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In the days of the "toad test": justice and abortion in mid-twentieth-century Argentina

Au temps du Test du crapaud. Justice et avortement (Argentine, mi-XX^e siècle)

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Varia

In the days of the "toad test": justice and abortion in mid-twentieth-century Argentina

Agustina CEPEDA

This article forms part of a research project about different kinds of judicial control over women's bodies from 1940 to 1994 in Buenos Aires province.[1] Through a long-term study of a *series* of legal proceedings in trials for abortion, the idea is to analyze the dynamics of criminal justice in terms of its *interpretation of the law* and to correlate the findings with the different political and medical contexts. Abortion is illegal in Argentina, except in cases of rape, or when the woman has been declared insane or her life or health is in danger (articles 85 to 88 of the 1921 Reformed Penal Code).

This paper's scope is more limited, as it deals with the Peronist experience in the years 1946-1955. The era's population policies have led to heated historiographical debate over whether they should be defined as pro-natalist or pro-maternalist.[2] During this period too, a

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1 The title of my social-sciences thesis is: *Corpus delicti: women, abortion and justice - Argentina 1940-1994,* IDES-UNGS. An earlier version of this article was presented at the Eighth Mercosur Anthropology Reunion (Buenos Aires, 2009) and at the Gino Germani Institute's Eighth National Multidisciplinary Debate Days about Health and Population (2009).

2 For gender and Peronism, see Valobra, 2004-2005.

pregnancy test devised by the Argentinean doctor Carlos Galli Mainini (1914-1967), an endocrinologist trained in Italy and at Harvard, became widely used. In 1947, Mainini published *El Test del Sapo* o *El diagnóstico del embarazo con batracios machos* (The Toad Test or detecting pregnancy with male batrachians).

By focusing on the emblematic 1954 case of Elena Teotina Haedo de Gaitán and the midwife Catalina Fuccia – who were cleared of charges for abortion on the grounds of an "impossible abortion attempt" – this article aims to contribute to the debate and to understand the bio-normative system imposed on women. Like Elisa Guerra Speckman,[3] I will try to reveal the way in which the people administering the criminal justice system settled conflicts relating to the illegal termination of pregnancy.

Pro-natalism or pro-maternalism: the terms of the debate

Pro-natalism can be defined as a set of economic, social and judicial measures taken by a government to encourage fertility. For example, European feminist studies from the 1980s and 1990s have defined the policies of pre-1945 Fascist Italy and post-1945 Francoist Spain as pro-natalist.[4] In the context of a steep drop in birth rates, these governments encouraged an increase in the number of children per woman in a nationalist perspective. To prevent neo-Malthusian or eugenics-inspired behaviors, these policies were essentially aimed at discouraging birth-control practices.[5]

Nevertheless, very early on, studies of pro-natalism pointed out the limits of populationist policies, whose actual effect on the number of children was limited. The notion of pro-maternalism[6] better expresses policies that laud maternity as a social and civic responsibility, by referring to medical and moral notions about women's role as mothers. More generally, this concept focuses on measures protecting children, women and families.

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3 Speckman Guerra 2002.

4 Thébaud 1992.

5 Nari 2004; Miranda & Grión Sierra 2009; Eraso 2007; Otero 2004.

6 Bock & Thane 1996.

Argentina experienced an unusual demographic transition[7], because the birth rate dropped at the same time as the mortality rate. This particularity led to a crackdown on birth-control methods used by women. As historian Marcela Nari has pointed out,[8] in the 1920s and 1930s, doctors and authorities on criminal law who opposed birth control mainly targeted abortion. Along with infanticide and abandoning children, abortion practices were the main concern, because they challenged theories that defined maternity as a "natural instinct for self-abnegation." Around 1940, concerns about the declining birth rate – and the risks inherent in the drop in the number of births for developing the nation's power – increased. Historiography has long considered the years during and immediately after World War II as "pro-natalist," with the benefit money granted by the state for the birth of children as the most obvious proof.[9] Demographer Susana Torrado, for example, shows that although around 1930, the birth rate dropped to below 30 per 1000, the trend was reversed during the period from 1945 to 1951[10].

Yet some gender-conscious studies have pointed out that this data was not cross-referenced with other indexes, and that the statistics do not in fact point to a baby boom during the Peronist era.[11] Rather than a pro-natalist policy focusing on the number *of* children, the policy actually provided aid *for* children. For example, the Peronist government's first five-year plan (1947-1951) explicitly promoted the indissolubility of marriage and planned for anti-abortion campaigns. The second plan assigned the government the goal of increasing the rights of families by encouraging the constitution of inheritance entitlements, broadening access to family allowances and benefits, creating tax exemptions, and even eliminating civil discrimination towards children born out of wedlock. For Dora Barrancos, these are indeed "pro-maternalist" policies that reinforce the institution of the family and its well-being by protecting motherhood and by assisting

7 Pantelides 1983.

8 Nari 1996 and 2004.

9 Di Liscia 1999; Torrado 2003; Bianchi 1993.

10 Torrado 2003: 86.

11 Barrancos 2001; Valobra 2004-2005.

children in particular.[12] The National Directorate of Social Assistance was founded at that time (Law 13341, in 1948). In addition, the rule that punished mothers for abandoning children was also revoked. Nothing encouraged judicial proceedings against women who terminated pregnancies, even though – as the statistical data shows – women were resorting to abortion more often during the post-war years, in the context of the social transformations of the world of work and of political life.

Under the Peronist governments of 1946-1955, a *nuclear family ideology* that tended to reduce the number of children per family and to shrink family-relationship networks was actually being promoted.[13] No parliamentary actions were taken to change the sentence for abortion or to increase sanctions against it. Obstetrical practices were not overseen more closely, contraceptives were not taken off the market (as the 1974 Peronist government would later do)[14] and neither illegal abortionists nor women who had abortions were deliberately prosecuted.

Justice and abortion: an emblematic case

In 1947, when Peronist prison reform was being implemented,[15] Felicitas Krimpel – a Chilean jurist, feminist and criminologist – presented her plan for turning women's prisons into reform centers in the journal *Revista penal y penitenciaria*. She explained the injustice done to women to Roberto Petinatto, the General Director of Penal Institutions, in the following terms:

> If we consider the many cases of women who are convicted of infanticide, abortion or adultery, we will see that in each of these cases where the law has condemned the woman only, the man's egoism appears clearly, as well as the legislators' failure to understand the need to face up to a problem that we have not managed to resolve entirely. An indigent woman, burdened by difficult circumstances and lack of

12 Barrancos 2001. In addition, Karina Ramaccioti (2004) studied Maternal Benefits. She finds clear evidence that Peronist pro-maternalism was more concerned with stay-at-home mothers than with working women with children.

13 Cosse 2006.

14 Felliti 2005.

15 Caimari 2004.

> education, by shame and poverty, gets rid of the fruit of illegitimate love. The law hounds her pitilessly and puts her in prison (…).
>
> The man, who is at least as guilty as she in engendering a life without the slightest sense of responsibility, remains free and carries on with his fatal deeds, thereby encouraging social ills, hatred and misery.

While it is true that women were more likely to be accused of and convicted on charges of abortion and infanticide, many of them were acquitted and freed, for the very reasons that Felicitas Krimpel refers to. According to the prison-population statistics published in the same journal, between 1946 and 1955, the number of women remanded in custody on charges of abortion in Argentina averaged 27 a year.[16] Out of this average number, approximately 85% were acquitted (charges dropped for lack of cause justifying judicial action) or found not guilty. When the decisions of the Supreme Court of Buenos Aires province and the National Appellate Court in terms of criminality in the city of Buenos Aires are analyzed, we see that the most common judicial stance for justifying acquittal is the *impossible criminal attempt* or *impossible abortion offense*.

Let us examine a case from late 1954 in Buenos Aires, involving the midwife Catalina Fuccia and Elena Teotina Haedo de Gaitán. The former was accused of committing abortive measures on the latter, with her consent.[17]

> Buenos Aires, September 1954. Inspector Federico G. Mendizábal testifies that on May 3 of this year, at 3:30 A.M., he was called in by the guard at Policlínico Teodoro Alvarez Hospital, because of a woman, Elena H. de Gaitán (…) Interrogated on the spot, Elena Teotina Haedo de Gaitán confessed that in late March of this year, not having had her menstrual period, she believed herself to be pregnant. She went to the office of Señora Fuccia on April 3 of this year in order to have an abortion.

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16 Most of the women accused of and tried for abortion were held at the Asilo Correccional de Mujeres, in Buenos Aires. The other prisons that housed women accused of abortion were Formosa, Posadas, Presidencia Roque Sáenz Peña, Santa Rosa and Neuquén.

17 *Jurisprudencia Argentina* 1955, tome II, April, May, June, p. 458-459. It is impossible to access the files because of the justice department's file-conservation and destruction policies. The decision was pronounced by the National Criminal Appellate Court of the City of Buenos Aires.

> Señora Fuccia had her lie down on a stretcher, and inserted a sharp object into her vagina, which she was supposed to leave there for 24 hours. She was estimated to be 40 days pregnant. The next day, she removed the object herself, and hemorrhaged blood, including clots, which led her to believe that the abortion had been successful. After 20 days of bleeding, she went back to Señora Fuccia, who advised her to lie down and place a bag of gel on her stomach. Because the bleeding continued, she went back to the midwife, who refused to treat her this time, which is why she went to Alvarez Hospital. Señora Gaitán did not wish to have another child, because she is already living in cramped quarters, insofar as she, her husband and their two children live in a single room.
>
> The midwife Catalina Fuccia acknowledges that Señora Gaitán did indeed come to her for an abortion at the time and place stated, and that she did insert a sharp object inside her and give the instructions that Señora Gaitán referred to. The rest of her statement is identical to her co-defendant's.
>
> The prosecutor accuses these women of committing the offense of abortion (Article 85, Paragraph 2, and Article 88 of the penal code) and asks for them to be sentenced to: one year and six months in prison for Catalina Fuccia; one year for Elena Teotina Haedo de Gaitán, and for both of them to bear the cost of the judicial procedure. Señora Fuccia's lawyer asks for the facts to be viewed as an impossible abortion attempt, and for his client to be acquitted. Señora Elena Teotina Haedo de Gaitán's public defender also asks for an acquittal, in his presentation on page 47.

The Court took into account both the fact that neither of the accused had any prior convictions and the reasons that led the pregnant woman to commit her act. Both women were given suspended sentences for the terms requested by the prosecutor. The defendants and their lawyers appealed the decision. On March 11, 1955, Judge Mario Oderigo stated to the Appellate Court:

> In my opinion, the two defense laywers are right, and their logic is undeniable. Señora Fuccia admits having committed abortive measures on the person of Señora Gaitán, who recognizes having consented to this. These acts are proven, because, even though there was no trace of them when the medical examiner whose report is on page 36 performed his examination, they had been proven beyond reasonable doubt in the medical officer's report on page 7 (art. 346, Criminal Code). But what has not in any way been proven is whether Señora Gaitán was in fact pregnant at the time that these acts were committed. The report on page 7 cannot be taken into consideration on this point, because its laconism on the subject can only be interpreted as the result of simple inference on the part of the doctor who examined the patient. It is practically superfluous to repeat that the so-called condition of pregnancy – an

> essential element for the offense of abortion to take place – cannot be proven by confession or clues, because these elements are not sufficient to prove the offense, as this court has already stated repeatedly. We are, therefore, dealing with an attempt at an impossible abortion, which is not punishable for the woman, in accordance with the provisions of Article 88 of the Penal Code, which allows for an exemption or reduction in sentencing for a third party.

Impossible abortion attempt? The defendants' lawyers drew attention to a crucial question: was Elena Gaitán actually pregnant? And the judge acquitted them. If Peronist politicians' population goal had been to increase the number of children per family, criminal proceedings against abortion would have been more hard-hitting. Whereas in fact, the use of a judicial loophole allowing for acquittal of the accused would seem to show a lack of interest in punishing the crime. But let's take a closer look at the "impossible abortion offense."

The impossible abortion offense

The Argentinian Penal Code dealt with the question of the impossible offense in Title VI of Book I, devoted to "attempted offenses," but it omitted to include in that notion any reference to appropriate means,[18] which makes the impossible offense an attempt.[19] Neither the judges nor the lawyers in the Fuccia-Gaitán case employed particularly original arguments in their search for a loophole in favor of the accused. In 1901, Franz von Lizt, an Austrian jurist, had pointed out that "an attempted abortion on a woman who isn't pregnant is punishable when the pregnancy is not absolutely impossible; the attempt to cause the death of a stillborn child is punishable if the death is not indisputable." In Argentina, from very early on, theoretical discussions about the jurisprudence of the judicial stance on "attempts" were taking into account the situation of abortive measures being applied to a woman who was not in fact

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18 Cavallero 1983.

19 Penal reform of 1921. The last paragraph of article 44 of the applicable Penal Code states: "If the offense was impossible, the sentence will be reduced by half, and can be reduced to the legal minimum or be excluded, depending on the degree of dangerousness shown by the delinquent."

pregnant. The impossible abortion offense has not been punishable since 1903.

The Fuccia-Gaitán case was not the first one to have been settled in that manner. Since 1941, several pronouncements by provincial Courts of Appeal had acquitted women, midwives, concubines and husbands of the offense of abortion by finding their acts to be *impossible offenses* in light of the evidence. In none of these cases could the pregnancy of the woman who underwent an abortion be "scientifically" proven. The painful or mortal "abortive measures" were merely "attempts"; there was no "corpus delicti," only resorting to an illegal practice.[20]

Most criminal suits for abortion stemmed from the woman being denounced by a doctor or other medical practitioner in a public hospital. Women would go there because of infections caused by the abortive measure, and police involvement would begin at that point. During the trial, the victims would be described as good mothers or as women whose "honor must be protected," and the absence of a criminal record as well as neighbors' testimony as to their good character would count in their favor. Judicial procedures included medical examiners' reports, official searches of backstreet clinics, taking witnesses' testimony, lengthy interrogations of the defendants and collecting the materials used to perform the abortions (pointed objects, pills, bandages and blood-stained cloths). These lengthy judicial procedures could lead to a modification of the accusation, if pregnancy prior to the illegal measures could not be proven.

In accordance with the Argentinian Penal Code, confession alone is not sufficient evidence for convicting someone. And just as "confession and evidence" couldn't confirm the pregnancy, early pregnancy-detection methods didn't allow it either, at least not at the time of the case in question. At that time, biological tests were based on the effects produced by HCG (human chorionic gonadotropin) on the reproductive organs of various animals (rats, rabbits, frogs, toads).

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[20] The "corpus delicti" is something that must be shown; it is not a fact, but a *factum probandum*. The corpus delicti is composed of three parts: *corpus criminis* (the outcome of the crime), *corpus probationi* (the evidence), *corpus instrumentori* (the instrument).

As a review of medical and gynecological magazines shows, as early as 1934, practical applications of the Friedman reaction were used to test for pregnancy. Discovered in 1931, that test was based on obtaining "ovarian hyperemia in rabbits after the injection of a pregnant woman's urine in marginal ear veins." But its reliability was contested by several doctors, who expressed their misgivings in scientific journals. A 1947 decision acquitted the defendants, even though the Friedman chemical-reaction test had been positive. The judge in that case (the same as in the one we have been looking at, Horacio Vera Ocampo) pointed out that the "Friedman reaction could give false positives in cases where there was in fact no pregnancy, and therefore it could not be used to establish tangible truth.[21]

Basing his work on earlier research, Carlos Galli Mainini (1914-1967), a doctor at Rivadavia Hospital, injected urine from pregnant women into male *Bufo Arenarium* toads' dorsal lymph sac in 1947, and, after analyzing 179 cases, concluded that it caused a specific reaction. Published in Argentina, in Latin American medical journals and in New York, his study caused quite a stir: the description of the technique was reproduced in practically all the Argentinian medical journals, and its reliability was soon subjected to repeated evaluations, the results of which were also published. Considered to be over 99% reliable, the "toad test" spread across Argentina and Latin America in the 1950s, yet no reference was made to it in the judgment handed down in the case of Gaitán and Fuccia.[22]

The lack of a reliable technique for establishing whether or not Elena Haedo de Gaitán had in fact been pregnant worked in the

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21 Law nº 23.429 of 16 November 1947, Criminal Court of the City of Buenos Aires.

22 During my oral survey, poor women whose sons and daughters were born in the 1950s told me that they had not had blood or urine tests done during their pregnancies. Nevertheless, most of them had heard of the toad test at least once. One of the women I interviewed remembers: "People from the Sulivan-Díaz laboratory would catch toads in the park near my house, when we were living near Mar Chiquita. They needed male toads, because the test didn't work on the female ones. They would go back to their lab with bucketfuls of them for their tests. That would have been from the late 1940s to 1958, when we were living there." Interview conducted on 11 June 2008.

accused's favor. Precise descriptions of the abortive measures left little doubt about her condition, but Argentinian criminal jurisprudence left a loophole enabling acquittal. What was the price to pay for this legal sleight-of-hand? Should we believe that, during negotiations to define an "impossible abortion attempt" women lost their right to be heard, and were unable to testify as to "their own pregnant condition"?[23]

Women as victims of law and science?

The offense was not the focus of the Gaitán-Fuccia judgment, and there were no moral, pro-natalist or ethical arguments offered. The acquittal of the accused was justified by the strict application of legal rules. The women's confessions were subordinated to the "scientific evidence": they were indeed acquitted of the criminal offense, but at the same time, they were dispossessed of their specific knowledge about pregnancy.[24]

In her study of nineteenth-century law in Argentina, Gabriela Dalla-Corte Caballero demonstrated that cases of abortion, infanticide and child abandonment constituted a key element in the construction of criminal law as a "field of gender studies". The legal asymmetry based on sexual difference, and the idealization of motherhood and feminine honor were legitimized by existing criminal law. Penalization of behaviors tied to reproduction differed depending on the sex of the defendants. Nevertheless, while an "exegetic" reading of the legislation shows that it assigns responsibility to women for criminal acts related to reproduction, in the author's opinion, the interpretations made by judges expressed an ambiguous acceptance of the strategies women employed to limit births.[25]

The "medical or scientific" proof of the pregnant condition overrides and discredits women's own testimony as to their own

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23 For a feminist analysis of judicial discourse, see Smart 2000.

24 It is clear that the appeal to these women's "honorability" constituted a change in orientation in the defense lawyers' and judges' arguments. In Argentine, "honorability" paired with the typology of offenses has been the subject of several highly respected studies (Ruggiero 1994; Rubial 1996).

25 Dalla Corte Caballero 1996. Other studies have analyzed the legal ban on abortion as well as social tolerance of it in Brazil (Pedro 2003).

pregnancy. The process of medicalization that giving birth and motherhood had been undergoing since the early nineteenth century had instituted science as the authority in matters related to pregnancy, giving birth, nursing, and caring for young children.[26] The possibility of "detecting the embryo" had devalued the knowledge of women who noticed the "symptoms" of their own pregnancy. Women lost their rights to Science and their knowledge to Law.[27]

This is where, in my opinion, a problem arises about the place taken by the "construction of the maternal role and the ideal of the mother" in the historiographic discourse developed in women's and gender history. In studies of social, educational, medical or judicial measures relating to motherhood, abortion has been viewed from the angle of punishment and discipline exercised over the maternal body. Starting from the hypothesis of the effectiveness of legal dictates, researchers worked under the assumption that the relationship between the Law and sexual difference was obvious: women were the victims, and abortion constituted a punishable offense.[28]

The mistaken epistemology of standpoint theory underestimates the subjects' capacity for "cheating", and turns out to be unable to expose the contradictions inherent in a liberal legal system relating to sexual difference.[29] Reading the judgments rendered during the

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26 I would like to point out the very interesting work done by Fabiola Rohden about the professionalization and growth of gynecology in Brazil (Rio de Janeiro) in the late nineteenth century as the "science of woman". Twenty-two per cent of medical theses produced between 1833 and 1940 addressed sexuality and reproduction, the vast majority of them specifically focusing on women, to whom all problems in those areas were ascribed (Rohden 2011 and 2002).

27 Using a few hypotheses drawn from the work of Joan Scott (1996) on abstract individualism, I have written elsewhere about the paradoxical situations in the field of rights and policies affecting sexuality Argentina (Cepeda 2008).

28 The only research that offers an analysis along those lines is by Kristian Ruggiero (2000) for the nineteenth century. In "*Not Guilty (Abortion and Infanticide in Nineteenth-Century Argentina*, Ruggiero analyzes how the absence of penalization for a banned act can be explained by arguments for the protection of women.

29 Among others, Maureen Cain (1990) coined the term *standpoint* to indicate that knowledge should be produced from the point of view of the oppressed. Even though I do not share this feminist philosophical perspective, it seemed interesting to me as a metaphor for the claims of a specific kind of gender writing that uses

Peronist era, it appears that abortion was a common practice, and was often seen as such. Neither judges nor prosecutors nor lawyers for the defense were surprised about "abortive measures". In the cases that were judged to be "impossible offenses", mothers who resorted to abortion in order to limit the number of children they had were acquitted. The cases that were not recognized as such tended to concern "repeat offenders" or childless women who used abortion as a method of contraception, thereby breaking the direct connection between sex and reproduction.[30]

Why wasn't the law applied more strictly? Perhaps the legal ban on abortion began to act as a norm integrated into a *continuum of medical, legislative and moral measures* whose regulatory function was to reinforce the prohibition rather than to enforce actual punishment. Did cheating take place in the Gaitán-Fuccia case? The contradictions inherent to strict application of the law, particularly the legal obligation to scientifically "prove" pregnancy without having the technical means to do so, worked in their favor. Their testimony, the only proof of the abortive measures, was hushed up for their own good. So women got around the law – until toads became famous and/or other reliable tests became available.[31]

The drafters of the Penal Code required proof of pregnancy in order to prove that an abortion had been performed.[32] All the

judiciary and criminal source material. I recognize the importance of Gabriela Dalla Corte Caballero's work, while at the same time maintaining a certain distance from it. In her work, she analyzes criminal cases concerning abortion, infanticide and child abandonment in the city of Rosario in the late nineteenth century, concluding that penal instructions were interpreted by magistrates to the advantage of women (particularly of single women responsible for "unwanted children"), but she does not analyze the contradictions inherent to the liberal legal system.

30 This break occurred before the introduction of the contraceptive pill, or the debates about the sexual revolution, the greater permissiveness towards a range of sexual practices, and the feminist discourse which all appeared in the 1970s.

31 A longer-term analysis of my doctoral work shows three ways that women "having practiced an abortion" were acquitted: since 1962, lawyers plead the legal concept of *professional discretion*, the *impossible abortion attempt* and what is termed a *sentimental abortion*. The most common justification is still the impossible attempt, but its frequency began to decline in the 1980s.

32 Soler 1973.

commentators highlight the need to prove that *the woman was pregnant, that the fetus was alive at the time of the agent's act and that its death was caused by that act.*[33] While pregnancy is the necessary condition, the body of the embryo *is not the corpus delicti,* unlike what happens in the case of homicide. *The only thing* that needs to be proven is that the woman was pregnant.

In the case presented here, the defendants were caught between a legal system that was trying to penalize them and a normative system of bio-political order.[34] I have shown that the natalist rhetoric of the Peronist experiment did not necessarily jibe with the way in which judicial players intervened in criminal trials for abortion. Any analysis of national policy must be attentive to the actions that are taken within that nation's administration, and the way in which the law is applied must be seen as an expression of a legal culture in which doctrinal aspects are reinterpreted. The law is not always what it seems to be. Thus it becomes possible for there to be a plethora of crafty, cunning "frogs," rather than the toads whose name, in Argentinian slang, is synonymous with failure.[35]

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33 Klein 2005.

34 Rifiotis (2007) draws our attention to the difference between *subjects of rights* (legal entities) and *subjects' rights*. He looks at the question of the judicial interpretation of rights that would engender the repetition of infantilizing subjects whose capacity for action has been placed under the authority of a guardian, rather than a *culture of rights*.

35 Espindola 2002.

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