

Gamete donation in France: the future of the anonymity doctrine

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Abstract In France, since the approval of the first bioethics laws in 1994, the principle of the anonymity of sperm donors has prevailed. This choice is regularly challenged, namely by children who have been conceived under these conditions and have now reached adulthood. In this paper, we will briefly describe the reasons that led practitioners of assisted reproduction to endorse the anonymity principle in 1994. Secondly, we will elaborate on the reasons why this principle is becoming so controversial today. Finally, we shall examine two possible outcomes of the debate, highlighting their respective legitimacy as well as their consequences, as far as the rights of children, the notion of the family, and medical practice are concerned.

Keywords Anonymity · Gamete donations · Bioethics laws · France · Medical practice · Children rights · Family · ART

Introduction

Over the years and by customary practice, the doctrine of gamete-donor anonymity, introduced when France first passed bioethics legislation in 1994 and preserved for lack of debate when the laws were revised in 2004, has become one of the pillars of the French legal apparatus regulating

the uses of the human body.¹ Now the laws have again come up for comprehensive review, and the legitimacy of the doctrine is seriously challenged, on the basis of experience with the procedures. A lively controversy has ensued, fed both by numerous reports and opinions issued by public commissions in charge of setting guidelines for new bioethics legislation, and by statements of position filed by concerned citizens, individually or collectively.²

The parliamentary debate over the bioethics law passed July 7, 2011 revealed a singular ability of the French gamete-donor anonymity doctrine to withstand protest, even though public opinion seemed to favor abandoning the doctrine, or at least overhauling it considerably. The media had aroused indignation with accounts of the plight of children born by sperm donation, prevented by the laws on donor anonymity from discovering the identity of their biological fathers, and the ethical basis of anonymity was widely challenged. Thus, despite the reluctance of the majority of the authorities in the field to endorse a repeal of anonymity, the initial draft bill submitted by the government sought a compromise. Once a child reached 18, he or she could engage a legal procedure to find out the donor's name, as long as the latter had previously signed consent

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¹ In favor of maintaining anonymity: National Ethics Consulting Committee (Comité consultatif national d'éthique, CCNE) (2005); Academy of Medicine (2006); Graf (2009); Claeys and Leonetti (2010, p. 106ff). Note however, the committee chairman's dissenting opinion on this point (p. 110); Leonetti (2011, pp. 39–47).

Opposed to maintaining anonymity: Claeys and Vialatte (2008, vol. I, pp. 133–140); Conseil d'Etat (2009, pp. 40–43).

² Terra Nova (2010).

waiving anonymity.³ Despite a wave of support for a Senate motion to lift donor anonymity,⁴ the status quo was maintained and the anonymity doctrine survived intact.⁵ The principle remains firmly rooted, even though the values and context grounding anonymity in 1994 have changed considerably. The doctrine's survival is a persistent vestigial result of the way legislation in the field of bioethics has evolved,⁶ rather than the product of organized resistance to change. The side defending donor anonymity is not committed to upholding an old-fashioned vision of assisted procreation that conceals donor intervention in an effort to imitate natural reproduction. Such a vision would contradict Western trends towards openness regarding the secrets of birth, the use of DNA to determine paternity, and amendments to paternity law to reflect the truth. In medical practice, an effort has been made to implement a revised interpretation of the doctrine of anonymity, and thereby acknowledge the individual's right to know the identity of his or her parents. But can the doctrine be reconciled with contemporary values? It is currently straddling a paradox. The expansion of the rights of the individual has made considerable headway against earlier laws restricting access to birth data, which is now considered an integral part of the identity of the individual.

An understanding of the history and evolution of the gamete-donor anonymity doctrine will clarify the issues currently being raised. We shall divide the doctrine's history into three periods: first, the background leading up to its implementation; second, its gradual weakening, while support for the child's right to know the truth about his origins increased; and lastly, the crisis battering the doctrine today, as it confronts the individual's right "to establish details about his identity as a human being,"⁷ particularly his biological origins. We shall analyze each of these three periods from two different perspectives, drawing parallels between the position of the law, both French

and European, on these matters, and input from doctors who are specialists in the field of gamete-donor reproduction.

A fundamental deontological principle in the French bioethics model

The comprehensive legislative framework regulating anonymous gamete donation and the paternity (or maternity) of donor offspring in the 1994 law was transposed from the deontological policies of the national federation of Centers for the Study and Storage of Human Egg and Sperm Cells (CECOS). We shall begin by outlining the law as it currently stands, before moving on to a historical analysis of its sources and the issues it raises in practice.

A legal principle

In 1994, lawmakers enshrined the doctrine of gamete-donor anonymity in the body of law specific to medically-assisted procreation (MAP) which was appended to the Public Health Code (art. L. 1211-5). However, it is important to note that the concept of anonymity was not tailored to gamete donation. Anonymity applies to the donation of all parts and products of the human body, as a corollary of the principle of gratuity: such parts and products will be donated free of charge. Together, anonymity and gratuity anchor a third principle, fundamental to French law, that the human body and its products cannot be commoditized. By keeping donor and recipient from knowing each other's identity, the legislation prevented the existence of a market, where such human-body products as gametes could be traded by private agreement.⁸ As a result, the law makes no distinction between gametes and other body products or tissues; likewise, no distinction is made between sperm and egg cells.

The gamete-donor anonymity rule is thus an integral part of an imperative, uniform, and coherent legal structure regulating and restricting the uses of the human body. The principles it contains (the person's consent to any invasion of his or her body, the anonymity of donation, and the non-commoditization of the donation) are fundamental to the French bioethics charter, entered in the Civil Code (articles 16 and those which follow). The goal of the legislation was to institute an overall framework deriving its authority precisely from its applicability to all products of the human body, without exception. The validity of the whole edifice might be weakened if an exemption were made for gamete donation, as opposed to other products of the human body.

³ Bioethics bill no 2911, October 20, 2010, French National Assembly, no 2011.

⁴ Milon (March 2011, pp. 69–75 and pp. 196–199); see also the Senate debates recorded in the *Journal officiel*, April 7, 2011, p. 2561ff.

⁵ However, under article L. 1244-6 of the French Public Health Code, the new law does classify "personal data identifying gamete or embryo donors, couples who receive the donations, or persons born following medically assisted procreation techniques involving a third-party donor" with the CNIL (Commission Nationale de l'Informatique et des Libertés), the French data-privacy authority.

⁶ We refer here to an observation by Szejer (2010, p. 613).

⁷ European Court of Human Rights (ECHR), February 2, 2002, case of *Mikulic vs Croatia*. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Mikulic&sessionId=83476105&skin=ludoc-fr>. Accessed 15 December 2011.

⁸ Thouvenin (1995, pp. 149ff, 163–164).

The issue of the donor anonymity doctrine is also related to its effects on the parentage of donor offspring. Recourse to donor gametes involves a special legal procedure, whereby in the chambers of a judge or notary public, the sterile couple signs consent to the intervention of a third-party donor. They are informed of the duties incumbent upon them as the legal parents of the child to be born. This procedure establishes the parental rights of the couple receiving the donor gametes (art. 311-19 et 311-20 of the French Civil Code): on the one hand, no family rights can be claimed by the donor or the offspring from the donation; and on the other, the family rights of the child and the couple receiving the donation are protected and stabilized by legal provisions specific to the case.⁹

The product of the set of statutes is a perfect and nearly irrefutable imitation of birth by natural reproduction. The child's filial relationship to the couple receiving the donation is locked into place, and the fact that a donor existed ends up being concealed, because the child is divested of any right to trace him or her. In other words, in 1994, French law contrived to erase the donor's status, so to speak, by making the doctrine of donor anonymity a pillar of the legislation.

A complex model originating in deontology

When the first laws on bioethics were passed, the doctrine of gamete-donor anonymity was chosen for lack of a better solution. It had been discussed at length in 1994, when the laws were drafted. For several years, the doctrine had been condemned, consistently and repeatedly, by the psychoanalysts, child psychiatrists, and sociologists concerned about the effect it would have on the individual born from the donation.¹⁰ However, despite some misgivings, the anonymity doctrine prevailed.

The origins of this rule explain its authority in France. It was elaborated by doctors who pioneered assisted

reproduction by donor insemination, and its validity was quickly strengthened by the concomitant spread of the practice. The fact that donor insemination developed so rapidly and functioned so smoothly was attributed, in particular, to the application of the anonymity doctrine to the third-party donor. In fact, the French model was recommended as an example to be followed throughout Europe,¹¹ and in the early years, it was.

The anonymity doctrine was inherited directly from blood-bank policy developed in the post-war period, when blood-product storage techniques were improved. The practice of paying donors, customary before the war, gave way to national solidarity. Blood donation became an anonymous, altruistic deed¹². The policy was such a success that legislators transposed its rules to the donation of any other product of the human body. Moreover, the doctors who pioneered donor insemination in the 1970s by actively organizing the CECOS sperm- and egg-bank network had previously worked in the field of blood banks, where anonymity was already taken for granted. Moreover, due to the strong Catholic influences in French society, the doctors were sensitive to the Vatican's condemnation of donor insemination. The use of sperm other than the husband's had been likened to adultery.¹³ Although French medical authorities were not about to yield to Roman Catholic fundamentalism, they still sought to endow their practices with moral safeguards, as a means of warding off the association between sperm donation and adultery lingering in public opinion and even in medical circles.¹⁴ In their eyes, donor insemination would be destigmatized if a ban were placed on the earlier practice of compensating young, single men for their sperm. Anonymity and altruism were the passport to bringing the practice out into the open. The need to remove any moral ambiguity from sperm donation led to more requirements: the donor had to prove that he was married, or at least living in a stable couple, and that his wife or companion had consented to the donation. The idea was to organize "couple-to-couple donation," in order to avoid any moral condemnation and to preserve the integrity of marital bonds¹⁵.

In this deontological elaboration of the sperm-donation anonymity doctrine, the concept that the donation was an altruistic gift from one couple to another was pivotal. It convinced French public-health authorities to endorse this new way of having children, and allocate funding and credibility to the nascent sperm and egg banks. Gradually,

⁹ For maternity, common law applies, and the woman who gives birth, even following an oocyte donation, is *ipso jure* the child's mother. Conversely, paternity is established as the result of special consent in the presence of a judge or notary. For example, if the couple is not married and no legal presumption designates the father (in marriage, the mother's husband is presumed to be the father of the child), the law imposes forced paternity on the man who signed the consent for donor procreation even if he does not sign the birth certificate. Furthermore, with the exception of special cases, the law forbids those who have consented to assisted procreation from claiming or challenging the paternity of the child born as a result thereof on the grounds that paternity does not comply with biological truth (article 311-20, Civil Code). For a more detailed analysis of the legal mechanisms, see Neirinck (2010, pp. 259–261).

¹⁰ See, among others, Widlöcher and Tomkiewicz (1985, pp. 44, 546); Vacquin (1991, pp. 130–149); Delaisi de Parseval and Verdier (1994, esp. chap. 5); Cadoret and al. (2003, p. 39).

¹¹ David (2010, p. 157).

¹² Hermitte (1996).

¹³ Mehl (1999).

¹⁴ Théry (2010, pp. 70, 84–93). Here, she is referring to the pioneering study by Bateman (1994).

¹⁵ David (2010, pp.153–160).

other arguments in favour of the anonymity doctrine accreted, until the first bioethics laws were passed in 1994. On the one hand, at the time, donor anonymity was a screen making it easier for sterile couples to assume their parental role. Anonymity concealed any reference to the legal father's sterility, and kept him secure from any fear of competition from the child's biological father. Moreover, the secrecy surrounding the circumstances of conception was a means of preserving the parents' privacy: they could decide independently either to keep the procedure between themselves or, on the contrary, to inform the child or the family about the details of conception.¹⁶ Lastly, the guarantee of anonymity made it easier to attract sperm donors, by assuaging any fears they might have of being obligated to assume fatherhood for the people who sprouted from their seed.

The set of arguments forged by CECOS sperm-bank doctors to overcome any stigma attached to the intervention of a third party in the conception of a child was enshrined in the 1994 law as the doctrine of anonymity for all gamete donations. The set of donor selection criteria, with its requirement (until 2004) that all donors be married men who had previously fathered children, was transposed directly to the law. A donor who had already experienced fatherhood was thought to have a better understanding of the meaning and impact of his donation; moreover, if he had already descendants of his own, he was less likely to feel regretful later in life, about "what might have been" Nevertheless, when the law was revised for the first time, the principle of the "couple-to-couple" donation, decisive in 1994, was dropped. There were two reasons for doing so: to account for changes in the sorts of families people had (a higher rate of divorce or separation among couples, and a greater number of single-parent families), and to enlarge the pool of potential donors. As a result, the 2004 bioethics law no longer demanded that the donor be part of a couple, as long as he already had children. Nevertheless, if he had a new female companion, her consent was required.

The law passed July 7, 2011 introduces a radical departure from the initial donor profile. Difficulties with recruiting and the need to bank higher-quality gametes, from younger donors (particularly egg donors) convinced lawmakers to lift the provision requiring that the donor already have procreated. Instead, the bank offers to collect and conserve some of his or her gametes for his or her own use, should he/she later resort to medically-assisted procreation (art. L. 1244-2 of the French Public Health Code). This measure serves to forestall the regrets of a donor who does not achieve natural reproduction. Perhaps it is also designed as an incentive to attract donors who have not yet

had children. The original model, the "couple-to-couple donation," is now far behind us.

In any case, once the entire procedure related to the doctrine of anonymity was implemented in the law, the intervention of the third-party donor fit so perfectly into the mold of biological parentage that officially, the procedure that had actually been used could not be suspected. The child's legal status bore absolutely no trace of the intervention of a donor in his or her conception. Moreover, efforts by sperm bank teams to match the donor's physical characteristics with those of the sterile couple, to avoid any striking lack of resemblance between the child and his parents, further reinforced the logic of imitating nature.¹⁷ As a result, the artifice was invisible. The fabrication has been called "the nearly perfect crime"¹⁸ and tagged with the expression "out of sight, out of mind."¹⁹

It is important to point out that until the law was revised, in terms of collective ethical responsibility, France's strict gamete-donor selection criteria and the doctrine of anonymity put it ahead of other countries. Elsewhere, any healthy man can donate or, in some cases, sell his sperm, and often college students with no experience of fatherhood are motivated by the financial compensation they receive. Until the provisions requiring that the donor already have been a parent, and able to present consent from his or her companion (if applicable), were lifted on July 7, 2011, French law obtained some assurance that the parties involved are aware of the far-reaching consequences of gamete donation. Of course, the law is still a long way from a procedure making the donor individually responsible, because he can maintain the secrecy of his identity. The law imposes a donor profile which assumes he is a mature adult. And yet the French donor screening system must try to predict what would happen if it had to implement a new system making it possible to inform the child of the identity of his biological mother or father. There have been reports that in countries where the legislation was changed to give offspring access to donor identity, a slump in donations was followed by a recovery, although the donor profile changed. The new donors were older, more stable professionally, and already had children.²⁰ In other words, they were similar to the typical French donor—prior to the 2011 update on the law. According to the studies cited, if the doctrine of anonymity is abandoned, the potential candidates for donation would resemble French donors currently donating anonymously,

¹⁶ Jouannet (1997, pp. 16–20).

¹⁷ Brunet (2011a, b).

¹⁸ Iacub (1997).

¹⁹ Théry (2010).

²⁰ Orfali (2011, p. 254); Tomlinson and al. (2010, pp. 163, 165).

as the law requires.²¹ Nevertheless, in 2005, in Sweden, there was such a shortage of donors that couples had to wait years for insemination.²² Obviously, if donation is non-anonymous, some men are reluctant to volunteer, in the absence of financial compensation.

It is reasonable to wonder how the situation in France would have been affected if donor anonymity had been abolished. The “old” French donor profile might have stayed about the same if the anonymity doctrine had been revoked, while donation gratuity was maintained. However, the large-scale survey of donors whose applications had been accepted or were being processed, carried out in 2006 in several French sperm banks, showed that their numbers were likely to dwindle. An overwhelming majority are in favor of maintaining anonymity (nearly 80 %). If the law changed, 61 % assert that they would give up being donors.²³ A minority of French donors (some 38 %) are willing to assume greater responsibility for their donation. Revoking anonymity would reduce the number of donors drastically. In 2011, this was the overriding concern in the French lawmakers’ decision to maintain the doctrine of anonymity in gamete donation.²⁴

We shall conclude this section by summarizing the consequences of the provisions for assisted reproduction as drafted and established by the law in 1994 and confirmed on a regular basis since. The gamete donation regulations are flawed by ambiguity; they vacillate between ignoring the donor and demanding a certain form of responsibility from him. It should be noted that the current law focuses on the donor-recipient relationship to the exclusion of a third party who enters the picture only later: the child born from the donation. French sperm-bank doctors readily acknowledge that the success of medically-assisted procreation with donated gametes is largely attributable to the altruistic, anonymous, collective donation ethic which has framed the practice. However, the impact on the individual families had not been thought out. Couples who used the technique bore the burden of keeping it secret. A large majority of couples who used donor insemination (DI) in the 1970s and 80s report that they were oppressed by two types of secrecy: it was difficult for them to confide freely to their friends and family their plans to conceive a family with a sperm donation. As a result, in most cases, they did not even consider revealing to their own children how they

had been conceived. Although the couple themselves may have been free of concerns about the children’s biological connection to the donor, they were afraid that their families might reject the child as kin, particularly their own parents: “I am not sure my father would really have considered them as his grandchildren,” said one sterile man. In the case of this couple, it was essential for their offspring to be registered naturally in the family genealogy. The attitude of the families and of society as a whole precluded their feeling comfortable about the use of donor sperm and anticipating that the child would one day be told the truth about how he was conceived. In the early years, several doctors warned the sterile couple to say nothing to their friends and family about the procedure. According to this logic, donor anonymity reinforced the secrecy maintained around reproduction: it enabled parents to “forget” the donor’s intervention, insofar as the latter was devoid of an identity and faceless. Concealment of the donor figure made it easier for the parents to decide not to say anything to the child about the special circumstances in which he/she was conceived. Moreover, no systematic follow-up of the families was organized, because the parents were usually eager to put some distance between themselves and the clinic. For decades, the parents of children born as a result of private and anonymous donor insemination improvised their own answers to their children’s questions about where they came from and their conception. It is indeed surprising that such a secretive attitude continued to thrive at a time when social values tended more and more in the opposite direction, and the truth about biological origins became a leitmotif of family law.

Adapting the anonymity doctrine to a changing social context

Assisted-reproduction clinics have been providing counselling to help couples work through their feelings about the meaning of parentage. In recent years, the concept of parentage has been redefined and broadened, encompassing psychological and sociological aspects in addition to the bare biological facts. This trend is a corollary of the movement in French family law promoting the establishment of biological truth about paternity and maternity. We shall begin by describing the legal framework before going on to analyze how the doctrine of anonymity has been reinterpreted by medical practice itself.

The rise in value of “biological truth” in French family law

The movement in favor of recognizing the “truth” about birth and parental bonds has affected both forms of

²¹ According to the findings of a nationwide survey carried out by the CECOS, the sperm donor’s average age is 38 ± 6 years (see Kunstmann and al. 2010, p. 93). Note that the CECOS exclude men over 45 from donation.

²² Nordic Council of Ministers (2006, p. 22).

²³ Kunstmann and al. (2010). For more detailed conclusions, see Kalampalikis and al. (2009, p. 206ff.).

²⁴ Cheynet de Beaupré (2011, p. 2220); Binet (2011, p. 20).

parentage, biological and artificial (i.e., adoption). However, the consequences of the evolution are not the same.

Regarding adoption, the law dated July 11, 1966 put an end to the old administrative practice whereby the birth certificates of children who had been abandoned or born of a mother who wished to remain anonymous (*né sous X*) were falsified, making it very difficult for the child to find out the names of his or her birth parents. When the hospital had promised secrecy to the mother, it was nearly impossible to trace her. Moreover, although the adoptive family replaces the original family once the baby is adopted by *adoption plénière*, the identity of the birth parents is not completely hidden.²⁵ True, the infant's original birth certificate is annulled and replaced by the adoption ruling, but the procedure is not as misleading as it seems. The adoptee's new birth certificate is explicitly presented as a transcription of the adoption ruling, reference to which is required by law (Art. 354 al. 1 of the Civil Code). For example, a full transcription of the birth certificate leaves no doubt as to the adoptive nature of paternity or maternity, and the adoptee could file a request to see the adoption ruling.²⁶ The adoptee's right to know his or her own history and the circumstances of his or her adoption was preserved by this provision. In this field, the legal framework extended and strengthened the opinion unanimous among adoption specialists, that it is good for the child to know he or she was adopted. Full knowledge of individual biological origins and history is assumed to be in the best interest of the child, a prerequisite for fulfillment.²⁷ However, the child's rights were limited to demanding disclosure of the circumstances surrounding his or her adoption; those surrounding birth itself could remain hidden. In any case, were the adoptee to discover them, the law did not give him or her any grounds to claim a birthright on the basis of this knowledge about his biological parents.

In the field of paternity law, however, entirely overhauled by the reforms dated January 3, 1972 and July 4, 2005, the positive attitudes towards truth about biological origins had legal implications of a much greater order of magnitude. The issue was no longer merely knowledge of origins, as in the case of the adoptee. Instead, the revelation of the biological truth conferred a birthright on the child. Lawsuits related to establishing or challenging paternity ties put DNA front and center. Indeed, the criterion of biological truth is currently held to serve the interest of the child, who has a legal right to sue for his or her "true

parentage relationship".²⁸ Truth is proof of successful parentage, and therefore of "a certain right to happiness for the child, but also for the parents, both real and false".²⁹ Henceforth, the courts would have an increasingly positive attitude towards this right.

As a result, since biological testing for paternity was introduced by the law dated July 15, 1955 (when blood types were compared), it has become the judge's preferred tool. Biological evidence is considered irrefutable and in the child's best interest in cases where paternity is disputed, at a time when informal separations and family rearrangements may make it impossible to resolve a conflict between two men who each claim to be the child's father, or when there is some uncertainty about who fathered and should therefore assume the paternity of a child. Judges have put so much pressure on legislators to expand the power of the court to order biological testing for paternity that the legislators have finally given in, to some degree.³⁰ The 2005 law stipulates that "parentage is proved and contested by any means, subject to the admissibility of the claim" which opens the door to using DNA testing in any and every paternity suit. However, although the legislation confirms the weight of biological truth once the paternity suit has been filed, it nevertheless restricts the right to file in two ways. In addition to a statute of limitations, requiring that the case be submitted to the judge before a certain number of years have elapsed, it accounts for the emotional reality of family bonds, called "apparent status" (*possession d'état*),³¹ a wall making it impossible to initiate legal proceedings.³² In fact, the role played by apparent status does not stop there. It has gradually become

²⁸ According to French Supreme Court ruling (Cour de Cassation, Civil Chamber 1) dated February 27, 1985, "one of the main goals of the 1972 law was to provide every individual with his true parental relationship."

²⁹ Terré and Fenouillet (2011, p. 412).

³⁰ The order dated March 28, 2000 was a major breakthrough, stating that "biological testing is a right unless a legitimate motivation exists for refusing to admit it as evidence." (*Revue Dalloz*, 2000: 731, note T. Garé; *Droit de la famille*, 2000, June, no 72, obs. P. Murat.) In other words, if one party to a case asks the judge to order testing, the judge can no longer refuse to do so, unless he presents a legitimate motivation for his refusal.

³¹ Art. 311-1: "apparent status shall result from a sufficient collection of facts showing a bond of parentage and relationship between a person and the family to which he is said to belong"; the constituent elements are cited in the following paragraph of the law (*nomen, tractatus, fama*).

³² "Whenever they are not confined by statute within another period, claims regarding parentage are time-barred after 10 years as from the day when the person was deprived of the status that he claims, or began to enjoy the status that is contested against him" (art. 321, Civil Code); however, the claim is time-barred after 5 years when the apparent status is consistent with the record (birth certificate): where the apparent status consistent with the record has lasted at least 5 years no one may contest a parentage (art. 333, Civil Code).

²⁵ The second form of adoption accepted by French law, "simple adoption," proceeds by addition instead of substitution: adoptive birthright is added to the original birthright. The child belongs to two families, but parental authority belongs to the adoptive family alone. Nevertheless, this second form of adoption is much rarer.

²⁶ Salvage-Gerest (2011, § 221–311, 315).

²⁷ Hamad (2001, p. 137 et 141).

an independent means of establishing paternity, as valid as the certificate of birth or recognition, as long as it is noted in an affidavit (art. 310-1 and 310-3 of the Civil Code). The goal of the 2005 reform was therefore to strike a new balance between sociological truth and biological truth. Nevertheless, once the paternity suit has been filed, very few objections to admitting evidence from DNA testing will stand up in court.³³ It is undeniable that making DNA testing available to judges in paternity suits led to a biologically-centered reinterpretation of parentage. DNA testing is presented as the right for every individual to establish his or her "true parentage relationship." Actually, the expansion of the use of biological testing should be placed within the context of a renewal of Western family law to center on the interests of the child, a renewal which itself is part of a broader democratic movement in favor of the rights of the individual. Together, these developments conspired to make biological truth, and—more broadly—scientific truth the new "etiologial myth" of modern individualist societies.³⁴ In such a world, it is tempting indeed to strengthen one's personal feeling of identity by authenticating it, if possible, with proof by blood and genes.

In both adoption and paternity law, the same movement led to an acknowledgement of the child's right to know, in all or in part, the truth about his or her conception. The legal consequences of this recognition are quite different, of course, because in cases of adoption, the disclosure does not affect the child's birthright, whereas in the case of a paternity suit to determine biological parentage, the child's birthright is exactly what is at stake. However, both are inspired by the same will to do away with hypocrisy and lies. How could the gamete-donor anonymity doctrine resist such a strong undercurrent?

Changes in CECOS sperm bank practices

Over the past 35 years, practices at CECOS sperm and egg banks have changed considerably. At first, still wary of the opprobrium surrounding artificial insemination in the early days, most couples decided to keep the procedure a secret. The father simply behaved as if he were the biological father. This was all the more advantageous for him in that male sterility was something of an embarrassment, often confused with impotence. Secrecy and anonymity were the rule governing assisted procreation.

A change in attitude began in the early 1990s, driven by CECOS counselling staff, particularly psychologist J.-C. Mazzone³⁵ A concern for the child's interest seemed

irreconcilable with such a loose approach to the facts of his or her conception. In fact, many parents had unburdened themselves by telling their closest kin or friends. There was a great risk the child would learn the facts by accident, or that a reproach would slip out during a family quarrel. Child psychologists and analysts concur that this type of sudden revelation can be traumatic to the individual, and is a direct threat to the development of a healthy self-image and identity. Mazzone had observed that the only men who suggested they might tell their children about donor insemination (DI) were those who had been informed of their sterility long in the past, and had in turn told their family and friends about it. Conversely, the men who had only recently learned they were sterile were still coping with the knowledge. They saw DI as a healing mechanism that would enable them to "make believe" they had sired offspring. In their eyes, keeping the procedure a secret from both the child and their families was the only possible course of action.

These findings prompted the CECOS counselors to institute a program to encourage couples, particularly men, to work through their feelings of grief about the loss of their natural fertility before going ahead with a different sort of fatherhood. The point of the process was to make it possible for these couples to feel comfortable about telling their children about DI as soon as possible, in a relaxed and natural way. Once the parents accepted the donor's contribution and could explain it to themselves, they could tell their children without misgivings, and the children could adopt the knowledge quite naturally. In a way, if the child has "always known" his father is not his biological father, he or she is not disturbed by the knowledge. Today, two-thirds of the CECOS client couples have committed to this type of counselling. The agency published a book entitled "My Own Story," to help tell the particular facts of life to a child conceived by DI when he or she is between 3 and 5 years old. The program has had positive results: more and more CECOS parents and offspring report they have made their peace with the procedure and its implications, and are not interested in tracing the donor. The key is for fathers to spend "quality time" rearing their children, and to willingly and openly discuss the subject of DI with the children. The 1994 law is a validation of the alternative family for parents who could not conceive by natural means: it provides a reassuring framework within which they can tell their children how they were conceived. By guaranteeing anonymity, it assuages fears that the donor will suddenly intrude on the family life, thereby making it easier for parents to lift the secret and disclose to their children all the facts about how they were conceived.

³³ See Brunet (2011b).

³⁴ We extend the connotations of an expression borrowed from Golse (2009, p. 31).

³⁵ Mazzone (2000, 2010).

Moreover, the program prompts both donors and couples to think more seriously about their own individual reasons for taking part in donor insemination. They work through their feelings about fatherhood and the origin of the person who will be born.

Up to now, the donor screening criteria (altruism, anonymity, and previous experience with fatherhood) were justified all the more by the changes in attitude within the CECOS sperm banks. The donors, who are often already blood or marrow donors, receive no financial compensation for their donation. But having been fathers themselves, they are conscious of how rewarding fatherhood can be. To them, donating the semen that will enable a sterile man to become a father is like returning the favor Nature granted them. The genetic ties mean little to them, according to what they say: "I have several children, and they are all different, even though they all came from my sperm. I believe fatherhood is earned by daily investment in one's children's lives." "I have no plans to have a child; I'm just giving cells so that another man can become a father." "Sharing these cells is a form of human solidarity." "I don't count at all in the lives of these children, which depend entirely on the couple who wants to have them." "If I volunteer to donate altruistically, it must be an anonymous donation. I do not wish to be responsible in any way, because I already have the responsibilities of my own family to assume."

As for couples seeking the procedure, they have a better idea of how to go about pioneering this alternative parentage. Here are some of their comments: "Giving life to a new baby is much more than merely giving him or her DNA." "Our genes are really just the result of a random combination, picked out from millions of others, and those millions of possibilities are what make each individual unique, unpredictable and, especially, unprogrammable." "Giving life to a new baby starts with the desire to become parents, to behave responsibly and nurture the child, to build a trusting, loving relationship, and to endow the child with the values and ideas that will help him or her thrive."

These accounts show that anonymity is an integral part of the donation set-up. Divested of an identity, the gametes are "depersonalized." As a result, the donor no longer worries that he might bear some responsibility for the children conceived with the sperm. Conversely, the sterile couples becoming parents can feel fully engaged in and responsible for their new family. Reappropriating parentage is decisive when it comes time to tell the children the thrilling tale of how they were desired and conceived, especially for sterile men. As long as the father is convinced that nurture, not Nature, is what makes him his children's dad, the children will not fail to validate and reciprocate those feelings. The child can be secure in the knowledge that he was desired so keenly by his parents that

his biological background is irrelevant. He is truly the product of his parents' love.

The parents' obliviousness to shared genetic material in the construction of a loving family is again evidenced when the families return to the CECOS clinic hoping to conceive a second or third child with donor insemination. Often, couples ask that sperm from the same donor be used. However, CECOS staff policy is oriented towards varying donors, as a means of reinforcing both the random nature of each child's genetic origin and the preponderance of the social father who desired the children and embraces them in the same family. Were a single donor used, the identification with the social father might be weakened.

CECOS practices are now coherent with the policy of donor anonymity. Anonymity no longer reflects secrecy about the artificial insemination procedure; instead, it is an integral part of the way the parents will tell the children the story of their conception, and it is the best defense against some irrational fear that the sperm donor will suddenly intrude on their family life. As a result, the ultimate question is whether donor offspring will successfully reappropriate the conditions surrounding their birth and make their peace with the truth, without feeling a need to know the donor's identity and perhaps even meet him in person. However, for the first generation of donor offspring, CECOS practices changed too late. The gamete-donor anonymity principle is confronted with radical challenges.

The anonymity doctrine in crisis

There are a number of reasons why the validity of donor anonymity is being challenged, despite improvements in practice which have made it more coherent, reconciling it with the devaluation of secrecy about conception. The first decisive attack is legalistic in nature. French law has outlined the contours of a "right-to-know" statute confirmed by European law. The second line of fire is sociological: a number of donor offspring have been publishing books and articles and appearing on television.

The legal catalyst

Giving birth anonymously ("accouchement sous X") is a very old practice in France. It was gradually legalized and finally enshrined in the Civil Code in 1993. At that time, the protests always elicited by anonymous birth reached a crescendo. Associations of orphans and adoptees lobbied for legal recognition of their right to know the identity of their birth mothers, and were ultimately successful, with the passage of the law dated January 22, 2002 on "access by adopted persons and people in State care to information

about their origins".³⁶ According to the statute, when a woman chose to put her child up for adoption immediately after birth, she was encouraged to leave her name and other relevant data in a sealed envelope. The law created a National Council for Access to Information about Personal Origins (Conseil national pour l'accès aux origines personnelles, or CNAOP) to handle requests from these children who, grown to adulthood, wish to know the identities of their "birth mothers" and, when applicable, "birth fathers."

The 2002 law was the result of a significant conceptual innovation which separated the idea of origins from maternity and paternity. It explicitly states that an individual's access to knowledge of his origins has no bearing on "the rights or responsibilities of anyone concerned". Discovery of one's birth mother and (when the information was specified) birth father, had "absolutely no impact on the individual's civil status and maternity or paternity" (art. L. 147-7 of the Social Action and Families Code). The issues at stake were philosophical ones. Most children abandoned by their mothers are adopted in infancy. The law does not grant them any right to substitute their birth mother for their adoptive families, whose rights are validated by a legal procedure. There is more than one purpose for these explicit stipulations and limitations, above and beyond symbolism (one may fantasize about switching families, but one can't). Essentially, the law introduces a new operative distinction, with the unprecedented acknowledgement that biological origins may be valuable as such, without being absorbed into the legal category of birthright. By detaching personal origins from the body of law concerning birthright, the law admitted that the individual's psychological identity could be independent of his or her civil identity.

Could this concept also be applied to the field of donor insemination? Are there truly any similarities between infants who are donor offspring and infants who were put up for adoption immediately after birth? The differences seem obvious. One can hardly compare the situation of an infant born without a name and abandoned by his or her mother to be adopted by a new family (in most cases) with that of an infant born to a mother and father who wanted a family so much they underwent the procedures of reproduction through donor insemination. The latter is the product of his (sterile) parents' love and desire, not that of the sperm donor.³⁷ Nevertheless, in both cases, adult children have complained of being deprived of access to

their origins. They feel like they came from nowhere, and are excluded from an experience shared by all humanity.³⁸

Despite these differences, French law regarding the right to access to one's origins is heavily supported by rulings by the European Court of Human Rights. Indeed, the ECHR gave unprecedented weight to the concept of the child's right to know his or her genetic origins under the aegis of personal autonomy contained in the right to respect for private and family life (art. 8 of the European Convention on Human Rights).³⁹ The case of *Jäggi vs Switzerland*, July 13, 2006 is particularly noteworthy. The European Court of Human Rights condemned the refusal of Swiss authorities to exhume for the purposes of DNA testing the body of the man the plaintiff claimed was his biological father. The plaintiff sought to establish paternity merely to determine the biological bonds between himself and his presumed father, not to claim any inheritance to which he might have a birthright. While living, the plaintiff's father had always refused to submit to biological testing, despite the suspicions that he was the father. In their brief, the ECHR notes that "persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity."⁴⁰

If the question of lifting gamete-donor anonymity were directly submitted to the Court, it seems unlikely that the judges would be able to grant the French system a complete *satisfecit*. Moreover, a clear trend in favor of lifting donor anonymity can be observed in the legislation of several countries that belong to the European Convention on Human Rights, in Sweden,⁴¹ the Netherlands⁴²,

³⁸ Théry (2007, p. 616–618).

³⁹ For further elaboration, see Brunet (2010, p. 235ff.).

⁴⁰ ECHR, *Jäggi vs Switzerland*, July 13, 2006. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=J%E4ggi&sessionId=83476368&skin=hudoc-fr>. Accessed 15 December 2011.

⁴¹ Sweden was the first country in the world to lift the donor-anonymity rule (by a law passed March 1, 1985); the scope of the law was extended to cover oocyte donations on January 1, 2003. See Orfali (2011, p. 251ff.).

⁴² In the Netherlands, a law leaving the choice on anonymity up to donors was abolished by new legislation passed on April 25, 2002, regulating the storage, processing, and publication of data about donors in cases of medically-assisted procreation. The new law applies only to donations made after June 1, 2004. However, note that the Dutch system makes the release to the child of information about the identity of the donor contingent on written consent from the latter. See Sijmons (2011, p. 227ff.).

³⁶ The law dated January 22, 2002 on "access by adopted persons and people in State care to information about their origins" is codified in articles L. 147-1ff. of the Social Action and Families Code.

³⁷ See Le Boursicot (2006, p. 40), Marzano (2009).

Switzerland,⁴³ or the United Kingdom,⁴⁴ for example. Because the European Court's duty is to encourage harmonization of national laws, it is usually sensitive to shifts in balance and the emergence of any new consensus.

Nevertheless, considering the significant differences that subsist between various national legislations within the Council of Europe, it is unlikely that the Court would recognize an absolute right to know the identity of one's biological parents, if the conformity of French law on gamete-donor anonymity with the European Convention on Human Rights was argued. The European Court would probably recommend a compromise solution modeled on the one that emerged from the case of *Odièvre vs France*, February 13, 2003.⁴⁵ The Court could thereby recommend a fair arbitration between the preservation of donor anonymity and the child's right to know his biological parents' identity, which would assume the existence of a specific procedure enabling them to gain access to sperm-donor identity, under certain conditions.⁴⁶

⁴³ Swiss federal law dated December 18, 1998 on medically assisted procreation, going into effect January 1, 2001.

⁴⁴ In 2004, the Human Fertilisation and Embryology Act of 1990 was amended by regulation 1511, enabling donor-conceived children to access the identity of the donor for donations dating from April 1, 2005. Unlike Dutch law, UK legislation resembles Swiss law in recognizing the child's absolute right to information making it possible for him to identify the donor, without the donor's consent. Outside Europe, the same concept entitling donor-conceived children to broad access to donor identity can be found in the legislation of the State of Victoria in Australia (Assisted Reproductive Treatment Act 2008), and in New Zealand (Human Assisted Reproductive Technology Act 2004).

⁴⁵ The petitioner, adopted at the age of four, had obtained access to certain information about her biological mother from her adoption records, but it was insufficient to identify the mother. French social services had refused to release further information to her. Although the Court took care to note that "birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention," it ruled that the French law dated January 22, 2002 was sufficient to ensure fair balance between the protection of the privacy of the biological mother, who had given birth anonymously, and the child's interest in having access to the identity of his biological parents. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Odièvre&sessionid=83475929&skin=hudoc-fr>. Accessed 15 December 2011.

⁴⁶ See EHCR, *S.H. v. Austria*, April 1, 2010. While considering that such a fair arbitration is required, the Court also ruled Austria's restrictions on medically-assisted procreation were a form of discrimination (§ 84), but this ruling was overturned on appeal by the Grand Chamber, November 3, 2011, and the ECHR has yet to elaborate any further on the question of access to the identity of gamete donors. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=S.%20%7C%20Autriche&sessionid=83476062&skin=hudoc-fr>. Accessed 15 December 2011.

Trial by personal accounts

Usually, laws are amended in response to criticism pointing out social dysfunctions that resulted from them. As we saw, the passage of the 2002 law on the adoptee's right to know the identity of his or her birth parents is a perfect illustration of an attempt to right an injustice. In the field of donor-assisted MAP, accounts from the first generation of young adults born by these procedures were eagerly awaited. The public expected them to prove the validity of what much of society saw as a social and ethical experiment: recourse to science and a third-party donor to have a child.⁴⁷ In this context, it is not surprising that their bitterness about the gamete-donor anonymity doctrine had such an impact. The expression of their existential anguish, caused by the impossibility of knowing the identity of the sperm donor, as well as their resentment towards all those in favor of gamete-donation practices were a challenge to the validity of the anonymity doctrine. The effect was amplified when a highly active self-help group (PMA) was organized to serve as spokesman for their interests.⁴⁸ Moreover, their tragic search for an identity was sensational enough to attract widespread media attention and support. In the professional realm, the mobilization was endorsed by specialists in family issues whose theoretical research, prior or concomitant to the issue, provided a basis for the movement lobbying to revoke the gamete-donor anonymity principle.⁴⁹ At this stage of the public debate, hope lies in the potential synergy between the evolution of norms, especially international ones, and social demands. In France, legal cases opposing donor offspring and the CECOS sperm banks are still pending; the CECOS have maintained their refusal to grant the adult children access to the medical files concerning the donor with whose gametes they were conceived, whether or not this information makes it possible to identify the donor.⁵⁰

Regardless of the legal outcome of these cases, it is important to remember that the young adults now protesting the anonymity doctrine were conceived when the CECOS clinics were pioneering donor insemination. At that time, most of the parents applying for the procedure thought they would be able to keep the procedure a secret.

⁴⁷ Simon (1974).

⁴⁸ The association is called Procréation médicalement anonyme (PMA); the chairman is P. Tiberghien: <http://www.pmanonyme.asso.fr>.

⁴⁹ Mehl (2008), Delaisi de Parseval (2008), Théry (2010).

⁵⁰ These legal actions are grounded in the right for respect for private life (art. 8 of the European Convention on Human Rights) and its extension by the European Court of Human Rights to cover the concept of personal identity, mentioned above. Note that the interpretative authority of the rulings of this European jurisdiction is increasingly influential in French courts.

As a result, when the secret was finally revealed, the revelation was belated, abrupt, and traumatic for the child.⁵¹ But this is not necessarily what happened to all the young adults active in opposing donor anonymity today. Conversely, according to a number of personal accounts, when the children learned of how they were conceived, the knowledge was easier for them to understand and accept if the parents sat down and told them together than if the mother acted alone. In the best of cases, if the father “talked out” what had happened “in his own words,” they were comforted.⁵² There are also fears that in cases of divorce, the revelation will have a destructive impact on the child, especially if the mother uses it as a means of pressure. The consequences of “finding out” in such dramatic circumstances are even more devastating in cases where the father never managed to assume his social and legal role as the father. In situations like these, it is not at all surprising that the adult child feels betrayed and victimized: “Why was I lied to? Why am I denied the right to know my origins and meet the donor?”

However, the public debate became more complex when other voices were raised, contradicting the first. Another group of young adults, the offspring of donor gametes, finally spoke up. Being satisfied with the conditions of their conception, they did not feel their interests were represented by the members of PMA, and they wanted to voice a dissenting opinion.⁵³ According to their personal experience, early knowledge of the way they were conceived, as long as it was shared with them by both their parents, enabled them to accept their special circumstances more easily, taking them almost for granted. They are unlikely to invoke any necessity to meet the sperm donor. Quite the contrary, they say—when they have a positive father figure to rely on, they are not especially curious about the identity of the donor or even what he looked like. Their confidence in and comfort with the anonymity of the donor who enabled them to be conceived obviates any need to go to the media with the story of their conception. They believe that doing so would be an invasion of their parents’ privacy. Unfortunately, for some time, their discretion skewed the debate. Today, however, they are speaking out, so that the multiplicity of viewpoints and personal stories can be heard. They also want to insist on the importance of telling children the truth about how they were conceived. Although they were heard late in the parliamentary debate process, their testimony was instrumental in convincing

French legislators to leave the donor anonymity doctrine intact.

Conclusion

The second revision of the law on bioethics has elicited a debate of unprecedented breadth and depth on the legitimacy of the principle of gamete-donor anonymity, of substantive law. Admittedly, for the first time since the principle was implemented by the CECOS, the opinions of all the parties involved were solicited, beginning with those who had not yet had their say: the first generation of donor offspring have reached adulthood. Moreover, the debate has gone well beyond the halls of the legislature. Nevertheless, the new law did not reverse the doctrine of donor anonymity, apart from some instruction as to maintaining donor files. In retrospect, the vast amounts of research and reflection invested in the preparations for revising the law may seem to have borne little fruit. But that would be a serious underestimation of the progress made. A great deal has been learned from all this analysis, and it will pave the way for the decisions to be made in coming years.

First of all, despite persistent disagreement, in-depth discussions have consolidated the political and social legitimacy of the principle itself. Such progress is hardly negligible, because in 1994, despite a lack of consensus, the doctrine survived only for lack of a better alternative, because of its efficiency in practice. Although the second legislative review blatantly failed to yield a consensus, it is nonetheless evidence that this is not the result of insufficient democratic evaluation.⁵⁴

Furthermore, the debates showed that now is the time to become conscious of the potential offered by ART techniques. Science can now free human beings from nearly all of the natural limitations on reproduction. We cannot ignore the impact of these new means of procreation, in the belief that societies have always invented forms of kinship free of the laws of biological reproduction, and provided homes and rules for the adoption or fostering of children, matching a family’s desire to have descendants with the children’s need for protection.⁵⁵ Indeed, in the history of human reproduction, it is impossible to underestimate the radical changes wrought by medical assistance, in its newly-discovered ability to transfer reproductive resources from one person’s body to another’s. The long series of manipulations, starting with the collection or removal of sperm or eggs from the donor (or seller, in some countries), their deep-freezing in drums of liquid nitrogen, and their artificial implantation into a woman’s womb following

⁵¹ See the accounts of certain experiences reported by Clément (2006, pp. 140–187).

⁵² Kermalvezen (2008, pp. 106–107).

⁵³ Such as the Association des enfants du don (ADEDD): <http://adedd-asso.blogspot.com>. Cf. round table on anonymity in Leonetti (2011, pp. 166–187).

⁵⁴ For an analysis of these debates, see Mehl (2011, chap. 5).

⁵⁵ I. Jablonka (2006), Iacub (2004, esp. chap. 2 and 3).

a complex procedure associating matching and constant medical testing and monitoring, upsets the foundations of our kinship system in ways that surpass our imagination. The bitterness and distress expressed by some of the children born as a result of these techniques, like the tensions that arose during the parliamentary debates about the question of donor anonymity,⁵⁶ are evidence that third-party donor-assisted procreation is not yet fully assimilated into our culture. This new means of reproduction has yet to find a place in social representations of the family and the collective mind of society.⁵⁷

Past experience invites us to be cautious about the future. MAP techniques already make it possible to go farther. The boundaries imposed by age, disease, death, and the complementary duality of the genders are being pushed back, and the prospect of an artificial uterus is becoming less unlikely every day. Reaching adulthood, how will a generation of children view the feats of biotechnological engineering by which they were born? Even if they are born whole and healthy, might these children one day feel that their birth in such unnatural, unconventional circumstances makes society liable for moral damages? Although medically-assisted procreation can be a solution to the impossibility of reproducing naturally, and enables us to imagine alternative forms of family relationships, it is up to us as a society to define new representations of kinship, which are free of narrow biological interpretations and make sense to everyone. The child's welfare depends directly on society's acceptance of the special way he or she came into the world. Even if an individual is conceived by radically innovative means, he or she must be able to say so without fear of being ostracized or stigmatized.

The policy of the CECOS sperm banks is optimistic on this point, after much research and follow-up on families constituted through gamete donation, as we have seen. Their goal is to do away with opacity and secrecy, giving the child all the facts about the way he was conceived. But as we noted above, the success of the approach depends on the existence of a social and family environment with a benevolent view of this other way of making a family.

Finally, one last lesson, more forward-looking, has emerged from the analysis of these debates on anonymity. Although the doctrine successfully weathered the challenges and is stronger than ever, in another way, paradoxically, its weaknesses have never been more obvious. For in both this field and the one concerning conditions for access to medically-assisted procreation, a tension is apparent, opposing the shared values which are the cornerstone of the French bioethics charter to individual claims based on the concept of personal autonomy. As we

noted, donor anonymity is an integral part of a collective ethic associating the donation of gametes with all other donations of parts and products of the human body. The doctrine of anonymity is a supreme expression of human solidarity, and at the same time, it facilitates the sterile couple's appropriation of the donation. Now this shared ethical construct is embattled by the demands of certain adult children for access to donor identity, in the name of their subjective determination of their biological origins and identity, even though the knowledge will have no effect on their social or legal birthright. The individual's interest in knowing all the details of his or her history is therefore directly opposed to the principle of donor anonymity, to which the survival of the Western family model is staked. In this confrontation, certain children's search for an identity seems to benefit from the support of European jurisprudence, which for several years now has been strengthening the matrix of personal autonomy, discovering a number of specific rights of the individual encapsulated in the concept. European courts have recognized the right to obtain the information necessary for the construction of one's personal identity. There is no guarantee that the defense of collective values, even if they are updated and reformed, like the doctrine of gamete-donor anonymity, will continue to win out over the protection of individual interests deemed to be legitimate.

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⁵⁶ See Mehl (2011, p. 221ff.).

⁵⁷ See Kalampalikis et al. (2009, conclusion).

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