The two short pieces that follow are post-prints. The published versions, part of a larger debate and dialogue on ‘Embryonic Hopes’ with Barbara Prainsack, Marie-Andréé Jacob and Sarah Franklin, are available at (2010) 19(4) Social & Legal Studies 497-517.

In the published version the piece immediately below is preceded by an introduction from Jacob and Prainsack, titled ‘Embryonic Hopes: Controversy, Alliance, and Reproductive Entities in Law and the Social Sciences’ (2010) 19(4) Social & Legal Studies 497-498.

Can Law Facilitate Embryonic Hopes?
Marie Fox and Thérèse Murphy
For the published version see: (2010) 19(4) Social & Legal Studies 498-505

‘I’m hoping for a girl. They’re hoping for good weather. He’s hoping for the best, and she hopes for good news. You think there’s no hope for us.’ Hope is, it seems, ubiquitous. Still, this short piece examining the relationship between law and hope in the context of debating embryos, feels like new ground. In legal circles, law and hope is not exactly a widely-discussed coupling, and the triumvirate of law, hope and embryos is certainly not familiar. Moreover, even though embryos have generated extensive legal commentary, their precise legal status remains undecided, or perhaps undecidable. The Warnock Report, which famously shaped the legal landscape in this field, concluded that embryos were not persons but merited ‘respect’ (Department of Health and Social Security, 1984: para. 11.17) and recommended that legislation specify that embryos cannot be owned (Department of Health and Social Security, 1984: para. 11.20). However, the 1990 Human Fertilisation and Embryology Act, which ultimately enacted most of the Warnock proposals, remained silent on this key issue. Its interpretation section stated simply that ‘embryo means a live human embryo where fertilisation is complete’ (s. 1(1)(a)). At the point of revising the legislation in 2008, technological developments had posed vexed questions about precisely what kinds of embryos were covered by the legislation, and indeed what counted as a ‘human’ embryo. A new section 1(1)(a), inserted by the 2008 Act, provides that ‘a live human embryo . . . does not include a human admixed embryo’ but that it does include ‘an egg that is in the process of fertilisation or is undergoing any other process capable of resulting in an embryo’. In failing to offer a clear definition of the embryo or its status – what Stephanie Hennette-Vauchez calls ‘the socio-legal (non)construction of the embryo’ (2009: 54) – law seems to reflect the judgement of social theorists that embryos are ‘elusive’ (Becker, 2000) or ‘unruly’ (Latour, 1993). Existing at the margins of the human, in different contexts embryos seem to embody different hopes and fears (Mulkay, 1997). Consequently they are variously treated in ways akin to property or commodities, as well as potential persons in some contexts. Given this, it seems, as Emily Jackson concludes, that ‘law is not capable of divining any absolute truths about the moral status of the embryo’ (2001: 229).

However, a significant shift does seem to have occurred in legal debates since the 1990s, in that there now appears to be less preoccupation with the status of human embryos per se. In part this may be due to certain embryos becoming normalized as increasingly familiar family members (Franklin, 2006: 177; Thompson, 2005). As Isabel Karpin argues, IVF babies and frozen embryos have made ‘the transition from illegal aliens, mutants or
freaks to … join the lexicon of the natural’ (2006: 618). Yet, technologies which have enabled fragmentation of embryos to produce human embryonic stem cells (hESCs), or to facilitate mixing with cells from other species, have generated new and more problematic types of research. Hybrid or ‘admixed’ embryos (containing both human and animal material), which call species barriers into question, are particularly troubling for law, given how they complicate still further categorizations of embryos as (potential) persons or things (Fox, 2009; Sharpe, 2010: Chapter 7). The emergence of new types of embryo has also been accompanied by the promotion of seemingly less controversial forms of stem cell research using adult cells, which in turn have generated new hopes of therapies. For instance, the use of pluripotent stem cells which are derived from non-embryonic or ‘adult’ sources (hASCs), such as umbilical cord blood, may in future serve to render anxieties over the use of embryos redundant. The discovery in 2007 that fully differentiated somatic cells (such as skin cells) can be ‘turned back’ into undifferentiated cells (Yu et al., 2007), holds out further hope for the development of technologies that will ultimately by-pass embryo sources. But, as Russell Korobkin cautions, ‘scientific advances one day might prove that hASCs, when appropriately manipulated, can fulfil all of the aspirations that scientists have for hESCs, but that day has not arrived’ (2007: 25, emphasis added). Moreover, exciting new possibilities in hESC technologies, coupled with the significant investment in embryonic as well as other stem cell research, mean that it would be naïve to expect this avenue of research to be abandoned in the immediate future. Hennette-Vauchez has argued that where embryos are the source of stem cells, advocates of embryonic stem cell technology have much to gain from ‘the construction of a conceptual severance between the “embryo” and “embryonic stem cells”’ (2009: 59). We suggest that, as a result of this severance, law’s preoccupation with the meanings and status of embryos has appeared to recede in the face of new challenges and regulatory questions raised by proliferating forms of embryonic and cell technologies. One aim of our contribution is, therefore, to place the embryo centre-stage once again, with the aim of thinking about it in new ways. In particular, we want to consider whether in this field human rights could – or should – be said to be law’s ‘hope technology’.

Historically, discourses grounded in a rhetoric of hope have had strong purchase in Parliament (Lee and Morgan, 2001: Chapter 3; Mulkay, 1997), and narratives of hope have continued to resonate in the recent debates. For instance, introducing the final reading of the Human Fertilisation and Embryology Bill in the House of Commons in 2008, the Health Minister noted that it:

contains important provisions that . . . have a potentially profound impact. One in seven couples needs help with fertility treatment; 350,000 people in this country live with Alzheimer’s; every week, five children are born with, and three young people die from, cystic fibrosis. All those issues, and the potential for treatments, this Bill addresses. (The Minister of State, Dawn Primarola, Report Stage, 22 October 2008, col. 324)

While similar rhetoric may accompany legislation in other fields, we suggest that the trope of hope is particularly compelling when it ‘fuels expectations for medicine’s newest frontiers’ (Murdoch and Scott, 2010). Moreover such sentiments clearly resonate with participants in IVF programmes as well as pro-research advocates in Parliament and the media. Individual and societal investment in having one’s ‘own’ child (Lesnik-Obersten, 2008: 78) and in ‘reproductive futurism’ more generally (Edelman, 2004: 3–4) means that hope seems inherent to the ‘constitutively promissory’ embryo (Thompson, 2005: 255), surrounded as it is by the
discourses of reproductive revolution and technological progress (Franklin, 1997). It is scarcely surprising then that ‘hope’ has been a constant among the myriad of contested meanings that attach to embryos, whether they are destined to be used in research or fertility treatment.

As we noted above though, hope and law is a less obvious coupling. Power and law – as in ‘the power of law’ – is the preferred combination. Faith in law is another commonplace, but faith and hope are not identical, so that offers little assistance here. There are, of course, those who take the view that there is no hope for law, and it is certainly possible that this position will become more popular over the coming years. In the criminal justice field, for example, it is not hard to imagine anxious, efficiency-driven regulators who might be more than willing to embrace technology rather than law as the optimal regulatory tool. For these regulators, technology’s promise of compliance ‘built-in’ and human agency ‘designed-out’ is likely to have considerable appeal (Brownsword, 2008). For most lawyers, though, conjuring law in this way will be less than ideal: an alternative is clearly needed.

We have been wondering whether human rights could provide this alternative. Could they supply the missing link between law and hope? Could they be, in other words, law’s own ‘hope technology’? Diane Blood (R v Human Fertilisation and Embryology Authority, ex p Blood, 1997) and Natallie Evans (Evans v United Kingdom, 2007) seemed to think so. Moreover, a lawyer asked to reflect on the ‘moral pioneers’ (Rapp, 2000) and ‘bio-citizens’ (Rose, 2007) engaging the interest of sociologists of new technologies, would surely raise the question of resonances with human rights activism. Also, UNESCO’s clutch of instruments on genetics, bioethics and human rights – the Universal Declaration on the Human Genome and Human Rights (1997), the International Declaration on Human Genetic Data (2003), and the Universal Declaration on Bioethics and Human Rights (2005) – certainly suggest that human rights are a jumping-off point in the evolving body of international law and practice which aims to regulate repro-genetic technologies. Putting that another way, these instruments point to human rights as a ‘hope technology’ for the regulation of new technologies.

But is this positioning of rights plausible? And is it worth investing in? Socio-legal scholars have long been concerned about the hype or ‘myth’ of rights, branding rights-based litigation as ‘the hollow hope’ (Rosenberg, 2008). Problems with rights have also been emphasized by rights-sceptics (Campbell et al., 2001; Montgomery, 2006). What is more worrying though is that the relationship between human rights and new technologies is itself a matter of growing concern, and that rights advocates are among those expressing concern. To learn more about what is happening we can look to the work of Emily Jackson (2008), Isabel Karpin (2006) and Roger Brownsword (2008), respectively. Jackson has charted a link between the harm-to-women claims that are now being championed by the anti-abortion movement in the US and a set of arguments against egg donation to stem cell research projects that have been surfacing in the UK. The link, Jackson asserts, is a new version of paternalism. This new paternalism differs from old paternalism because it insists that it is for women’s rights. In so doing, it colonizes the core territory of human rights advocates, offering a radically different interpretation of women’s rights. New paternalism does not say that ‘women need proper information and the option of making a decision for themselves, based on full information’ (Jackson, 2008: 300); instead it insists that restrictions on women’s autonomy rights are pro-women. For example, according to the neopaternalists, banning intact D & X abortions protects women’s rights: doctors are unlikely to disclose full details of
this procedure to women patients so, if we want to safeguard women’s capacity to give informed consent, the procedure should be banned. Similar arguments play out in an egg donation context (Jenkins, 2009).

Karpin’s focus is law’s proscription of hybrid and genetically manipulated embryos and, like Jackson, she too is concerned about the implications of emergent approaches or ‘frames’. Among other things, Karpin asks a question that is likely to trouble human rights advocates:

If the prohibited embryo is brought to life through gestation and birth, one might ask, how would law adjudicate its value if called upon to do so? Would its proscription in embryonic form have any impact on its status as a human person before the law? (2006: 611)

Further troubles for human rights advocates emerge from Roger Brownsword’s (2008) work on the ‘bioethical triangle’ and the ‘dignitarian alliance’. Brownsword emphasizes that, while human rights represent a point of departure in the emerging international regulatory framework on new technologies that has been pioneered by UNESCO, they do not stand alone. They are instead one part of an ethical plurality, or ‘bioethical triangle’, sharing the regulatory terrain with both a dignitarian ethic and a utilitarian one. Moreover, although the dignitarian ethic and the human rights one share a commitment to human dignity, they differ radically as to what is needed in order to protect and promote this commitment. In the rights ethic, dignity is linked to autonomy whereas, for the ‘dignitarian alliance’, dignity is invoked as the reason why we must say ‘no’, ‘no more’, or ‘enough’ to particular technologies. This difference of opinion on human dignity, and more generally the existence of three different ethics, will not be problematic in every case; sometimes utilitarians, dignitarians and rights advocates will be in agreement. But it does suggest that the regulatory framework might be less than viable over the longer term and it also challenges the idea of human rights as law’s paramount hope technology.

It seems that things are all mixed-up. Rights arguments are being made by those who used to line up against rights, and both ‘human dignity’ and ‘risk of harm’ are being set against rights. Some of this may be collateral damage from post-9/11 rhetoric about life in a ‘time of crisis’ and exceptional times needing exceptional measures to deal with risk. But that is cold comfort. Furthermore, although President Obama’s inauguration address announced that the US would now ‘reject as false the choice between our safety and our ideals’, it may prove harder than we imagine to rid ourselves of the idea that ‘human rights can be ‘‘turned off’’ when necessary’ (Lazarus and Goold, 2007: 4). We conclude then with a confession: we differ in our reactions to the current standing of rights and the idea that rights could be law’s ‘hope technology’ in the field of repro-genetics. One of us queries whether human rights arguments can be recuperated and made to work in these contexts, given their historical tendency to define the appropriate subject of human rights in an unduly narrow and exclusionary way, while the other is committed to hope in rights and is keen to fight back against the newest (anti) rights revolutions. What we do agree on though is that it would be interesting to hear what a social anthropologist has to say about these matters.

Notes
1. Which is somewhat tortuously defined in sub-section 4(6).
2. For instance, cell therapies for the treatment of heart disease have proved elusive, but a recent study suggested that ISL1 stem cells derived from the developing hearts of embryos at around the three-week stage had greater potential to repair heart damage than adult cell transplants and also could potentially be used to treat foetuses with cardiovascular malformations: see Bu et al. (2009).

3. Thus, in response to a Parliamentary question, the Minister for Business, Innovation and Skills stated that ‘stem cell research is a strategic priority for UK public funding. Funding for all forms of stem cell research has doubled from about £30 million in 2005–06 to more than £60 million in 2007–08’ (House of Lords, 22 June 2009: Column 1341). He went on to make it clear that embryonic stem cell research would remain an important strand of this research, notwithstanding the controversy it prompts:

We believe that this is a fast-moving field of research whereby we have to maintain investment in all forms of stem cells – adult, embryonic, induced and pluripotent – and that that requires us to be open minded about the pace at which development can take place in them all. We have to recognise that the field of adult stem cell research has been in existence since the 1950s whereas embryonic research has been with us only since the 1990s. It is therefore too early to judge whether that field has a full potential to be realized. (Column 1342)

In the US, Korobkin reports that ‘[f]orecasts of the market for stem cell technologies range from a fairly modest $100 million to a more optimistic $10 billion by 2010’ (Korobkin, 2007: 4).

4. Zarzecny and Caulfield note in their systematic literature review of legal, social science and biomedical discourse surrounding stem cell research (over the period 1 January 2007–16 September 2008) that the moral status of the embryo remained what they deemed ‘a central matter of controversy’ (Zarzecny and Caulfield, 2009: 96); but that in popular representations of the issue in Canadian print media (examined over a slightly shorter period) this moral issue was overshadowed by ‘representations about scientific developments’ (p. 98).

5. Accounts portraying scientific developments in embryonic and stem cell research in a glowing light were common to both broadsheet and tabloid newspapers – see for instance Leader Column, The Observer, 2008; Staff Reporter, The Sun, 2008.

6. That is, an embryo containing adult cells or which has been illegally enhanced.

Cases Cited

R v Human Fertilisation and Embryology Authority, ex p Blood [1997] 2 All ER 687 (CA)
Evans v United Kingdom Application No 6339/05, Judgment of 10 April 2007 (ECtHR Grand Chamber)

References


At this juncture the published version features a reply by Sarah Franklin, titled ‘Response to Marie Fox and Thérèse Murphy’ (2010) 19(4) Social & Legal Studies 505-510. That in turn is followed by a response from us:

Response to Sarah Franklin
Marie Fox and Thérèse Murphy
For the published version: (2010) 19(4) Social & Legal Studies 510-513

We agree with Sarah Franklin about the importance of inventorizing embryos. We agree too that demonstrating respect for diversity and seeing disagreement as a resource can boost both the workability and the durability of regulatory measures. What we are less sure about, however, is the wisdom of hoping that contemporary law-making on embryos can be both durable and workable. We think that durability has to go: it can no longer be our hope for the law in this area. Giving up on durability does not mean giving up on law as a tool, however. Nor does it mean that we give up on the workability of law. In fact, ditching durability as one of our hopes for the law, enhances workability by accepting change as a necessary feature of legislating in this area. But for this to happen we will have to embrace a series of difficult truths and, consequently, a different way of thinking about law. Specifically, we would contend that, perhaps counter-intuitively, failure needs to become more central to how we think about law and, related to this, a facility to face failure needs to be one of our hopes for the law in this area. Failure, in other words, needs to be made ordinary; we need to expect it and to build in ways to deal with it.

This is, we accept, an unusual proposal. The reasoning behind it becomes clearer once we examine the short history stretching from the Warnock Report to the HFE Act 2008. That history teaches us at least seven things. First, technology moves on and so too do our responses to it, but this is not a linear narrative. For example, not so long ago IVF was perceived as revolutionary, with all the hopes and fears that accompany technological breakthroughs; subsequently it was normalized as Nature’s helping hand, but more recently its emergence as a platform technology for PGD and embryo selection has rendered it newly controversial (Korobkin, 2007). Second, trust in law-makers and in scientists has ebbed away since the time of Warnock, and it is by no means clear that mechanisms for public participation, accountability and transparency in science and law-making are improving trustworthiness (O’Neill, 2002). Third, a stronger emphasis on procedural agreement – increasingly a favoured mechanism for coping with disagreement on ethical issues in rights-regarding, pluralistic societies – is certainly valuable, but it must be recognized that there are matters – including embryo status – where differences run so deep that fair procedures will simply not be enough to produce respect for the outcomes of those procedures (Pardo and Calvo, 2008). Fourth, adjudication becomes a great deal more complex in a world of rights-
based claims, where the role of courts overlaps with statutory decision-makers, such as the HFE Authority, and where law-making at supra-national level is having a growing impact in this field. Fifth, going to court and ‘public participation’ are not the only options: travel overseas to jurisdictions with different regulatory regimes means that ‘silent’ claims-making is also possible (Turkmendag et al., 2008), since a global market for IVF, and its ‘by products’, including embryos, exists. Sixth, since the Warnock deliberations, the regulatory landscape has changed as a consequence of the public and private investment that has gone into maintaining the UK’s position as a key player in this field. The need to protect existing investment in embryo research serves both to set the parameters for regulatory reform, and to promote an increasingly liberal system of governance for certain types of embryo research. Seventh, and finally, we concede that the 1990 HFE Act has won plaudits both at home and abroad. In addition to influencing legislative initiatives elsewhere, its framework has endured notwithstanding the far-reaching amendments in 2008. In its 2005 consultation document on reforming the legislation, the Department of Health noted that:

The Government believes that the HFE Act has performed well and largely continues to do so . . . But any cutting-edge legislation, no matter how successful, needs at some stage to be reviewed and any necessary readjustments made to ensure that it continues to be effective. (Department of Health, 2005: para. 1.3)

Many academic commentators have concurred with this view. Yet, we would contend that from today’s vantage point the HFE legislation looks rather less fit for regulatory purposes. It was plagued by twists, turns and controversy even before the reforms of 2008, and its regulatory agency found itself repeatedly in the eye of the storm. We wonder if these problems stemmed in part from misplaced hopes and expectations? In particular, was part of the problem a misplaced desire for durability? If, rather than hoping for durability, we instead had anticipated failure, would this have enabled such failure to be seen as less fundamental, and would the short history of the 1990 Act read differently as a consequence? Procedurally, Canada’s 2004 legislation contains a clause requiring that it be reviewed three years after coming into force by a Parliamentary committee established for that purpose (Assisted Human Reproduction Act, s. 70). The insertion of procedural provisions in legislation might be one way of accommodating new developments and shifting attitudes, but perhaps more important is the inculcation of a mindset which accepts that durability is an impossible hope for regulation in this field. Parliamentary and media debates preceding last year’s reforms were preoccupied with definitional questions and attempts to police reproductive possibilities (Karpin and Ellison, 2009) which left little space for debating rights. If human rights are to have any chance of operating as law’s hope technology, then space must be created for debate about what a commitment to such rights would entail, given that biotechnologies increasingly call into question not just what we mean by embryos, but by the human itself. Acknowledging the limitations of existing forms of regulation, including their temporal limitations, might, we argue, leave us in a better place for moving forward and answering such questions.

Notes
1. In addition to the international instruments we noted above, the growing impact of European Union law in this field may be seen in conjunction with requirements under the Tissue and Cells Directive (2004/23 Article 4) to harmonize standards of quality and safety for all establishments involved in the donation, processing and storage of human tissues and cells, including embryos.
2. Significantly the Department of Health consultation on reform of the 1990 legislation was clear that re-opening certain contentious issues was out of the question:

The Government does not intend that the review of the HFE Act will open up those fundamental aspects of the legislation which are widely accepted in our society or which have been recently debated and conclusively resolved in Parliament. These include the creation and use of embryos for research, the prohibition on human reproductive cloning, and the removal of donor anonymity. (Department of Health, 2005: para. 1.13)

3. For example, s. 4 of the 2008 Act marked a shift from a prohibition on creating hybrid animal–human embryos for research purposes to a very liberal provision allowing for the creation of many kinds of ‘human admixed embryos’.


5. For instance, in Emily Jackson’s view that the 1990 legislation ‘has, in fact, stood the test of time rather well’ (Jackson, 2008: 429).

6. A series of litigated cases since the turn of the century have both challenged the power of the HFE Authority and reshaped aspects of the 1990 legislation, including how it defines embryos, the removal of the right of donors to anonymity, and circumstances in which PGD and tissue-typing of embryos may be licensed, etc. (Brownsword, 2008).

7. Criticism has ranged from excessive bureaucracy (Meikle, 2004, Sample, 2007b) to exceeding its jurisdiction (Sample, 2007a) to a failure to prevent exploitation of women (Jha, 2007).

References

The published version is rounded out by a short piece by Jacob and Prainsack, titled ‘Unfreezing Embryos?’ (2010) 19(4) Social & Legal Studies 513-517.