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## **Whose embryo is it anyway? A critique of *Evans v Amicus Healthcare* [2003] EWHC 2161 (Fam)**

By Karin Webster<sup>1</sup>

### **Abstract**

In this paper I critique aspects of the law relating to in vitro fertilisation ('IVF') treatment in the United Kingdom. Focusing on the case of *Evans v Amicus Healthcare Ltd* [2003] EWHC 2161 (Fam), where two women sought to have their embryos transferred after the consent of their partners had been withdrawn, I discuss the legal constructions applied to embryos and participants to IVF treatment. In the *Evans* case the Judge's decision to reject the women's claim was popularly accepted as morally, ethically and legally correct. I argue, however, that because the treatment of embryos is founded upon a constructed (and changeable) division between a human subject and an object of property, there is no greater coherence or legitimacy in the current law than would have been the case had the claimants' submissions been accepted. I then discuss how a presumption of equal rights over the embryo can, in practice, consistently prejudice the interests of women despite an appearance of neutrality. Drawing on the work of Michel Foucault and Judith Butler I go on to consider the ways in which law manages to appear fair and neutral despite its internal inconsistencies. Finally, I explore some alternatives to the current law.

*Keywords:* In-vitro fertilisation; human embryos; queer theory; legal aspects

### **Introduction**

In the case of *Evans v Amicus Healthcare Ltd* (the 'Evans' case) two women who had been undergoing IVF treatment with their partners wanted the embryos transferred after the breakdown of their relationships. Each couple had signed consent forms in accordance with Schedule 3 to the Human Fertilisation and Embryology Act 1990 ('the 1990 Act') stating that the embryos were to be used in providing treatment services to the person giving consent and another specified person together. On the breakdown of the relationship the male partners decided they no longer wished to proceed with treatment and expressed a desire to have the embryos destroyed. In accordance with Sch. 3, para. 4(2), either party to IVF treatment is free to vary or revoke consent prior to the 'use' of the embryos. Justice Wall held that 'use' meant the transfer of the embryos to the woman. In addition, the consent given had been for 'treatment together' and once the relationship had broken down the couples could not be said to be undergoing 'treatment together'. The consent originally given, even if not expressly varied or revoked, would have been ineffectual for the purposes of enabling the woman to proceed. Furthermore, s. 13(5) imposed a requirement to take into account the welfare of any child born as a result of treatment, including the need of that child for a father. In the interests of certainty of

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outcome the Judge accepted the defendants' argument that the embryos should be destroyed. Other submissions were made based on the European Convention of Human Rights and promissory estoppel. However, the scope of this essay will be restricted to the operation of provisions of the 1990 Act and policy considerations underlying it.

Firstly I will critique the constructions employed in the Evans case and the 1990 Act. Focusing on the construction of the embryo in law when outside the body, I will examine why the point of irrevocable consent is at the point of transferral and discuss the allocation of equal rights over the embryo. As part of this analysis I will show how the law appeals to different meanings of 'nature' and 'the body' within the Act to the extent that its justifications are inconsistent and derive no legitimacy from nature. Secondly, having denaturalised the current law I will widen the analysis to show how IVF and the operation of the 1990 Act affects men and women differently to such an extent that a neutral approach is not adequate to protect the interests of women. Thirdly, I will examine how the current law secures its claims to moral and ethical correctness before finally considering some alternatives to the current law.

### **The embryo and boundaries of the body**

In law the embryo is deemed to be a special object over which the gamete providers have certain rights and interests<sup>2</sup>. In line with the treatment of other body parts, the law has refused to accept that embryos can be objects of property. Once transferred to the woman, the embryo becomes part of her and it is only at this stage that the male gamete provider cannot withdraw consent<sup>3</sup>. In order to understand and critique the law's position on this issue it is necessary to investigate the ways in which the body and the subject are conceptualised in law and the role of the law of property relations in regulating space and boundaries between subjects.

#### *Legal personality and the subject/object dichotomy*

The liberal tradition's model of personhood has the characteristics of being autonomous, whole, rational, self-determining and self-owning (see Davies and Naffine, 2001, pp. 51-73). John Locke (1690)<sup>4</sup>, in particular, is credited with the development of ideas concerning self-ownership. According to Margaret Davies (Davies, 1994, p. 380), self-ownership generally refers to the division between mind and body; subject and object: the mind/subject is owner of his body/object. It can be seen that property is based on the existence of the liberal legal subject because it is concerned with the relationships between subjects as autonomous and bounded persons. In addition the purpose of property is commonly described as being the protection of the space of the individual as against the collective and can actually be a means of realising the self<sup>5</sup>.

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<sup>2</sup> There is no property in an embryo, but in contrast to a fetus, both gamete donors have an interest in, and rights over, the embryos they have created. Those rights are governed by the [1990] Act. The embryo, however, cannot be considered a person, or to have a "qualified" right to life' - see *Evans v Amicus Healthcare* [2003] EWHC 2161 (Fam) (hereafter referred to as 'Official Transcript') at para. 178.

<sup>3</sup> See the Human Fertilisation and Embryology Act 1990, Sch. 3, para. 4.

<sup>4</sup> 'Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.' See Locke, 1690, ch V, para. 27, 287-8.

<sup>5</sup> For a more detailed explanation of the relationship between property and personality, see Davies and Naffine, 2001, pp. 1-21.

However, concepts of self-ownership and property sit uneasily with ideas of personhood because self-ownership creates the potential for the body, as object, to be owned and controlled by someone else. Bodily integrity is therefore given legal protection so as to safeguard the freedom and autonomy of individuals<sup>6</sup>. Furthermore, in order that bodies are not subject to commodification or alienation, the law refuses to recognize bodies or body parts as objects of property. In law, human beings can only be subjects. Although conceptually linked, an attempt is thus made to keep personhood and property distinct. Margaret Davies and Ngaire Naffine note, however, that the opposition between subject and object is historically variable. For example, slaves were once considered property in some jurisdictions, and women were for some purposes subjected to the legal control of a father or husband (Davies and Naffine, 2001, p. 24).

Following the work of post-structuralist theorists (eg Derrida, 1976, 1978), it can be seen that in language the person is understood as whole through the dichotomization of mind and body: the body comprises what the mind is not. However, concepts that are positioned as oppositional to one another are in fact relational; a concept needs an opposition for its very definition and existence. Rather than existing as natural phenomena matter attains meaning through discursive constructions. Applying this approach to an analysis of the legal subject, the body is not just matter existing in nature; rather the law's construction of the human subject invests it with meaning: the body is a physical, material representation of the human subject. Its inviolability is essential for the concept of personhood to remain intact.

Property and personality are also positioned as opposites: the individual's interests sit in opposition to those of the collective. However, as has been stated above, they seek to protect the same model of personhood. In addition Jennifer Nedelsky has pointed out that property as a concept is relational (Nedelsky, 1991, pp. 162-89). The existence of something as *mine* depends on the recognition of the right to call it mine by the collective. The opposition of individual against the collective can thus be shown to be merely one construction of the relationship between subjects. It emphasizes the isolation, independence and fixed boundaries of individuals, glossing over aspects of dependence and connections with others in the process.

#### *Applying theory to reproduction*

The dichotomy of subject/object ensures that once outside the body, the egg and the sperm are treated as alienable objects over which the subject has control. Law's reluctance to treat such body parts as objects of property reflects the tension arising from the uneasy proximity between concepts of personality and property. However, the binary of subject/object used to categorise all matter in law ensures that body parts must either be treated as human subjects or objects of property<sup>7</sup>. The law's determination that a foetus inside the womb is not a legal human subject renders it difficult for the law to consider embryos as anything other than objects. It adopts a piecemeal solution to the

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<sup>6</sup> There are, for example, a number of criminal provisions geared towards the protection of bodily integrity (eg. Assault; Grievous Bodily Harm).

<sup>7</sup> This point become particularly clear when we consider the definitions and meanings attached to 'property'. According to Margaret Davies, "'Property' is primarily a relation between legal subjects which has things as its focus' (Davies, 1999, p. 328).

uncomfortable fact that gametes are necessarily more like objects of property than anything else in law. Its position is reinforced by appeals to the higher status and natural form of human life.

The point of irrevocable consent in the 1990 Act can be analysed in a similar manner. At the point of transferral, the embryo becomes part of the woman. Following the liberal concept of personhood, interference with her bodily integrity against her will cannot be thought of as anything but unlawful. Outside the body, however, the embryo takes on a different form. It is an object that is neither part of male or female subject and the law acquires the role of managing relations between the subjects who claim an interest in the object.

### *Limits of existing legal concepts*

The persistence of the subject/object distinction underpinning the construction of the autonomous legal subject is tested when confronted with phenomena that do not easily fit into either classification. This was recognized during debates on the Human Fertilisation and Embryology Bill by Lord Hailsham:

A human entity which is living is not a chattel and neither is it a person in the ordinary sense [...] It is wrong to try to define a human embryo in terms of existing legal definitions which are plainly inapplicable to human embryos. Why must an embryo be one or the other? Why cannot it be just an embryo? (Hansard Vol. 515, col 750-1)

I would agree that meanings arising from the oppositional human/non-human binary simply do not fit the meaning the embryo culturally acquires or the relationship of the gamete providers to it. This would indicate that it is an unsatisfactory way of managing the relationship between gamete providers<sup>8</sup>. I would submit, however, that the treatment of an embryo as neither chattel nor a person is currently unachievable because the subject/object dichotomy is still in place, both in law and in broader understanding. For the special status of an embryo to have real meaning in legal discourse, meanings attached to a whole range of legal concepts and binaries would need to be rethought. The allocation of something to the category human as opposed to non-human, for example, transforms the rights and privileges available.

In defense of the current position it could be said that the subject/object dichotomy is necessary in order to protect the natural vulnerability of the embryo outside the body as compared to inside. In this respect it does derive some legitimacy from nature because of the physical form it takes. However, I would submit that it does not

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<sup>8</sup> Similar challenges to the idea of legal personality surfaced on debates concerning abortion (as to which see generally, Petchesky, 1990). The construction of the legal subject as autonomous and whole means that the law cannot recognize a pregnant woman as a legal personality. Arguments polarised into two camps: those who assert the right to life for the foetus on the one hand, and those who defend the woman's autonomy and right to choose on the other. This description designates the woman's body as a battleground, the foetus and woman battling against each other. Other conceptualisations which would perhaps better describe the relations between foetus and mother and the relationship between the mother and other involved parties are rendered unspeakable. The law's unsatisfactory solution is to make a distinction between capacity to exist as an independent autonomous being on the one hand and physical dependency on the mother on the other.

necessarily follow that because the embryo needs legal protection as an object for one purpose, that all the associated meanings arising from being designated an object are appropriate to embryos<sup>9</sup>.

*Allocation of rights and interests in the embryo and the use of nature*

The law allocates equal rights over the embryo according to its biological constitution. The biological, natural reasoning for equal treatment supposedly positions the embryo outside culture and signification<sup>10</sup>. Again, the subject/object dichotomy ensures that debate concerning the embryo is polarised and makes only two *meaningful* choices possible. As an object, the embryo is treated as conceptually distinct from any subject. The experiences of the gamete providers and also, therefore, consideration of gender are irrelevant.

Both the 'natural' and 'equal' aspects of this construction of the embryo are problematic and I will explore these in turn. At several points in the 1990 Act, the law appeals to nature to justify its position. However, even within this narrow framework it can be seen that the use of the 'natural' is internally inconsistent and incorporates social values through the back door. The law defines the natural and the meanings arising from it and, moreover, decides at what point the natural is relevant<sup>11</sup>. This point is evidenced by the fact that construction of the embryo follows biological constitution in an unquestioning manner yet at the same time the natural method of reproduction is deemed to be unfair, irrational and in need of control. This is consistent with Alan Hyde's (1997) analysis that the law constructs different bodies for different purposes: sometimes it is sacred and other times it is a threat to society. The construction of the body in this instance is the same as that relied on to justify the refusal to acknowledge property in the body. Human life is positioned as special and possessing ontological quality.<sup>12</sup>

Similar inconsistencies arise when applying equality rhetoric to actual disputes. Where both parties have equal rights but cannot come to an agreement, appeals to judicial authority are often made in order to reach a final decision. At this point any notion of 'equal rights' is replaced by a judge's view of a compromise or a desirable outcome. Where a stalemate has arisen, equal rights are necessarily transformed into something

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<sup>9</sup> This example is a good illustration of the strength of the association of different meanings attached to the subject/object dichotomy. In the final part of this essay I will explore the intersection of different concepts which produce a seemingly natural result.

<sup>10</sup> In the following section of this essay I will argue that as with the human body as a whole the embryo is invested with meaning and does not just 'exist'.

<sup>11</sup> Here there are certain similarities to debates over the public/private divide. Nikolas Rose explained when talking about the regulation of marriage, divorce and sexual behaviour: 'Designating them as personal, private and subjective makes them appear to be outside the scope of law as a fact of nature, whereas in fact non-intervention is as socially constructed, historically variable, and inevitably political decision.' (Rose, 1987, pp. 64-5).

<sup>12</sup> Such inconsistencies can also be seen in law's relationship with medicine. Medicine is represented as a means of controlling the unruly natural, but attitudes surrounding cloning and sex selection illustrate how it can also represent a danger to society. That inconsistent meanings are given to medicine, nature, the body, does not seem to diminish the degree of legitimacy they have in legal discourse. Paradoxically, the one consistent meaning they seem to have as signifiers is that they are powerful speakers of truth. Ways in which the law manages to achieve this respect are explored in the final part of this essay.

that is more or less than equal according to the decision eventually made. In this case, the defendants wanted the embryos to be destroyed and they got their wish. Surely if rights were equal the law would be prevented from doing anything with the embryos unless the parties were in agreement. Even without judicial intervention, if consent can be withdrawn at any time prior to transferal then 'equal rights' is of questionable meaning. In such situations one party has the monopoly on decision-making whilst the other party's opinion is legally irrelevant. This total exclusion of a woman's voice shows how 'equal rights' can be an extremely misleading construction of the relationship between the parties. The law does not engage with any debate on the precise meaning and application of equality, however, but circumvents the issue by relying on the desirability of certainty - another construction that is sometimes deemed suitable and sometimes is not. In this case, it was decided that the embryos should be destroyed so as to bring peace of mind to the defendants and provide a final resolution to the matter. However, such certainty could alternatively be viewed as a sign of inflexibility and a possible source of injustice.

### **Sex discrimination?**

Evidence filed for the Secretary of State in the Evans case identified 'clarity and certainty in the relations between partners' and 'equality of treatment between the parties' as policy considerations underlying the consent regime in the 1990 Act (Official Transcript, para. 186). Social and personal investments are rendered invisible. The success of this policy was claimed to be evidenced by the fact that there had been no litigation between parties to IVF treatment until the Evans case whereas in the United States there were several examples<sup>13</sup>. In the following paragraphs, I will explore the different positions occupied by men and women, to show that a presumption of 'equality' is inappropriate.

Both the subject/object distinction and allocation of equal rights on a biological justification sit uneasily with women's relationship with their embryos. If the narratives of the claimants in the Evans case are studied it can be seen that the position of the embryo is far from neutral and beyond interpretation. There was even recognition of the different investment the two claimants had in their embryos<sup>14</sup>. Such investment, however, is given no value in law. Different treatment of embryos outside the body compared to inside seems artificial when the woman's subjective feelings and her investment in the embryo do not transform according to its physical location. The physical boundaries of the body are assumed to correlate with the individual's psychological identification, but this assumption is clearly tested by IVF cases where consent to the removal of eggs is only given for the purpose of enabling fertilisation to take place before being placed back inside the patient. The woman's subjective identity does not correlate with that of the bounded autonomous subject. In addition, the status of the embryo as 'special' and as signifying a potential life is artificial when it is considered that it needs the woman's body to develop.

Moreover I would submit that the gender-neutral framing of the Act's consent

<sup>13</sup> This is a strange argument because no litigation could mean a number of things. It could also mean that a section of society is powerless and is given no voice or protection in law. It may be that there has been no litigation because there is certainty that the person wishing to reproduce has no case.

<sup>14</sup> Whilst much sympathy was afforded to Evans because the embryos being fought over in her case represented her only chance of having a child that was genetically connected to her, Hadley's situation was said to have 'none of the poignancy' of Evans's case because she already had a grown-up daughter and it was not impossible for her to conceive naturally in the future (Official Transcript, para. 101).

provisions<sup>15</sup> are unhelpful and misrepresentative of the facts. 'Treatment together' might reflect biological contribution but the presumption of equality ensures that many crucial facts surrounding a dispute are rendered totally irrelevant. In the vast majority of cases the woman undergoes all the surgical treatment whereas the man's provision of sperm is usually a simple procedure<sup>16</sup>, yet the framing of the law ensures that these differences remain well hidden. This is not to say that the man does not have an interest and investment in the embryo, but I would submit that the positions and perspectives of the two parties are, in any given case, sufficiently different for a gender-blind approach to be inappropriate.

An example of the dangers of a gender-blind approach can be seen in the judgment of Justice Wall in the Evans case:

It is not difficult to reverse the dilemma. A man has testicular cancer; his sperm is preserved prior to treatment and used to create embryos with his partner. The couple then separate before the embryos are transferred into the woman. Nobody would suggest that the woman could not withdraw her consent to treatment and refuse to have the embryos transferred into her. The statutory provisions, like Convention Rights, apply to both men and to women. (Official Transcript, para. 320)

The above paragraph assumes that the position of men and women can be simply reversed. Whilst it is acknowledged that there are occasions where men have to undergo surgical procedures to collect sperm, to assert that it is matter of reversal is to ignore the different physical and social realities of male and female parties in the IVF process. It could be argued that pregnancy places a longer-term and more total physical demand on a woman's body than the extraction of sperm but even if this approach is rejected, any presumption of equality is problematic when the physical contributions of men and women are so fundamentally different and the circumstances surrounding that contribution can vary so widely. Constructing the issue as a simple reversal is also likely to result in unfounded assumptions concerning the types of procedures usually undertaken and the forms of contribution that are most often made. Harvesting eggs is likely to be more common than sperm extraction and, moreover, women still tend to bear the burden of most of the childcare responsibilities. In addition, it could even be argued that the social consequences of *not* becoming a parent are not equal for some men and women. There are still elements of constructed subjectivity that equate motherhood with womanhood. Fatherhood, on the other hand, does not currently have such social and cultural significance in constructing manhood<sup>17</sup>. Commentators criticising decisions of

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<sup>15</sup> See the Human Fertilisation and Embryology Act 1990, Sch. 3, para. 2.

<sup>16</sup> This was explicitly recognized by Justice Wall in *Evans v Amicus Healthcare*: 'There are, of course, elements of artificiality about the argument because, in conventional terms, the only "treatment" undergone by Mr Johnston was the provision of his sperm' (Official Transcript, para. 135).

<sup>17</sup> This is a problematic argument because feminists have long been trying to escape the danger of women being defined by their reproductive capacity and, in addition, there is no consensus that the best way to deal with inequality is to focus on the differences between men and women. However, it is beyond the scope of this essay to engage with the relevant merits of different arguments in this matter. My purpose, rather, is to point out the limitations of a gender-blind approach and show why different approaches need to be

the American courts have made similar points (see, for example, Pachman, 2003). Although the situation of women in the American courts is arguably little better than in Britain<sup>18</sup>, the existence of case law on the subject at least makes the inequality more visible - the person wishing to continue with IVF treatment is invariably the woman (see Steinberg, 1998, para. 325). Given the issues raised above this should not be surprising. However, the framing of the legislation in Britain has kept such inequality hidden and this stifles debate.

In practice, therefore, I would suggest that the application of 'equal treatment' means that the contribution of the woman is likely to be ignored and under-valued. Rather than assess the respective worth of male and female contributions, however, the aim here is to highlight the absence of such considerations in the law and the negative consequences this has. The Evans case demonstrates that the ability of the law to effectively manage relations between individuals and provide just solutions to disputes is compromised when its construction of a problem operates at such a high level of abstraction. The refusal to incorporate considerations of sex and gender concerning a matter that is saturated with sex and gender precludes any in-depth analysis of a dispute.

Interestingly, the 1990 Act applies an abstract, neutral meaning of equality in Sch. 3, para. 2, where recognition of difference would seem to be more appropriate, yet elsewhere makes a distinction between the social roles of men and women as parents. S. 13(5) of the 1990 Act provides as follows:

(5) A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

Emily Jackson (2001, p.192) has pointed out that whilst the phrasing of the subsection focuses on the welfare of the child, the real requirement is for clinics to look at the patient's aptitude for parenthood<sup>19</sup>. As agent of the state the clinic ensures that a rational decision is made: the dividing line between public and private is redrawn. The assumption must be therefore that women cannot be trusted to make responsible decisions in the interests of society. The picture of a woman that emerges in the Evans case is of a person whose decisions are potentially irrational - she is controlled by her emotions and behaves according to her natural instinct to want a child<sup>20</sup>.

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discussed.

<sup>18</sup> In many courts a right not to procreate appears to override any other interests parties may have: see, for example, *Davis v Davis* 842 S. W 2d 588 and *AZ v BZ* 725 NE 2d at 1058.

<sup>19</sup> Ian Kennedy and Andrew Grubb have also put forward a similar criticism: 'If there is an option to bring about the birth of a child, it can never (or almost never) be in its welfare or interests not to be born [...] Thus, the reference in s. 13(5) to the child's 'welfare' cannot have its ordinary family law meaning. Instead, s. 13(5) must be directing us elsewhere and this can only be to the suitability of the proposed parent(s). Given that those who become parents by conventional means do not need to pass any suitability test, the dangers of prejudice and discrimination are obvious.' (Kennedy and Grubb, 2000, p. 1274).

<sup>20</sup> Because Evans is thought of as being controlled by her bodily instincts and the state is needed to impose reason this can be cited as an example of an association of mind/rationality with masculinity and body/irrationality with femininity. Binaries create hierarchies of meaning and it has been noted by numerous theorists that terms associated with femininity are the underside of masculinity (see, for example,

Whilst s. 13(5) and Sch. 3, para. 2 can be contrasted in terms of their differing approaches to sex and gender, the reoccurring theme is that women should have less control over the reproductive process than they have with natural conception. The man and the state have greater power in relation to decisions that previously would be left to women alone in respect of body boundaries<sup>21</sup>. The implications of these provisions can only be that the best environment for a child to grow up in is the two-parent family where the child is biologically related to both parents. However, there is no real evidence of this actually being true<sup>22</sup>. There is also no consideration afforded to the woman's views or needs when undergoing treatment.

Having analysed the law and its justifications it can be seen that far from being objective and immune from criticism, the decision was an expression of a particular subjective idea of what the desirable outcome should be. Rather than argue for any particular alternative, the main aim of my comments so far has been to show that there are other ways of conceptualizing embryos and the relative positions of the parties and that this draws into question the correct and legitimate qualities that the decision in the Evans case was felt to possess. This does raise a further question - if the law really is this inconsistent and does not stand up to close analysis, then how does it command so much respect and seem legitimate? The law's authority was particularly noticeable in the Evans case. The decision of Justice Wall was widely felt to be not only legally right, but also ethically and morally correct. In the following paragraphs I will explore this issue further.

### **Legitimacy of the Law: the operation of discourses**

If the workings of existing legal principles are examined using the work of Michel Foucault on the operation of discourse (Foucault 1998 [1978]), and the subsequent writing of Judith Butler (1990, 1993)<sup>23</sup>, it can be seen how they intersect to produce a result that appears natural yet consistently prejudices the interests of women. Firstly, I have already established that the law's decision as to what can and cannot be an object of property is socially determined and does not have a pre-discursive origin. In addition, in legal discourse, the meanings attached to the subject/object distinction ensure that the explicit denial of embryos as objects of property can only be a rejection of the label 'property' and symbolism attached to it. This is because the subject/object dichotomy precludes the existence of a third category, so if an embryo is definitely not a human subject with rights, it can only fall into the property category. From that starting point, the law makers apply certain qualifications to the treatment of body parts (eg that they cannot be sold) but it is very much a piecemeal process reflecting the fact that the law finds it very difficult to incorporate body parts into existing categories. However, in saying that eggs and embryos aren't objects of property the law also avoids entering into debate concerning the nature of the rights and interests the gamete providers have in the

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Cheah and Grosz, 1996, p. 4).

<sup>21</sup> If seeking treatment alone using a sperm donor, the clinic assumes the role of decision-arbiter through s. 13(5). Seeking 'treatment together' on the other hand ensures that the woman's actions are mediated by the man's.

<sup>22</sup> See, for example, Lee and Morgan, 2001, p. 164.

<sup>23</sup> In *Gender Trouble* Judith Butler attempts to denaturalize the 'heterosexual matrix'. The association of desire with sex and gender reinforces the legitimacy of each concept even though they are distinct. This makes heterosexuality appear coherent and natural (Butler, 1990, p. 22).

embryos. This position is reinforced by a construction of the body and human life as special, natural and outside culture. A final ingredient of 'certainty' enables the law to override the presumption of 'equal' rights over the embryo (reinforced once more by the vagueness of the nature of rights in gametes). The liberal subject and the social family are also employed and are mutually reinforcing yet seemingly distinct in origin: the right of the man not to father a child he does not want should be respected as part of *his autonomy* and right to self-determination. Any reverse arguments focusing on a potential right to reproduce are weakened by the *social* undesirability of having a child exist in the world that is born to a single mother. Thus the law draws upon several different concepts to reinforce the legitimacy of the outcome. Forcing an association between these supposedly unrelated concepts reinforces their claims to truth in discourse by providing a sense of completeness<sup>24</sup>. Any statement concerning 'what the embryo is' and what the relationships of individuals is has its truth grounded in the full spectrum of nature, culture, familial relations and legal relations. Moreover, I have shown earlier that concepts which are positioned as opposites and unassociated in origin are in fact related and that each concept is socially constructed — none of them have roots in nature. Their division and their appearance of having totally different origins, however, is part of the operation of discursive constructions to produce a legitimate and truthful sounding response.

Broadening the analysis, it can also be seen how other discourses outside law reinforce the legal position. Looking at medicine, for example, the treatment of the patient encourages a gender-blind approach. Couples who go for IVF treatment are considered to be one patient and this is reflected in law. Irma Van Der Ploeg (1995) criticises this, however, and also suggests that the development and use of IVF technology has been in men's interests to the detriment of women - even in cases of male fertility it is the woman's body that is problematized and treated<sup>25</sup>. Focusing on the Evans case, it should be noted that the claimant was not given the option to freeze her eggs at the chosen clinic because the technique was in its infancy and was not provided in most places. However, no-one questioned why the technique was in its infancy, nor why further investment to extend its availability had not been made. The presumed neutrality of a well-respected medical profession ensured that Evans' plight was simply accepted as unavoidable.

Providing a slightly different focus, Charis Cussins (1996) critiques the notion of objectification vs personhood. The imaginary patient is constructed as being a helpless woman who surrenders herself to medicine in order that it may help her become pregnant. Cussins argues that the patient actively participates in her own objectification and she does so in order to bring about desired changes in her identity. The patient, wanting a child, seeks to present herself as a good object of study. In addition, opinions of the women who didn't become pregnant through IVF focused on the mechanics of the body when discussing why the process didn't work. This medical construction of the way things are filters through into legal categories which seek to reflect the 'real'.

<sup>24</sup> The association of biological parenthood with social parenting, for example, strengthens the appearance of the traditional family as the natural and best environment for bringing up children.

<sup>25</sup> Van der Ploeg notes that 'Conceiving of the couple as an organic or a functional unit, even if only temporarily and for pragmatic therapeutic purposes, has the effect of rendering invisible the asymmetrical positioning of women and men'. (Van der Ploeg, 1995, p. 465).

The constructions of identities of women featuring in IVF cases is also informative in this regard. Using Judith Butler's work on performativity<sup>26</sup>, Kirsty Keywood (2000) discusses the case of Diane Blood. Diane Blood sought to be inseminated with her dead husband's sperm, but the Human Fertilisation and Embryology Authority claimed that this would be in breach of s 4(1) of the 1990 Act, which required written consent to treatment. The husband had been in a coma at the time the sperm was collected so had not given his consent. Keywood argues that the construction of Diane Blood's identity in the case positioned her as a socially ideal mother, reinforcing the normalising heterosexual effects of the 1990 Act<sup>27</sup>. However, any such identity is an approximation, a performative. Applying this analysis to the Evans case, it can be seen that the parties involved were performing<sup>28</sup> different gender roles. Evans was very much a victim of circumstance. She had the role of unfortunate woman who was desperate to have a child. In this way, the law's treatment of the case looks fair because it seems to reflect a 'reality' - the woman's position can be much sympathised with but her views are based on the irrational. That the woman has actively participated in this construction lends it legitimacy.

The role of the image is also another example of a reinforcing discourse but the visual has a particular strength in its assertions of what is real and natural - the existence of something cannot be more strongly affirmed than by the fact that it can be seen. However, again the meanings ascribed to what is seen are constructed. Moreover, scientific advances have enabled us to see parts of the body that have not always been visible. The choice of image arises from cultural values and images are used to support particular arguments concerning the nature of life. Although images were not directly relied upon in the Evans case, I would suggest that they contributed to the widespread public acceptance of the decision as morally correct. The visual image given to embryos reinforces the correctness of the decision to treat them as objects, distinct from the originating subject and not forms of human life. Artificial insemination in the laboratory, moreover, has been filmed under the microscope thus reinforcing the procedure as a medical phenomenon that is detached from culture. These images are routinely projected in the process of debate on such technologies. The abortion debate, on the other hand, contends with images of the foetus in the womb, scans clearly showing how the foetus can be seen as a human being<sup>29</sup>. Thus it can be seen how the image can be used as an

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<sup>26</sup> Butler's analysis separates sex from gender using a Foucauldian approach to the workings of discourse: 'If gender is the cultural meaning that the sexed body assumes, then a gender cannot be said to follow from a sex in any one way', (Butler, 1990, p. 6). Once the 'natural' association of sex and gender is deconstructed, Butler describes how gender is performed using drag as a metaphor (Butler 1990, p. 137).

<sup>27</sup> According to Keywood the identity approximated by Diane Blood can be seen as transgressive: 'Diane Blood's viability as a *Madonna minus child* is not an immutable feature of her female identity but is instead premised on a series of fictions. She is not infertile. She does not have a husband. She does not have a male partner. Indeed, the very availability of her husband's sperm is, arguably, the result of an act of violence in which she was complicit' (Keywood, 2000, p. 330).

<sup>28</sup> These performatives are not voluntary, but are rather how the subject attains meaning in discourse and comes into existence (Butler, 1993, p. x).

<sup>29</sup> Sarah Franklin, for example, notes that 'the convergence between the scientific discourse of "fetology" and the visual discourse of fetal autonomy produces a specific construction of fetal personhood which has proved highly compatible with the strategy of contemporary anti-abortionists' (Franklin, 1997, p. 489). Linda Birke (1999, p. 163) notes how visualising the foetus as a separate entity is made possible by not just

appellation of the thing itself.

### **What are the alternatives?**

The main purpose of this essay has been to critique the existing law but for the purposes of providing a more complete analysis it is necessary to introduce a discussion on some of the alternatives to the current position.

Another possible way of conceptualising reproductive technologies would be to say that the laboratory is standing in for the woman's body in the process of conceiving. If the process is thought of in this way, we do not lose sight of the different social, cultural and bodily investment in the embryo. Following a radical feminist path it could be said that the woman should have a greater say over the fate of the embryo because she has undergone more suffering in the course of IVF treatment in the invasion of her body. Additionally, the social and cultural consequences of not becoming a mother are different to the consequences of not becoming a father and therefore cannot be treated on an equal, gender-blind footing. Anticipating a possible criticism that it is unfair to the male participant, it could be argued that such an alternative does not render the man's opinions to be irrelevant. It merely requires him to be sure that he wants to be a father and places the point of irrevocable consent at an earlier stage. Following the importance afforded to bodily integrity it could alternatively be argued that as the woman only agreed to be invaded for the purposes of pursuing an opportunity to have a child, the fact that the male gamete provider changes his mind should render the interference with her bodily integrity unlawful.

To a large extent the above alternatives operate according to the same logic as the current law - the point of irrevocable consent moving on a continuum according to current social values in the first example, and acceptance of the liberal legal subject in both examples. In this respect the alternatives can be seen as pragmatic developments that seek to emphasise the contribution of women. As such, they derive no greater conceptual legitimacy than the current law and they are open to similar criticisms. For example, the presumption that a woman's investment is always greater than the man's can be accused of determinism and may be seen to favour women's views at the expense of men's. Furthermore, they reassert the importance of bodily integrity, for which there is no natural justification. However, they also illustrate how other ways of constructing disputes and solutions can start to be explored once the current law's moral authority is weakened. Although the suggested alternatives seem to involve only minor adjustments to the current law, they also allow more fundamental changes to occur. For instance, the extension of the body to include space that is outside the embodied subject should not be understated in its significance. It signifies a transgression of body vs machine and calls into question the boundaries of the human<sup>30</sup>.

Some feminist theorists (see, in particular, Nedelsky, 1991) have argued that generally a change of focus, terminology and metaphors is needed in order to explore alternative constructions of legal personality. If focus is placed on the interconnectedness of subjects instead of thinking of isolated and autonomous beings whose boundaries need

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the photographs, but by our prior conception of the inner space of the body.

<sup>30</sup> Similarities can be seen here with Donna Haraway's model of a cyborg and related ideas of prosthesis (Haraway, 1997).

protecting, then we are more likely to reach a satisfactory approach to constructing human relations. The capacity of such values to achieve a better way of organising and categorising human relations can really only start to be assessed once they are reflected in law. However, as a critique of the current position, it can be seen that the subject/object dichotomy and language surrounding approaches to reproductive technologies could encourage an overly confrontational way of dealing with disputes.

Emily Jackson's position is that regulation surrounding reproductive technologies should be facilitative and respect autonomy: there should be no interference with the right of an individual to have control over their reproductive capacity (Jackson, 2001)<sup>31</sup>. This approach can be seen to advocate a loosening of the social and moral control over reproduction in that it would not require consideration of the need for a father and it would allow greater access to services. Jackson's project is very much to criticise the moral imperative integrated into the legislation and it is her aim to open up the possibilities to new forms of social parenthood. Her ideas relating to autonomy, however, seem to be geared towards potential users of donated gametes or other such similar situations. How her concept of autonomy would cope with disagreements between individuals is not really discussed. In this respect her analysis is incomplete - the law has a major role in managing relationships between individuals and reproduction necessarily involves the participation of more than one person. Nevertheless, it can be seen how a more facilitative approach as advocated by Jackson can be of use in enabling fairer decisions to be made in resolving disputes and perhaps even a way of preventing such disputes occurring. In the case of Evans, for example, if the model of a single parent family was not so badly thought of then the claimants' case would have appeared stronger. In addition, perhaps if the social obligation of parenthood was not so attached to biology, the defendants would have felt less strongly about the fate of the embryos. This is not just to say that Evans should have been able to release her partner from the obligations imposed by the Child Support Act 1991. Evans too would not have attached so much importance to the embryos if other forms of social parenting were on equal footing with biological connection. The whole issue of biological parenthood could become less important in the structure of familial relations and this would open up parenting options for both men and women, making it less likely for disputes to occur.

## Conclusion

In this essay I have analysed the relevant law and its justifications for the purpose of showing that, although the outcome of the Evans case seemed legitimate and neutral, the law's effects in this area can be seen to favour mens' interests over womens'. Space has prevented me from examining all constructions employed in the case but I would suggest that my argument is also applicable to the human rights and promissory estoppel submissions<sup>32</sup>.

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<sup>31</sup> By 'autonomy' however, Jackson is not referring to the usual meaning given to the word. She instead prefers a relational approach advocated by Nedelsky (1991) and rejects the idea that 'autonomy' necessarily means self-interest vs. collective interest. As relational beings our decisions will be informed by considerations of social, economic and psychological relationships (Jackson, 2001, pp. 1-10).

<sup>32</sup> The personality relied upon in rights discourse, for example, appeals to the higher status of human life and also employs the subject/object distinction. The exclusion of promissory estoppel by the 1990 Act would also be justified on the lines that the special status afforded to human life and the right of an individual not to reproduce override any claims to reliance on something said by the defendant.

My analysis in this essay has used a Foucauldian approach concerning the operation of discourses. To conclude however, it is appropriate to look at the limitations of recent theoretical development that has taken its cue from Foucault. Foucault (1991 [1977]) identifies the body as a site of cultural inscription that is regulated and disciplined by systems of knowledge. He sees power as fluid, constantly shifting in the workings of discourse. Using the example of homosexuality he asserts that the condemnation of homosexuality also enables resistance to occur:

‘[it made] possible the formation of a “reverse” discourse: homosexuality began to speak in its own behalf, to demand that its legitimacy or “naturalness” be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified.’ (Foucault, 1998 [1978], p 101)

Developing from Foucault's thoughts on reverse discourse, queer theory has been variously employed as a means of transgressing dominant binaries. We cannot escape universalising notions based on dichotomies because they are present in language, but an understanding of the workings of discourses allows us to manipulate the path of discourse, and transgress dominant ways of seeing by redefining terms. However, I would submit that many of the recent theoretical writings that focus on the body have fallen into the trap of dichotomising the body and the outside. Of direct relevance to my arguments concerning the conceptualisation of the embryo, much focus on the body investigates the way in which the body can be moulded<sup>33</sup>. Comparatively little attention has been paid to the limits of the body and what constitutes the body<sup>34</sup>. The collective effect of these writings is an implicit acceptance of the different meanings ascribed to body parts as objects as opposed to the body as part of the subject and this reinforces the law's treatment of embryos as natural. Work on the 'lived body' (eg. Grosz, 1994, pp. 86-111) which seeks to transcend the binary of mind/body falls into similar dichotomisation of body and the outside. This should perhaps not be surprising given that until recently the only matter leaving the body was either expelled or willingly given away. IVF can thus be seen to present a challenge to the way in which bodies are defined and theorised.

### **Bibliography**

AZ v BZ 725 NE 2d.

Bainham, Andrew, Sclater, Shelley, Richards, Martin (Eds.), 2002 *Body Lore and Laws* Oxford: Hart Publishing.

Birke, Linda, 1999, *Feminism and the Biological Body*, Edinburgh: Edinburgh University Press.

Brook, Barbara, 1999, 'Performance and Spectacle' in *Feminist Perspectives on the Body*, London: Longman, pp. 111-35.

Butler, Judith, 1990, *Gender Trouble: Feminism and the Subversion of Identity*, New

<sup>33</sup> Barbara Brook provides a good summary of some of the areas of exploration including body building, anorexia and foot-binding in China (Brook, 1999, pp. 111-35)

<sup>34</sup> This is not to say that work does not exist or that the issue of body boundaries has gone unnoticed. Both Judith Butler's and Donna Haraway's work, for example, deal with the permeability of bodies and the constitution of bodies. My point, rather, is that the beginning and end of the body as signifier of the embodied subject still holds great force in present systems of meaning and that this is reinforced by repetitive use of traditional, liberal meanings of 'the body'.

York: Routledge.

- Butler, Judith, 1993, *Bodies that Matter: On the Discursive Limits of Sex*, London: Routledge.
- Cheah, Pheng and Grosz, Elizabeth, 1996, 'The Body of Law: Notes Toward a Theory of Corporeal Justice' in *Thinking Through the Body of the Law*, Sydney: Allen and Unwin, pp. 2-25.
- Cussins, Charis, 1996, 'Ontological Choreography: Agency through Objectification in Infertility Clinics', *Social Studies of Science*, 26(3) (Aug 1996): 575-610.
- Davies, Margaret, 1994, 'Feminist Appropriations: Law, Property and Personality', *Social & Legal Studies*, 3 (1994) 365-91.
- Davies, Margaret, 1999, 'Queer Property, Queer Persons: Self-Ownership and Beyond', *Social & Legal Studies*, 8(3) (1999), 327-52.
- Davies, Margaret and Naffine, Ngaire, 2001, *Are Persons Property? Legal Debates about Property and Personality*, Aldershot: Dartmouth Publishing.
- Davies v Davies 842 S. W 2d 588.
- Derrida, Jacques, 1976, *Of Grammatologie*, Baltimore: John Hopkins University Press.
- Derrida, Jacques, 1978, *Writing and Difference*, London: Routledge.
- Evans v Amicus Healthcare [2003] EWHC 2161 (Fam).
- Foucault, Michel, 1991, *Discipline and Punish: The Birth of the Prison* (Harmondsworth: Penguin, 1991 reprint) (first published 1977).
- Foucault, Michel, 1998, *The History of Sexuality, Vol. 1: The Will to Knowledge* (London: Penguin, 1998 reprint) (first published as *The History of Sexuality: An Introduction* in 1978).
- Franklin, Sarah, 1997, 'Fetal Fascinations: New Dimensions to the Medical-Scientific Construction of Fetal Personhood' in Sandra Kemp and Judith Squires, (eds.), *Feminisms*, Oxford: Oxford University Press, pp. 487-91.
- Grosz, Elizabeth, 1994, *Volatile Bodies: Toward a Corporeal Feminism*, Indiana: Indiana University Press.
- Haraway, Donna, 1997, 'A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s' in Sandra Kemp and Judith Squires (eds.), *Feminisms*, Oxford: Oxford University Press, pp. 474-82.
- Hyde, Alan, 1997, *Bodies of Law*, Princeton: NJ, Princeton University Press.
- Jackson, Emily, 2001, *Regulating Reproduction: Law, Technology and Autonomy*, Oxford: Hart Publishing.
- Keyword, Kirsty, 2000, 'More than a Woman? Embodiment and Sexual Difference in Medical Law', *Feminist Legal Studies*, 8 (2000), 319-42.
- Kennedy, Ian and Grubb, Andrew, 2000, 'Medically Assisted Reproduction' in *Medical Law* (3<sup>rd</sup> Edition), London: Butterworths, pp. 1211-1404.
- Lee, Robert and Morgan, Derek, 2001, *Human Fertilisation & Embryology: Regulating the Reproductive Revolution*, London: Blackstone Press.
- Locke, John, 1690, *Two Treatises of Government, Second Treatise*, ch V.
- Morgan, Derek, 2001, *Issues in Medical Law and Ethics*, London: Cavendish Publishing.
- Nedelsky, Jennifer, 1991, 'Law, Boundaries, and the Bounded Self' in R. Post (ed.) *Law and the Order of Culture*, Berkeley: University of California Press, pp. 162-89.
- Pachman, Tracey S, 2003, 'Disputes Over Frozen Preembryos & the "Right not to be a

- Parent'", (2003) 12 *Columbia Journal of Gender & Law* 128.
- Petchesky, Rosalind, 1990, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom*, Boston: Northeastern Series in Feminist Theory, Northeastern University Press, (Revised Edition).
- Rose, Michael, 1987, 'Beyond the Public/Private Division: Law, Power and the Family', *Journal of Law and Society*, 14 (1987), 61.
- Steinberg, Daniel I, 1998, 'Divergent Conceptions: Procreational Rights and Disputes Over the Fate of Frozen Embryos' 7 *B. U. Pub. Mt L. J* 315.
- Van der Ploeg, Irma, 1995, 'Hermaphrodite Patients: In Vitro Fertilization and the Transformation of Male Infertility', *Science, Technology, & Human Values*, Vol. 20, No. 4, Special Issue: Constructivist Perspectives on Medical Work: Medical Practices and Science and Technology Studies (Autumn, 1995), pp. 460-81.