 14 HARV. HUM. RTS. J. 123, 128 (2001).

17. David Weissbrodt & Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983*, 75 MINN. L. REV. 1009, 1031–32 (1991).

18. *History of Abuelas de Plaza de Mayo*, ABUELAS DE PLAZA DE MAYO, https://abuelas.org.ar/idiomas/english/history.htm [hereinafter *History of Abuelas*]

19. Blakemore, *supra* note 9.

20. *Id.*

21. *Id.*

22. *See id.*

23. *History of Abuelas*, *supra* note 18.

24. *Id.*

25. *Id.*

26. *Id.*

have yet to be found, the Grandmothers employ modern science to help locate them.[27]

In 1983, after the end of the dictatorship, the Argentine democratic government established the National Commission on Disappeared Persons (CONADEP) to investigate what happened to those kidnapped.[28] After the discovery of "hundreds of human remains in mass graves . . ." and the continued pressure from the Grandmothers demanding the whereabouts of their grandchildren, the government turned to the American Association for the Advancement of Science for help due to Argentina's "lack of expertise in forensic anthropology and genetic identification."[29] Geneticist Mary-Claire King assisted in the genetic identification of those suspected as children of the disappeared.[30] King's developments in genetic identification led to the first identification of an abducted child in 1984.[31]

With this success, the government quickly centralized genetic testing for the children in a laboratory and the Ministry of Justice instructed courts to "open a file on every request from people searching for disappeared relatives and to direct them to that lab."[32] The Grandmothers acted as legal representatives on behalf of the victims and presented claims when there was a strong suspicion that a child was a victim of the regime based on circumstantial evidence.[33] If a judge considered the circumstantial evidence valid, an investigation commenced to determine whether the child was biological offspring of the adult raising him.[34] Next, "if the investigation proved that the child was not a biological son or daughter, the judge ordered that the his/her genetic markers be compared with those of potential relatives."[35] In cases where the victim was a minor the judge "represented the legal authority of the state . . ." and had discretion over all decisions from "testing to custody."[36] The success of the genetic testing amongst children led the Argentine

27. *Id.*
28. PENCHASZADEH, *supra* note 15, at 208.
29. *Id.*
30. *Id.*
31. *Id.* at 208–09.
32. *Id.* at 209.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*

government to establish a genetic database to store and compare genetic profiles of samples donated by searching relatives and located children.[37]

B. Adult Victims and the Role of the Court

This process grew more complicated as time went on and the potential child victims became adults. From 2005 to 2015, over 10,000 young adults voluntarily submitted their DNA to the genetic database for comparison to the genetic profiles of 311 families stored there, which resulted in fifty young adults being correctly identified as children of the desaparecidos.[38] Outside of voluntary submissions, families of the desaparecidos initiated court proceedings alleging that they were the true relatives of an adult in question.[39] These "unsuspecting young adults" were then brought into court with their genetic identities being challenged.[40] In most of these cases, the adults accepted voluntary DNA testing, "however, in a few cases, the adults would decline testing, alleging a right to privacy."[41]

In 1999, a court ruled in a suit brought by the Grandmothers[42] that a sample of Evelin Vázquez Ferrá's blood, twenty-two

37. *Id.*
38. *Id.* at 210.
39. *Id.*
40. *Id.*
41. *Id.*
42. In *Vázquez Ferrá*, Inocencia Luca de Pegoraro, "the mother of a woman named Susana who disappeared in 1977 when she was five-months pregnant," brought a claim alleging that Susana gave birth in captivity and the baby was given to Policarpo Vázquez, who falsely registered baby as the biological child of him and his spouse. *See* Marcelo Ferrante, *Proof of Identity in Criminal Prosecutions for Abduction of Children and Identity Substitution, in* CENTER FOR LEGAL AND SOCIAL STUDIES INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, 143, 144 n.261, https://www.cels.org.ar/web/wp-content/uploads/2011/10/makingjustice.pdf. The lower federal court ordered a compulsory blood test of the child to determine if she was the granddaughter of Inocencia Luca de Pegoraro. *Id.* The Argentine Supreme Court overruled the decision stating that the lower court's decision "violated the right to privacy ensured in Article 19 of the Argentine Constitution." *Id.*; *See* CONSTITUCIÓN DE LA NACIÓN ARGENTINA [CONSTITUTION] Aug. 22, 1994, art. 19 which states that: "The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit."

at the time, could be "extracted with the help of the police . . ." if she failed to cooperate.[43] An appellate court upheld that decision, though it was eventually overturned by the Argentine Supreme Court.[44] The Supreme Court found that it would be "an aberration . . ." to force Vázquez to submit to DNA testing against her will.[45] It held that an adult could not be forced to submit to DNA testing and that her right to privacy outweighed the right of her potential biological family to know her true identity.[46] The Grandmothers vehemently rejected this ruling explaining that it would be a setback in their activism efforts and that the ruling endorsed the military regime's acts of terror.[47]

In 2009, another case[48] reached the Argentine Supreme Court regarding compulsory DNA testing.[49] This time the Supreme Court reversed its 2003 decision ruling that while judges could not force adults to submit to DNA testing, "less invasive ways of obtaining the DNA, such as seizing personal items, would

43. Marcela Valente, *Argentina: Identity Dispute for Child of the 'Disappeared'*, INTER PRESS SERV. NEWS AGENCY (Oct. 1, 2003), http://www.ipsnews.net/2003/10/argentina-identity-dispute-for-child-of-the-disappeared/.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. This case concerned "a former sailor and his wife, Guillermo Prieto and Emma Gualtieri, who falsely registered two boys as their own" during the Dirty War. Debora Rey, *Argentine Court: No forced DNA for 'Dirty War' IDs,* SAN DIEGO UNION-TRIBUNE (Aug. 11, 2009, 7:09 PM), https://www.sandiegouniontribune.com/sdut-lt-dirty-wars-dna-081109-2009aug11-story.html. The Grandmothers urged a judge to order the "men to give blood samples" in order to ascertain who their biological mothers were. Both refused to provide samples and the judge "ordered a search of their home and recovered samples from their personal effects" certifying that they were not the biological offspring of Guillermo and Emma. *Id.* Two of the justices reasoned that potential adult victims cannot be forced to submit to DNA testing because "the right of biological families to know the truth does not mean that the other victim should shoulder all the emotional and legal consequences of establishing a new identity." *Id.* However, the court still went on to rule that "less invasive ways of obtaining DNA would respect personal dignity." *Id.*

49. Elizabeth B. Ludwin King, *A Conflict of Interests: Privacy, Truth, and Compulsory DNA Testing for Argentina's Children of the Disappeared*, 44 CORNELL INT'L L.J. 535, 543 (2011).

pass constitutional muster."[50] The Supreme Court recognized that the interest of the state and of society in solving crimes against humanity was of paramount status, giving the state not only the right, but the obligation, to seek the truth and that a suspected victim could not refuse DNA testing.[51] In an effort to recognize the right to privacy, the Supreme Court ruled that "obtaining DNA from indirect means (i.e. clothing and other personal objects) did not conflict with the right to privacy."[52]

On November 18, 2009, just three months after the Supreme Court's monumental ruling on DNA testing, the Argentine Congress passed Ley 26.549[53] (DNA Law) to allow judges to order biological samples, "such as samples of blood, saliva, or skin," in order to ascertain one's identity.[54] The DNA Law gives judges the discretion to order individuals to submit to DNA testing "to determine the identity of people in judicial proceedings involving crimes against humanity."[55] The judge's decision to order testing must be based on a standard of "necessity, reasonability, and proportionality."[56] If the individual refuses the DNA testing, the judge may order the confiscation of personal items to extract DNA samples.[57]

C. Argentine Dilemma

Opponents of the DNA Law include lawyers Gregorio Badeni and Rodolfo Barrutti.[58] Badeni, a professor of constitutional law, believes "that the right of privacy should prevail over the right to know an identity."[59] Badeni struggles with the idea that the law provides no recourse for an alleged victim that refuses to provide a DNA sample because a judge could still order

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50. *Id.*
51. PENCHASZADEH, *supra* note 15, at 210.
52. *Id.*
53. The DNA Law amends Argentina's Code of Criminal Procedure. Graciela Rodríguez-Ferrand, *Argentina: Law Amending Code of Criminal Procedure to Allow Compulsory DNA Extraction*, LIBR. OF CONG.: GLOB. LEGAL MONITOR (Dec. 7, 2009), https://www.loc.gov/law/foreign-news/article/argentina-law-amending-code-of-criminal-procedure-to-allow-compulsory-dna-extraction/.
54. Art. 1, No. 26.549 CÓD. PROC. PEN. NAC. (translation by author).
55. Rodriguez-Ferrand, *supra* note 53.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

that personal items be used to extract DNA.[60] He sees the law as an "unlawful government intrusion on the individual's privacy."[61] Barrutti draws issue with the law as it intrudes not on the rights of an individual being charged with a crime, but of an individual that is potentially a victim of a crime.[62] Further, the National Constitution of Argentina limits the government's ability to interfere with an individual's privacy.[63] An individual's private actions that "do not offend public morals and order, and do not hurt anybody are only reserved to God for judgment and are exempt from the authority of any court."[64] Critics of the DNA Law are also worried that it may have repercussions beyond that of the alleged victims of the regime.[65] They worry that the DNA Law may enable judges to order DNA testing from everyone whenever he or she deems it "absolutely necessary."[66]

Meanwhile, the Grandmothers support the DNA Law because they believe that genetic testing is the "only solution for the necessary reparations . . ." to be made to the victims of the dictatorship.[67] The Grandmothers' work was crucial in the development of the genetic database that the Argentine government enacted in 1989.[68] The Grandmothers proposed that the database would ensure the "possibility for children abducted by the military dictatorship to recover their" identities.[69] Advocates for the DNA Law believe in the use of genetic testing to "clarify serious human rights violations and cases of stolen children."[70]

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60. *See id.*
61. *Id.*
62. *See id.*
63. *Id.*
64. *Id.*
65. *See* Joel Richards, *New DNA Law in Argentina Will Help Find the Missing Grandchildren*, NACLA (Nov. 12, 2009), https://nacla.org/news/new-dna-law-argentina-will-help-find-missing-grandchildren.
66. *Argentina Forces DNA Tests in 'Dirty War' Cases,* ASSOCIATED PRESS (Nov. 20, 2009, 6:48 PM), https://www.nbcnews.com/id/wbna34071255.
67. Valente, *supra* note 43.
68. *Genetic Aspect - The Identity*, ABUELAS DE PLAZA DE MAYO, https://abuelas.org.ar/idiomas/english/genetic.htm (last visited Jan. 13, 2021).
69. *Id.*
70. Sebastián Lacunza, Rights-Argentina: New Methods to Identify Dictatorship's Missing Children, INTER PRESS SERV. (Sept. 30, 2008), http://www.ipsnews.net/2008/09/rights-argentina-new-methods-to-identify-dictatorshiprsquos-missing-children/.

II. THE RIGHT TO TRUTH

Unsurprisingly, the path to truth in Argentina following the dictatorship began with the influential work of the Mothers and the Grandmothers.[71] The military junta targeted many Argentines, but especially those that spoke out against the regime.[72] This fear tactic failed to keep the Mothers from protesting and demanding to know the whereabouts of their loved ones.[73] On October 5, 1977, over 230 mothers provided their names and identification card numbers for an advertisement in a national newspaper calling for "the truth" in relation to their loved ones.[74] The right to truth has evolved and exists so that victims or their families are informed about what happened in an effort to assist in the healing process.[75] Providing the truth for victims helps with closure and enables "their dignity to be restored . . ." while also enabling societies to understand why the conflict occurred.[76] The right to truth also exists as a "safeguard against impunity" and "has been used contest the validity of blanket amnesty laws shielding perpetrators of gross violations of human rights under international law, as well as to encourage more transparent and accountable government.".[77]

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71. Lester Kurtz, *The Mothers of the Disappeared: Challenging the Junta in Argentina (1977-1983)*, INT'L CTR. ON NONVIOLENT CONFLICT 1, 1, 4 (Jul. 2010), https://www.nonviolent-conflict.org/mothers-disappeared-challenging-junta-argentina-1977-1983/.

72. *Id.* at 1.

73. *Id.*

74. *Id.*

75. Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 INT'L REV. RED CROSS 245, 249 (2006).

76. *Id.*

77. *Id.* It is important to note that part of the reason there is so much difficulty in ascertaining the truth of what happened in Argentina is because in 1986 the government passed legislation called 'Punto Final' which stipulated that "all new criminal complaints against the military for human rights abuses during the 'war against subversion' had to be brought within sixty days." Gonzalez Tucker, *supra* note 1, at 25. Then, in 1987 the government passed a 'Due Obedience' law which pardoned "all but the most senior level officers under the presumption that lower-level officers were following orders and could not be held criminally liable." *Id.* In 1990, President Carlos Menem pardoned several high-ranking officers, including General Jorge Rafael Videla, the senior commander of the regime. *Id.* Finally, in 1998, families of the desaparecidos were granted the "official 'right to truth and information'" and a series of "truth trials" began in which military officials were back on trial. *Id.* In 2001 a federal judge ruled that the Due Obedience and Punto Final

A. Development of the Right

The right to truth is largely related to cases of enforced disappearances, however the right originates from international humanitarian law, and is often associated with human rights abuses committed by "authoritarian regimes in Latin America during the 1980s and 1990s."[78] The right to truth can be found in the 1977 Additional Protocol I to the Geneva Conventions of 1949 (Protocol I).[79] Article 32 of Protocol I recognizes the right of families to "know the fate of their relatives."[80] In more recent years the right to truth is typically associated with cases of enforced disappearances.[81]

In *Velásquez-Rodríguez v. Honduras*, a landmark case decided by the Inter-American Court of Human Rights, the Court found that Honduras had violated Articles 4, 5, and 7[82] of the American Convention on Human Rights and ruled that the State has a "duty to investigate . . . as long as there is uncertainty about the fate of the person who has disappeared."[83] The

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laws were unconstitutional and in 2003 "President Nestor Kirchner took office and repealed the blanket amnesty." *Id.* At over 20 years after the end of the dictatorship, many of the top officials had died, escaped Argentina, or were very old and the ability to restore justice became more complicated. *Id.*

78. Ludwin King, *supra* note 49, at 555–56.

79. *Id.* at 555; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979) [hereinafter Protocol I]

80. Protocol I art. 32.

81. *See* Ludwin King, *supra* note 49, at 555–56.

82. Organization of American States, American Convention on Human Rights, arts. 4–5, 7, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The preamble notes that the American States that are parties to the convention reaffirm "their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man." *Id.* at pmbl.

83. Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) no. 4, ¶ 181 (Jul. 29, 1988). In *Velásquez Rodríquez*, Mr. Velásquez Rodríguez, who was a student at La Universidad Nacional Autónoma de Honduras, was kidnapped by several armed men dressed in civilian clothing while in Tegucigalpa. *Id.* at ¶¶ 3 and 147(e). He was taken to an armed forces station where he was detained, interrogated, and tortured. *Id.* at ¶ 3. From 1981-84 around 100 to 150 people in Honduras disappeared under a similar set of circumstances as Mr. Velásquez Rodríguez. *Id.* at ¶ 147(a). The Court found that "the duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared." *Id.* at ¶ 181. Further, the State "has a legal duty to take reasonable steps to pre-

Inter-American Court of Human Rights also held that not only did a State have an obligation "to carry out a serious investigation of violations committed . . . [and] identify those responsible,"[84] it also had to "inform the relatives of the fate of the victims and, if they have been killed, the location of their remains."[85] Thus, the right to truth is not only an obligation of the state, it is a right that belongs to the victims and their families.[86]

Following this monumental ruling, and in response to the popular practice of enforced disappearances during the 1980s and 1990s, several human rights groups began filing reports and making recommendations in regard to the right to truth.[87] Finally, "in 2005, the International Convention for the Protection of All Persons from Enforced Disappearances [("Convention")] explicitly codified the right to truth for the first time."[88] Article 24(2) of the Convention states that "[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard."[89] The Convention comprehensively and explicitly codified the right to truth.[90] Also in 2005, the Committee of the Red Cross went so far as to

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vent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction…" *Id.* at ¶ 174.

84. *Id.* at ¶ 174.

85. *Id.* at ¶ 181.

86. *Id.*

87. *See* Ludwin King, *supra* note 49, at 556.

88. *Id.* at 557.

89. International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, *adopted* Dec. 20, 2006, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010) (emphasis added) (notes that with the help of the Mothers, the Latin American Federation for the Associations of Relatives of Detained-Disappeared (FEDEFAM) "came up with the first draft treaty to criminalize enforced disappearance." Further, the drafting of the International Convention for the Protection of all Persons from Enforced Disappearance confirms FEDEFAM's intention that the right to truth is a consequence of the right not to be subject to enforced disappearances).

90. Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, 33 BERKELEY J. INT'L L. 526, 536 (2015).

say that it is a norm of customary international law[91] that the parties in a conflict "must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate."[92]

In 2006, the UN Economic and Social Council (ECOSOC) released a study that found the right to truth to imply "knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them."[93] The ECOSOC concluded that the right to truth is an "inalienable and autonomous right, linked to the duty and obligation of the state to protect and guarantee human rights, to conduct effective investigations[94] and to guarantee effective remedy and repara-

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91. Dr. Yasmin Naqvi questions whether the right to truth is customary international law. Naqvi, *supra* note 75, at 254 (citing Theodor Meron, *Human Rights and Humanitarian Law as Customary Law*, Clarendon Press, Oxford, 1989, p. 93.). Dr. Naqvi follows Professor Meron's test for determining customary international law providing that "the 'initial inquiry must aim at the determination whether the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted.'" *Id.* Dr. Naqvi contemplates whether the right to truth meets either of those requirements because the definition of the "general 'right to truth'" is uncertain and because despite state practice in more than 30 countries, the existence of opinio juris is unclear. *Id.* at 254, 261. Dr. Naqvi suggests that the right to truth may be approaching a customary right. *Id.* at 267.

92. INT'L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 421, r.117 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). The Committee recognizes that the rule is customary international law based on state practice and that the "obligation to account for missing persons is consistent with the prohibition of enforced disappearances (see Rule 98) . . . the requirement to respect family life (see Rule 105) . . . and the obligation to record all available information prior to disposal of the dead (see rule 116)." *Id.*

93. Comm. On Human Rights, Rep. on the Work of its Sixty-Second Session, ¶ 59, U.N. Doc. E/CN.4/2006/91 (2006) [hereinafter ECOSOC].

94. Despite CONADEP's success in uncovering the fate of many desaparecidos, the Commission found that 10,000 Argentines were killed during the Dirty War while "outside human rights organizations had estimated that 30,000 citizens had been killed during the same period." *See* Kelcey Hadden-Leggett**,** *The Lasting Legacy of Argentina's Human Rights Commission*, PANORAMAS SCHOLARLY PLATFORM (Oct. 20, 2016), https://www.panoramas.pitt.edu/health-and-society/lasting-legacy-argentinas-human-rights-commission.

tions."[95] The study also showed that the right is "closely linked with other rights . . ." and has not only an individual aspect, but a societal aspect as well and is considered a "non-derogable right" that is not subject to limitations.[96] The right to truth is a "procedural right" that becomes especially relevant if authorities fail disclose information on the human right violation.[97]

B. Argentina's Recognition of the Right to Truth

In their quest to solidify the right to truth in Argentina, the Grandmothers were able to push for the inclusion of the "Argentine Clauses" in the International Convention on the Rights of the Child (International Convention).[98] The Grandmothers specifically lobbied extensively for Articles 7, 8, and 11.[99] Article 8(2) of the International Convention provides that: "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 re-establishing speedily his or her identity."[100] Under this article, the state has a responsibility to assist a victim in preserving their identity, thus pitting the right to know the truth about one's identity against the right to privacy.[101] This work lead to the incorporation of the International Convention into the Argentina Constitution under law number 23,849.[102] Additionally the Grandmothers petitioned for the Argentine government to create the National Committee for the Right to Identity (CONADI).[103] CONADI's primary goal is to help "young adults who doubt their identities . . ." seek out the truth by investigating documents and "referring them for blood analysis."[104]

95. ECOSOC, *supra* note 93, at summary.
96. *Id.*
97. Naqvi, *supra* note 75, at 249.
98. *History of Abuelas*, *supra* note 18.
99. *Id.*
100. Convention on the Rights of the Child, art, 8, Nov. 20, 1989, 1577 U.N.T.S. 3.
101. *Id.*
102. *History of Abuelas*, *supra* note 18.
103. *Id.*
104. *Id.*

C. Other States Follow Suit

While *Velásquez Rodríguez* set the stage for states developing the right to truth, other states have joined in implementing the right when their governments fail to provide adequate information following armed conflicts.[105] In 2011, the Constitutional Court of South Africa affirmed the right of the public to speak the truth about "crimes amnestied by the Truth and Reconciliation Commission . . ." for "truth-telling was the moral base of the transition from the injustice of apartheid to democracy and constitutionalism."[106] The Truth and Reconciliation Commission gathered accounts from victims and perpetrators of apartheid.[107]

In the "*Srebrenica cases*,"[108] the Human Rights Chamber of Bosnia and Herzegovina ruled that the families of 7,500 miss-

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105. *See* Naqvi, *supra* note 75, at 264; Szoke-Burke, *supra* note 90, at 534.

106. *South Africa: Constitutional Court Upholds Right to Express the Truth*, INT'L CTR. TRANSITIONAL JUST. (Apr. 8, 2011), https://www.ictj.org/news/south-africa-constitutional-court-upholds-right-express-truth#:~:text=CAPE%20TOWN%2C%20April%208%2C%202011,and%20Reconciliation%20Commission%20(TRC).

107. SZOKE-BURKE, *supra* note 90, at 545 (citing TRUTH AND RECONCILIATION COMM'N OF S. AFR., VOLUME ONE: TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 112 (Oct. 29, 1998). South Africa implements an emerging principle known as "accountable amnesties." Naqvi, *surpa* note 75, at 267. Under this theory, a committee on amnesty may grant amnesty to an applicant relieving him of criminal or civil liability in respect to any "act, omission or offence" as long as he "has made a full disclosure of all relevant facts, and provided further that the relevant act, omission or offence was associated with a political objective and committed prior to 6 December 1993." *See The Azanian Peoples Organization* v. *The President of the Republic of South Africa and others*., Case CCT 17/96, (South Africa), 1996.)

108. "In 1991, Yugoslavia's republic of Bosnia and Herzegovina (Bosnia)contained three main ethnic groups: Bosniak (Bosnian Muslims, 44 percent), Serb (31 percent), and Croat (17 percent)…" *Bosnia and Herzegovina, 1992–1995*, U.S. HOLOCAUST MEM'L MUSEUM (last updated July 2013), https://www.ushmm.org/genocide-prevention/countries/bosnia-herzegovina/case-study/background/1992-1995. Following Bosnia's declaration of independence from Yugoslavia on April 5, 1992, the Bosnian Serbs opposed the Bosniak majority within the newly independent state. *Id.* As such, "the Serbs targeted Bosniak and Croatian civilians in areas under their control, in what has become known as an 'ethnic cleansing.'" *Id.* A civil war broke out from 1992 to 1995 in which "an estimated 100,000 people were killed, 80 percent of whom were Bosniaks. *Id.* Subsequently, "Bosnian Serb forces killed as many as 8,000 Bosniak men and boys from the town of Srebrenica" in what is known as "the largest massacre in Europe since the Holocaust," *Id.* The *Srebrenica cases* were brought in the Human Rights Chamber

ing boys had the right to know the truth about their fate based on the European Convention on Human Rights.[109] The Human Rights Chamber based its holding on the right to not be subjected to torture or ill-treatment, the right to family life, and the state's duty to conduct effective investigations.[110]

In 2001, the Peruvian government investigated the atrocities committed by the Peruvian government from 1980–2000 through Peru's Truth and Reconciliation Commission (Commission).[111] Part of the Commission's findings showed that those more likely to be victims included people "experiencing poverty and social exclusion and those speaking indigenous languages."[112] The Commission expressly referenced the right to truth in its mandate acknowledging "the right of society to the truth."[113]Additionally, the Peruvian national courts were amongst some of the first to "uphold the right of society as a whole to the truth."[114] Both of these sentiments are evidenced by Peru allowing the public to attend some of the proceedings held by the Commission.[115]

III. HISTORICAL PRESENCE OF THE RIGHT TO PRIVACY

Argentina's DNA Law confronts the right to truth with the right to privacy, and of the two, "the right to privacy is more established in international human rights law."[116] The right to privacy dates back to as early as 1361 in Europe "when peeping toms and eavesdroppers in England became subject to ar-

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of Bosnia and Herzegovina following these horrific events. Decision on Admissibility and Merits of 7 March 2003, "Srebrenica Cases", case Nos. CH/01/8365.

109. Naqvi, *supra* note 75, at 264.

110. *Id.*

111. Jaymie Heilman, *Truth and Reconciliation Commission of Peru*, OXFORD RSCH. ENCYC. LATIN AM. HIST. 1, 1 (June 25, 2018), https://oxfordre.com/latinamericanhistory/view/10.1093/acrefore/9780199366439.001.0001/acrefore-9780199366439-e-495.

112. SZOKE-BURKE, *supra* note 90, at 534.

113. *Id.* at 558.

114. *Id.* at 541.

115. *Id.* (citing *The Human Right to Truth: Lessons Learned from Latin American Experiences with Truth Telling, in* TELLING THE TRUTHS: TRUTH TELLING AND PEACE BUILDING IN POST-CONFLICT SOCIETIES at 129 (Tristan A. Borer ed., 2006)).

116. Ludwin King, *supra* note 49, at 548 (noting that the right to truth is a relatively newly established right that emerged following the influx of human rights violations in the 1980s and 1990s).

rest."[117] In 1890, American lawyers Samuel Warren and Louis Brandeis wrote a pivotal piece concerning the right to privacy as a tort action described as "the right to be left alone."[118] Concerns about privacy in the European Union later evolved with the emergence of the Nazis seizing "personal records in order to target specific people in the 1930s and 1940s."[119] The modern benchmark of the right to privacy as an international fundamental right was first enunciated in Article 12 of the 1948 Universal Declaration of Human Rights (UDHR): "No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[120] Although the right to privacy appears in many international instruments as well as domestic laws, the right remains ambiguous, and countries vary in the interpretation of the laws and their application.[121]

A. Privacy Rights as International Human Rights

The right to privacy articulated in the UDHR is also mimicked in several leading human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR),[122] the Convention on the Rights of the Child,[123] and regional human rights conventions in Latin America,[124] the Middle East,[125] and Europe.[126] The right to privacy typically

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117. *See* Daniel E. Newman, *European Union and United States Personal Information Privacy, and Human Rights Philosophy – Is There a Match?,* 22 TEMP. INT'L & COMP. L.J. 307, 308 (2008).

118. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

119. Ludwin King, *supra* note 49, at 549 (citing Newman, *supra* note 117, at 328).

120. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948).

121. Newman, *supra* note 117, at 308 (noting that unlike the "prohibition on slavery, for example, the concept of privacy itself is open to debate" and thus different countries and regions differ.)

122. International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171.

123. Convention on the Rights of the Child, *supra* note 100, art. 16.

124. Organization of American States, American Convention on Human Rights art. 11, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 148.

125. Cairo Declaration on Human Rights in Islam, U.N. GAOR, 4th Sess., Agenda Item 5, art. 18, U.N. Doc. A/CONF.157/PC/62/Add.18 (Aug. 5, 1990).

falls under a broad or narrow interpretation.[127] Under the narrow conception, privacy relates exclusively to an individual's ability to control access to personal information, which is exactly at issue under the DNA Law.[128] Under the broader conception,[129] the right to privacy incorporates anonymity and restricted physical access.[130] Additionally, the right to privacy is often conceptualized as either a negative or positive right.[131] For example, the UDHR constitutes a negative privacy right by prohibiting "arbitrary interference . . ." of the "family, home, or correspondence."[132] In contrast, other instruments treat privacy as a positive right by recognizing that every individual has a "right to respect for his home, his personal life, and his correspondence."[133] Beyond the international sphere, most domestic constitutions, including Argentina's,[134] have at least recognized

126. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 222.

127. Norbert Gilmore, *Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL'Y 355, 409 (1996).

128. *Id.* Although the DNA law allows for less "intrusive" means of obtaining DNA in an effort to respect privacy laws, what is at issue here is not the methods in obtaining the DNA, rather what happens after to the DNA after it is obtained and the individual's inability to have control over that. Ludwin King, *supra* note 49, at 548.

129. *Id.* At its broadest, privacy is the "measure of the extent an individual is afforded the social and legal space to develop the emotional, cognitive, spiritual, and moral powers of an autonomous agent." *Id.* at 410.

130. *Id. Id.* At its broadest, privacy is the "measure of the extent an individual is afforded the social and legal space to develop the emotional, cognitive, spiritual, and moral powers of an autonomous agent." *Id.* at 410.

131. Ludwin King, *supra* note 49, at 549.

132. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948).

133. *Id.* at 549 (citing Cairo Declaration on Human Rights in Islam, *supra* note 125, art. 18., which states that "Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships."). Although the difference is subtle, "Negative rights require that states refrain from acting in a way that violates the rights of individuals, while positive rights require states to take action to protect the rights of individuals." *Id.* at 549 n.100 (citation omitted).

134. Although Argentina's constitution doesn't explicitly mention privacy, "private actions" are recognized in Section 19 which states that "The private actions of men that in no way offend public order or morality, nor injure a third party, are reserved only to God, and are exempt from the authority of the magistrates. No inhabitant of the Nation shall be compelled to do what the law does not order, or be deprived of what it does not forbid."

the fundamental importance of the right to privacy, even if it is not explicitly mentioned.[135]

B. The Right to Privacy on the International Stage

The variations on the meanings and interpretations of the right to privacy has led to regional and international courts adjudicating cases involving the right.[136] In 2008, the European Court of Human Rights unanimously decided that Britain's DNA and fingerprint storing policy violated the right to privacy.[137] The men involved in the case alleged that Britain violated Article 8 of the European Convention on Human Rights and Fundamental Freedoms,[138] and the Court held that the storing policy was a "'disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary for a democratic society.'"[139] The Court also found that the "policy failed to balance equally the state and individual interests at issue."[140]

In a more recent case in 2017, the Constitutional Court of Kuwait struck down the country's new DNA law that required all Kuwaiti citizens, residents, and visitors to provide DNA samples to "be put in a government database," leaving those

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CONSTITUCIÓN NACIONAL DE LA REPÚBLICA ARGENTINA [CONSTITUTION], amended by 1994 Amendment, Aug. 22, 1994, art. 19 (Arg.) (*translated in English*).

135. Ludwin King, *supra* note 49, at 549–50.

136. *Id.*

137. *See generally* S. & Marper v. U.K., App. Nos. 30562/04 and 30566/04 (Dec. 4, 2018), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-1784&filename=002-1784.pdf. This case involved two men that were arrested on separate occasions and ultimately released, but their DNA and fingerprints remained in the British database. *See generally id.* The gentlemen requested that the samples be destroyed, however the police declined to do so. *Id.* at [INSERT PINCITE].

138. Article 8 states that "Everyone has the right to respect for his private and family life, his home and correspondence" and that there can be "no interference [to that right] by a public authority . . . except as in accordance with the law and is necessary in a democratic society . . . for the prevention of disorder or crime . . ." European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 126, art. 8.

139. Ludwin King, *supra* note 49, at 550 (citing S. & Marper v U.K., App. Nos. 30562/04 and 30566/04, ¶ 125).

140. *Id.*

who did not to "face punitive action."[141] Kuwait's Constitutional Court concluded that the law violated Articles 30 and 31[142] of Kuwait's constitution protecting the right to personal liberty and privacy.[143] Kuwait introduced the law in 2015 following the "June 2015 suicide bombing of the Imam Sadiq Mosque, which killed 27 people and wounded 227."[144] Prior to this ruling the United Nations Human Rights Committee found that the law imposed "'unnecessary and disproportionate restrictions on the right to privacy.'"[145] In order to comply with international privacy standards set forth in the ICCPR, a DNA database system must be "extensively regulated, narrow in scope, and proportionate to meeting a legitimate security goal."[146]

In March 2019, Kenya's Parliament passed a sweeping amendment to the country's national ID law requiring "all Kenyans, immigrants, and refugees to turn over their DNA, GPS coordinates of their residential address, retina scans, iris pattern, voice waves, and earlobe geometry" in order to receive critical identification documents.[147] Opponents of the law state that it conflicts with Kenya's Data Protection Bill.[148] Opponents also worry about security vulnerabilities with such a large and centralized database of valuable personal infor-

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141. Jaber Al-Hamoud Al-Seyassah, *High Court Rules Against Controversial Law on DNA—'Articles Violate Constitution'*, ARAB TIMES (June 10, 2017), http://www.arabtimesonline.com/news/high-court-rules-controversial-law-dna-articles-violate-constitution/.

142. Article 30 of Kuwait's constitution provides that "Personal liberty is guaranteed," and Article 31 states that "No person may be arrested, imprisoned, searched, have his residence restricted or be restrained in liberty of residence or of movement save in conformity with the provisions of the Law. No person shall be subjected to torture or to ignominious treatment." دستور دولة الكويت [Constitution] Nov. 11, 1962, arts. 30–31 (Kuwait) (*translated in English).*

143. *Kuwait: Court Strikes Down Draconian DNA Law*, HUM. RTS. WATCH (Oct. 17, 2017, 1:50 AM), https://www.hrw.org/news/2017/10/17/kuwait-court-strikes-down-draconian-dna-law#.

144. *Id.*

145. *Id.* Sarah Leah Whitson, Middle East director of the Human Rights Watch stated that the law was too broad and lacked basic safeguards or restrictions, thus opening the door to government abuses. *Id.*

146. *Id.*

147. Glyn Moody, *The March to Mandatory, Nationwide DNA Databases Picks up Pace Around the World*, PRIV. NEWS ONLINE (Apr. 3, 2019), https://www.privateinternetaccess.com/blog/2019/04/the-relentless-march-to-mandatory-nationwide-dna-databases-picks-up-pace-around-the-world/.

148. *Id.*

mation.[149] In January 2020, Kenya's high court temporarily suspended the country's ID law until the government implements an "'appropriate and comprehensive regulatory framework"' that protects the data it collects and safeguards "minorities from discrimination."[150]

C. The Balancing Act Between the Right to Privacy and other State Interests

The right to privacy has not been treated as an absolute right from which no derogations are permitted.[151] In *S. and Marper v. U.K.*, the European Court of Human Rights balanced the interests of the non-convicted persons and the state's use of the DNA storing policy and found that the state's interest in its DNA storing policy was not enough to outweigh the individuals' privacy interests.[152]

In the instant case, Argentina is faced with balancing compulsory DNA testing of an innocent and potentially uninvolved person against the state's interest in finding the truth and seeking justice against those who perpetuated the crimes during the Dirty War.[153] Argentina's judiciary has attempted to balance the right to the truth and the right to privacy by allowing "less invasive . . ." ways of obtaining DNA than through blood extraction.[154] However, at issue here is not the method in which DNA is obtained, whether it be through blood extraction

149. *Id.*

150. Abdi Latif Dahir & Carlos Mureithi, *Kenya's High Court Delays National Biometric ID Program*, N.Y. TIMES (Jan. 31, 2020), https://www.nytimes.com/2020/01/31/world/africa/kenya-biometric-ID-registry.html.

151. Noa Vaisman, *Relational Human Rights: Shed-DNA and the Identification of the 'Living Disappeared' in Argentina*, 41 J.L & SOC'Y 391, 401 (2014) (noting that in the Argentina case concerning Guillermo Prieto, mentioned, the court attempted to find a middle ground between the conflicting rights and interests of the state to expound the truth, and of Guillermo's right and interest in protecting his privacy.) *See also* S. & Marper v. U.K., App. Nos. 30562/04 and 30566/04 (Dec. 4, 2018), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-1784&filename=002-1784.pdf.

152. *Id.* ¶ 125.

153. Ludwin King, *supra* note 49, at 553.

154. *See* Rey, *supra* note 48.

or through shed-DNA.[155] Rather, the issue is the testing of the DNA without consent and what happens to that information following the extraction and the testing.[156] In a case brought by Guillermo Prieto, Prieto argued against the use of shed-DNA, and contended that it violated "his basic rights to intimacy, privacy, and dignity," thus alleging a claim under article 19 of Argentina's constitution.[157] Prieto contended that there was no real difference "between the test based on shed-DNA and the one based on DNA that is extracted from blood samples because in both the foal is the same—to obtain elements of his body to verify his genetic identity."[158] Prieto further maintained that using his DNA without his consent was "forced subjugation that violates his rights over his body and property."[159] Prieto plead that "the violence inflicted upon him through the DNA identity test" went beyond his physical body, and that it extended "to the moral or spiritual sphere of his personhood," and forced him to question his own identity.[160]

IV. THE RIGHT TO TRUTH, BUT AT WHAT COST?

"There is no agreed-upon hierarchy of human rights," thus putting truth and privacy on "equal footing."[161] The DNA Law pits those rights against each other, and Argentina ultimately decided that the interest of the state and of society trumped the individual privacy right of the individual. This is supported by the thought that because "the individual is a lesser part of the social whole which will presumably benefit from disclosure, the individual will almost always lose."[162] Here, even though the adult may prioritize their right to privacy, "society views disclosure of the truth to be beneficial to everyone, including the

155. Ludwin King, *supra* note 49, at 548. Shed-DNA is the "DNA collected from the environment where the individual has been." Vaisman, *supra* note 151, at 392.

156. Gilmore, *supra* note 127, at 409.

157. Vaisman, *supra* note 151, at 401.

158. *Id.* at 402.

159. *Id.*

160. *Id.*

161. Ludwin King, *supra* note 49, at 561 (citing Kristin N. Wuerffel, *Discrimination Among Rights? A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 VAL. U. L. REV. 369, 399 (1998)).

162. Newman, *supra* note 117, at 318.

adult child."[163] Because there is no law commanding that the right to truth or the right to privacy should prevail over the other, Argentina has the power to decide which should prevail.[164] However, that does not mean that they made the correct choice.

A. Repeating History?

In prioritizing the right to truth over an individual's right to privacy it is hard to not question whether Argentina might be perpetuating past crimes. The DNA Law has the ability to "revictimize" the children and "recreat[e] similar harms" of the past rather than respecting the individuals' wishes to be left alone.[165] In a sense, the DNA Law seems to immortalize what happened during the Dirty War: the state acting in a way that goes against the rights of its citizens. In the case of Evelin Vazquez, after the court ordered that she hand over her official identity documents which were fraudulent, Vazquez stated that "'it feels as though they are trying to erase my entire existence . . .'" and she contended that "her individual rights should not be compromised in the interests of collective justice."[166] Vazquez continued that the state was guilty of stealing her before, and now they are attempting to do it again.[167] This supports the idea that pursuing the right to truth and justice for society can make victims feel as though they have "'disappeared' twice," and that the daunting thought of being torn apart from all that you know is exactly what happened during the Dirty War.[168]

Victoria Donda[169] described her experience following the revelation of her biological parents as a process where she repeat-

163. Ludwin King, *supra* note 49, at 560.

164. Based on the *Lotus Principle*, "restrictions upon the independence of States cannot therefore be presumed." S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7). Thus, in absence of a rule prohibiting Argentina favoring the right to truth over the right to privacy, there is no a violation of international law.

165. Mae Oñati, *Truth at Any Cost? Law's Power to Name Argentina's Disappeared Grandchildren*, 7 OÑATI SOCIO-LEGAL SERIES, 324, 333 (2017).

166. *Id.*

167. *Id.*

168. *Id.*

169. Donda blames her paternal "uncle" for handling what she calls her expropriation, not her adoption, as he was a naval officer at ESMA during the Dirty War. *See* Walter Bianchi, *Daughter of Argentina 'Disappeared' Becomes*

edly found herself unable to move forward, and she rejected that which seemed valid[170] to her before, even rejecting herself at times.[171] The state of limbo after finding out the truth left her feeling incapable of reconciling everything from her past, "'good and bad, truth and lies.'"[172] The DNA Law purports to find the truth, however in some cases it seems to perpetuate the harms of the past.[173] The shock of finding out the reality of one's biological family's past is overwhelming, and the DNA Law exacerbates that by not giving individuals a choice, whether ready or not, on whether to expose the truth.[174]

B. Not a Match

What happens when a judge orders DNA testing and the samples do not match those of the families of the desaparecidos? It is crucial to remember that the right to privacy is at issue here not because of the method of DNA testing, but because of the inability to control access to your personal information after the testing takes place.[175] In December 2009, Marcela and Felipe Noble Herrera[176] finally surrendered to court-ordered

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Lawmaker, REUTERS (Nov. 28, 2007, 2:08 PM, updated 13 years ago), https://www.reuters.com/article/idUSN27511149.

170. In a similar vein, after finding out that truth about his biological parents thirty-six years after not knowing his identity, Ignacio Hurban rejected going by the name that his biological parents gave him and refused to denounce the parents that raised him. Oñati, *supra* note 165, at 331–32. Hurban expressed sympathy for his biological parents, yet highlighted that he did not live through any of that. *Id.* at 332. He has pleasant memories of growing up on a farm with his "adoptive" parents, and he still recognizes them as his mother and father. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 334.

174. *See* Rodríguez-Ferrand, *supra* note 54.

175. *See infra* Section III(C).

176. This case received widespread national attention as "Marcela and Felipe Noble Herrera are the adoptive children of Ernestina Herrera de Noble, the largest shareholder in Argentina's Grupo Clarin, which controls Argentina's largest newspaper and cable network, and one of the largest television stations.". Sam Ferguson, *Children of Argentina Media Magnate Forced to Undergo DNA Testing*; CHRISTIAN SCI. MONITOR (June 7, 2010), https://www.csmonitor.com/World/Americas/2010/0607/Children-of-Argentina-media-magnate-forced-to-undergo-DNA-testing. Marcela and Felipe are heirs to a "multibillion-dollar" empire and some groups believed they were actually children of desaparecidos due to Ernestina's claim that she legally adopted Marcela and Felipe six months after the military regime took

genetic testing after refusing to do so for over nine years in a criminal investigation that launched in 2001.[177] The siblings chose not to give their samples to a court-approved lab, but "to a separate court lab with the stipulation that the results be compared only with DNA provided by two families that say they are relatives of their biological parents."[178] The siblings also specified that their samples not be given to the National Genetic Data Bank, for they believed it was "unreliable and overly politicized."[179] Shortly thereafter, Argentina passed the DNA Law and the Grandmothers insisted that Marcela and Felipa be tested again and a judge ordered a police raid of the family's home where the authorities "strip-searched them, seized underwear, toothbrushes and other articles for DNA sampling."[180] Marcela expressed, "'Our identity is ours. It's a private thing and I don't think it's up to the state or the Grandmothers to come and tell us what is ours.'"[181] Marcela and Felipe's blood and saliva were tested with the samples of the families of the desaparecidos in the National Genetic Data

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over after "Marcela was left in a cardboard box" at Ernestina's front door and Felipe was "handed to" Ernestina "when she went to court to submit papers to adopt Marcela" after being "abandoned by a single mother unable to look after him," thus leading to Ernestina's adoption of him as well. Christine Toomey, *Argentina's Stolen Children*, CHRISTINETOOMEY.COM, (May 1, 2011), christinetoomey.com/2011/argentinas-stolen-children/. After an "investigation into the legality of the siblings' adoption," the court "found nobody in Argentina by the name of the woman said to have abandoned Felipe," and "a man said to have witnessed Marcela being found on Herrera de Noble's doorstep was revealed as a long-time employee of Grupo Clarin." *Id.* These murky details led to a brief arrest of Ernestina "on suspicion of knowingly adopting children of the disappeared." *Id.*

177. Ferguson, *supra* note 176.

178. Andres D'Allessandro & Chris Kraul, *Argentina Tries to Uncover 'Dirty War' Orphans*, L.A. TIMES (June 9, 2010, 12:00 AM), https://www.latimes.com/archives/la-xpm-2010-jun-09-la-fg-argentina-heirs-20100609-story.html.

179. *Id. See infra* Section V(B).

180. Robert Krulwich, *Where Did I Come From? Some Stolen Children Don't Want to Know*, (Mar. 9, 2011), https://www.npr.org/sections/krulwich/2011/03/09/134364175/where-did-i-come-from-these-stolen-children-don-t-want-to-know. This police raid seems quite invasive even though this is the part of the law that lawmakers enacted to "respect" privacy by finding less intrusive ways to conduct genetic testing than blood tests. *See supra* note 52 for Argentina's Supreme Court holding that obtaining DNA indirectly does not conflict with one's right to privacy.

181. *Id.*

Bank, and the results showed that they were not linked to the families.[182] While Marcela and Felipe celebrated, the Grandmothers pointed out that the work was not done because their samples were only compared to samples of the families of the desaparecidos detained in 1975 and 1976 since Marcela and Felipe's identity documents say they were born in 1976.[183] The Grandmothers stressed that their birth dates could have been "invented to obscure their origin."[184] Four years later, a judge finally dismissed the case ruling that there was not enough evidence to show that Ernestina had illegally adopted Marcela and Felipe and a 15-year battle finally came to an end.[185]

V. UNCOVERING THE TRUTH WHILE RESPECTING THE RIGHT TO PRIVACY

Because there is no hierarchy between the right to truth and the right to privacy, Argentina has the option to choose which to favor.[186] Even though Argentina chose to favor the right to truth in enacting the DNA Law, an improved version of the law can better protect the right to privacy while also prioritizing the right to truth. Argentina's DNA Law is flawed because it focuses on the method in which DNA is obtained rather than

182. *No DNA Match for Argentina Publisher's Children*, ASSOCIATED PRESS (July 16, 2011, 10:50 AM), https://www.deseret.com/2011/7/16/20204031/no-dna-match-for-argentine-publisher-s-children.

183. *Id.*

184. *Id.* The results also showed that there were a few families whose samples could not determine whether or not there was a biological link with Marcela and Felipe. *Id.* The Grandmothers insisted that the genetic information of those families would need to be completed to determine parentage. *Id.* This seems to suggest that the Grandmothers will only be satisfied once all traces of the disappeared and their descendants were revealed—a puzzle that might be "impossible to complete." *See Id.*

185. Hernán Cappiello, *La Jueza Sandra Arroyo Salgado Sobreseyó a Ernestina Herrera de Noble en la Causa por Apropiación de Niños Durante la Dictadura*, LA NACIÓN (Jan. 4, 2016, 16:05), https://www.lanacion.com.ar/politica/la-jueza-sandra-arroyo-salgado-sobreseyo-a-ernestina-herrera-de-noble-en-la-causa-por-apropiacion-de-ninos-durante-la-dictadura-nid1859283 (translation by author).

186. *See supra* note 164. Under the Lotus Principle, in the absence of a rule of international law prohibiting conduct, a state may act. *See* S.S. Lotus (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (highlighting that "restrictions on rules cannot be presumed).

what happens to the DNA after it is extracted.[187] While the method in which DNA is extracted might itself seem like a violation of privacy, the real issue here is that there is no regulation over what happens to the DNA after it is extracted and tested against the samples of DNA from families of the desaparecidos. Additionally, the DNA Law is not narrowly tailored enough as to evade forced DNA testing that may be happening for political gain.[188] If Argentina believes that there is greater social benefit in uncovering the right to truth, it is still possible to respect the right to privacy and provide more procedural safeguards so that that who are not willing to submit to DNA testing still feel as though their privacy interests are protected.

A. Safeguarding Privacy

The DNA Law provides no recourse for those that are unwilling to provide their DNA, other than obtaining shed-DNA rather than physically extracting it. If the DNA Law is going to continue to exist, it should require more procedural safeguards so that Argentines are better prepared for what may happen if the judge orders DNA testing. Further, the DNA law should be narrowed, as there is no time limit in how long the National Genetic Data Bank can hold the potential victim's DNA information. In the case involving Marcela and Felipe Herrera de Noble,[189] the Grandmothers insisted that the National Genetic Data Bank continued to store the siblings' information even after testing concluded that they were not relatives of desaparecidos.[190] After four years, the judge finally dismissed the case, but it is still unclear if the siblings' information is still being stored, or if a new case would have to be opened for their DNA to be tested again. This is the type of uncertainty that

187. *See* Rodríguez-Ferrand, *supra* note 54. The DNA law provides that a judge may order DNA testing when it is necessary for identification or for the verification of circumstances. *Id.* The case must show that DNA testing is necessary, reasonable, and proportional. *Id.* The law attempts to "respect" privacy by allowing extractions of blood, saliva, skin, hair or other biological samples only when that person is willing to submit to DNA testing. *Id.* In other instances when the person does not want to submit to DNA testing, the judge may order obtaining DNA through shed-DNA. *Id.*

188. *See infra* Section V(B).

189. *See* Ferguson, *supra* note 176.

190. *See supra* Section IV(B).

leaves people weary about providing their DNA.[191] The law should provide for a "statute of limitations" of sorts that lays out what happens if the potential victim's DNA is not a match and how long the DNA will remain in the National Genetic Data Bank for testing.[192] The European Court of Human Rights has already held that Britain's fingerprint and DNA storing policy violated the right to privacy because the state could not continue to store people's information if they were not ultimately convicted of a crime.[193] Although the circumstances are different here,[194] the law should still provide for a strict amount of time in which the DNA samples must be destroyed, unless the potential victim agrees to store his DNA in the National Genetic Data Bank.

B. Evading Corruption

Another issue that opponents have with the law is that they believe that it was politically motivated and thus susceptible of expansion to those who are not potential victims of the Dirty War.[195] The DNA Law has been described as "pure fascism" and some believe it to be motivated by the government's battle with ideologically opposed media organizations.[196] If politically

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191. This is evidenced in Marcela and Felipe's case as they initially gave their DNA samples to a "separate court lab" because they believed the National Genetic Data Bank was "unreliable and politicized." D'Allessandro & Kraul, *supra* note 178. If people had control over where their information would be tested and stored, they might be more willing to submit to the testing.

192. The DNA law may also have a disparate impact on those that are unable to afford a lengthy legal battle. Providing a time limit on how long DNA samples can be stored in the database will give closure to those that cannot afford to challenge the judge's orders.

193. *See supra* notes 137–40.

194. The Grandmothers are constantly seeking out relatives of desaparecidos to add their DNA samples to the bank. *History of Abuelas*, *supra* note 18. However, because the military regime erased all traces of the desaparecidos and their descendants, in many cases it is impossible to solve the mystery of what happened. *See No DNA Match for Argentina Publisher's Children*, *supra* note 182. *See also* Ferguson, *supra* note 176.

195. *See* Richards, *supra* note 65.

196. *Id.* In 2008 Grupo Clarin turned its newspapers and television channels against President Cristina Fernandez de Kirchner's center-left government, and ever since the two have staunchly opposed each other. Helen Popper, *Argentine Heirs' 1st DNA Tests Come Back Negative*, REUTERS (July 11, 2011, 7:14 PM, updated 10 years ago), https://www.reuters.com/article/us-

powerful players can use the DNA Law to their advantage, the DNA Law is susceptible to being for ends that do not pertain the Dirty War. The DNA Law needs to be more narrowly tailored so that it can only be used in cases involving potential victims of the Dirty War, and so that it cannot evolve to being used in cases to solve more common crimes. While no one can erase the political history of the DNA Law, it could be changed to avoid corruption by making the ordering of DNA testing a two-part process. For example, once a judge orders DNA testing, that order could be sent to another judge for approval. By involving another judge in ordering DNA tests, the DNA Law would less susceptible to political pressure and to judges acting in certain ways to appease the government. Further, the standard for ordering testing should be changed to just necessary and proportional.[197]

CONCLUSION

There is social benefit in honoring the right to truth and the right to privacy, yet Argentina has chosen to only value the right to truth by implementing the DNA Law that incorrectly focuses on the method in which DNA is extracted, rather than what happens to that information following extraction. The right to truth is a fairly new right that has evolved as a result of enforced disappearances, and the international community has responded by making it an obligation of the state to uncover the truth. In contrast, the right to privacy is a right that has been around for ages, and it is not absolute, in that states are

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argentina-rights-clarin/argentine-heirs-1st-dna-tests-come-back-negative-idUSTRE76B01620110712. Political commentators suggested that President Kirchner encouraged the DNA testing of Marcela and Felipe in order to put pressure on Grupo Clarin for being critical of the government. Krulwich, *supra* note 180. In 2011, when Marcela and Felipe finally submitted to DNA testing, President Kirchner was running for another term in office and some thought that it would have been uncomfortable for her if Marcela and Felipe's DNA did not match any of the samples in the database so President Kirchner "pushed hard" for them to be analyzed. Popper, *supra* note 196.

197. Applying a reasonableness standard lowers the high standard required of necessary. "Proportional" seems to invoke the balancing test done by the European Court of Human Rights in balancing the interests of the state versus the interests of the individual. *See* Ludwin King, *supra* note 49, at 550 (citing S. & Marper v. U.K., App. Nos. 30562/04 and 30566/04, ¶ 125 (Dec. 4, 2018), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-1784&filename=002-1784.pdf).

capable of derogating from the right in the interest of society. In order for Argentina to respect both rights rather than just focusing on the right to truth, the DNA Law needs to be changed to regulate the amount of time DNA is stored in the National Genetic Data Bank. There also needs to be a clear procedure for what happens to the DNA sample if there is not match to the relatives of the desaparecidos. Making changes to the DNA Law will provide more privacy protection to those that are ordered to submit DNA samples, and it will also honor Argentina's obligation to expose the truth.

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